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

CHRISTY BURBAGE, et al., Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC., et al., Defendants.	Case No. 4:25-cv-00116 **ORAL ARGUMENT REQUESTED**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF CHRISTY BURBAGE'S COMPLAINT

Plaintiff's Opposition confirms that most of her Complaint should be dismissed. She does not dispute that her *Copperweld* conspiracy claim (Count Three) fails, thereby abandoning it. Plaintiff's "single-enterprise theory" for Texas, P.A. fares no better. This Court already explained what was needed, and Texas, P.A. being named a party to agreements "is not enough." *EMT* Order at 9, ECF No. 216.[1] On standing, Plaintiff attempts to defer her Article III deficiency to class certification. But she herself must have standing to pursue claims in the "distinct" ASC market she alleges; she has no injury there. *E.g.*, *Burbage* Compl. ¶ 101. On timeliness, 15 U.S.C.§ 16(i) does not toll claims in a market the government expressly excluded. Plaintiff's claims in what she insists is a "distinct" market are thus time-barred. Leave to amend cannot cure these defects.

I. Plaintiff Has Abandoned Her Conspiracy Claim.

Plaintiff's Opposition makes no mention of her Count Three *Copperweld* conspiracy claim, thereby abandoning it. *See Bradley v. Target Corp.*, 2023 WL 6166475, at *2 (N.D. Tex. Sept.

[1] *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-CV-03560 (S.D. Tex.) ("*FTC*"); *Electrical Med. Tr. v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-04398 (S.D. Tex.) ("*EMT*"); *Burbage v. U.S. Anesthesia Partners, Inc.*, No. 4:25-cv-00116 (S.D. Tex.) ("*Burbage*").

21, 2023); Mot. at Part IV (raising this argument); *see generally* Burbage Opp. (not opposing it). With no opposition, the Court should therefore dismiss Count Three.

II. The *Burbage* Complaint Fails To State a Claim Against Texas, P.A.

Plaintiff's group-pleading allegations against Texas, P.A. are inadequate, as this Court recently held in the *EMT* case. *See EMT* Order at 11, ECF No. 216. The Court specifically observed three deficiencies in *EMT*, and all three are present here: the respective plaintiffs did not (i) allege that Texas P.A. "negotiated or implemented" merger agreements, (ii) "identify any of the alleged reimbursement contracts" with commercial payors, or (iii) allege that Texas, P.A. used "negotiating leverage" against those payors. *Id.* at 9. Being "a party" to merger agreements "is not enough—in and of itself—to subject it to potential antitrust liability," *id.*, because "[a]ntitrust law doesn't recognize guilt by mere association," *id.* (citation omitted).

Burbage does not dispute the legal argument. Instead, she argues (at 6) that her complaint "addresses these concerns" by pleading more facts. It does not. She points (at 6-8) to just three supposedly sufficient allegations. None cures the three *EMT* deficiencies.

First, Burbage points (at 6-8) to her allegation that Texas, P.A. was a party to a supposed price-fixing agreement with Baylor. *See Burbage* Compl. ¶ 219. But being "a party" to an agreement "is not enough." *EMT* Order at 9, ECF No. 216. Burbage offers no allegation that Texas, P.A. had any "independent participation" in the alleged scheme. *Id.* at 8-9. She says nothing about whether it "negotiated or implemented" any merger or wielded "negotiating leverage" against commercial payors. *Id.* at 9. At most, this allegation relates only to Count Five's price-fixing claim; it does not support any of the other claims Burbage asserts against Texas, P.A.

Second, Burbage notes (at 8) her allegations about who owns Texas, P.A. That allegation is identical to the one this Court dismissed in *EMT*, *see EMT* Am. Compl. ¶ 19, ECF No. 127, and it is insufficient for the same reasons as there. *See*, *e.g.*, *Lenox MacLaren Surg. Corp. v. Medtronic,*

Inc., 847 F.3d 1221, 1237 (10th Cir. 2017) (corporation cannot be liable "merely by virtue of its place in the same corporate family"; plaintiff must show "each defendant independently participated in the enterprise's scheme").

Third, Plaintiff recites (at 8) her allegations that Texas P.A. is a named party to six merger agreements – "two more than the four identified in *EMT*." *Burbage* Opp. at 8. This mistakes quantity for quality. This Court's *EMT* order held that being "a party" to merger agreements "is not enough – in and of itself – to subject [Texas P.A.] to potential antitrust liability." *EMT* Order at 9. Adding two more contracts to the list does not change that. For these reasons, the Plaintiff's allegations against Texas P.A. fail to state a claim.

The Court should deny Plaintiff's request (at 10-11) for leave to amend on this issue. Plaintiff had the benefit of the *EMT* opinion before filing her opposition brief; she could have amended then if she believed she could allege sufficient facts. *See* Fed. R. Civ. P. 15(a)(1)(B).

III. Plaintiff Lacks Standing for Claims for "ASC-Based" Anesthesia Services.

Plaintiff lacks standing to bring claims for what she calls the "distinct" ASC market. Mot. at 11-12. Plaintiff tries two principal arguments to rescue her case; neither works.

First, Plaintiff tries (at 15) to dodge the issue, asking the Court to defer it until class certification. Deferral is unavailable where, as here, the parties "dispute [the named] [p]laintiffs' [individual] Article III standing." *Williams v. Steward Health Care Sys., LLC*, 2021 U.S. Dist. LEXIS 254179, at *149-51 (E.D. Tex. Dec. 16, 2021). Plaintiff cites (at 13) *Wilson v. Centene Mgmt. Co.*, 144 F.4th 780 (5th Cir. 2025), to argue for deferral, but that case is not good law. It has been withdrawn and superseded by *Wilson v. Centene Mgmt. Co., L.L.C.*, 168 F.4th 217 (5th Cir. 2026), which confirms that "if the class representative lacks individual standing, . . . that issue must be addressed *before* . . . deciding class certification." *Id.* at 224 (emphasis added). Her other cases (at 13-14) involve products within the *same* product line—the opposite of this case.

Second, Plaintiff runs away from her Complaint's allegations. Despite clearly alleging that hospital-only and ASC anesthesia services are "distinct" product markets and "not interchangeable," *e.g.* Burbage Compl. ¶¶ 84, 93, 101, 104, she now argues (at 14) that the two are "functionally identical." *See also* Burbage Opp. at 2 (arguing that the "only" difference is the site of service). "[P]laintiff cannot amend her pleadings with her briefing." *Fuller v. Bank of Am., N.A.*, 2013 WL 12134089, at *3 (N.D. Tex. Apr. 22, 2013).[2] Indeed, if she were to amend in this way, that itself would require dismissal, because she does not allege an antitrust violation in a combined ASC-plus-hospital market.

Plaintiff requests (at 15-16) leave to amend regarding her standing defect. But no amount of amending will change Plaintiff's treatment location from a hospital to an ASC.

IV. Plaintiff's "ASC-Based" Claims Are Time-Barred.

Plaintiff defends (at 16-20) her claim to timeliness only on the basis of statutory suspension; she does not contest any of USAP's other arguments. *See* Mot. at 15-19 (arguing that Plaintiff cannot rely on Rule 15(c), fraudulent concealment, or continuing violation theories); *Bradley*, 2023 WL 6166475, at *2 (arguments not raised in opposition are forfeited).

Statutory tolling under Section 16(i) cannot save Plaintiff's claims because it applies only where a private plaintiff's market is "identical to, or completely encompassed by" the government's. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 321 (4th Cir. 2007). Plaintiff argues that *any* overlap in subject matter is sufficient to toll antitrust claims. The Court should reject that reading. The FTC's complaint expressly *excluded* the market Plaintiff now invokes. *See* FTC Compl. ¶ 220 ("The relevant service market appropriately excludes anesthesia services that can be

[2] Plaintiff tries (*e.g.*, at 12 n.1) to suggest USAP's briefing in the FTC case requires Defendants to embrace her new position that the "ASC" and "hospital-only" markets are functionally identical. But Plaintiff alleged two "distinct" markets. At this stage, that allegation must be accepted as true.

provided outside a hospital setting."). And Plaintiff alleged the two markets are "distinct" (though she tries to abandon that allegation now). *See supra* at 4. Every single case Plaintiff cites (at 16-18) that allowed tolling involved a product linked to the *same* market alleged by the government. None involved a government action that expressly *disclaimed* the private plaintiff's market. Because Section 16(i) does not apply, and Plaintiff has abandoned other bases for tolling, her ASC-based claims are time-barred. On this point, she does not request leave to amend; but it would be futile in any event. *See Winzer v. Kaufman Cnty.*, 916 F.3d 464, 471 (5th Cir. 2019).

CONCLUSION

The Court should grant Defendants' motion to dismiss and deny leave to amend.

Dated: May 1, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 1, 2026, I filed the foregoing document with the Court and served it on opposing counsel through the Court's CM/ECF system. All counsel of record are registered ECF users.

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