

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTY BURBAGE, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

U.S. ANESTHESIA PARTNERS, INC., et al.,

Defendants.

Case No. 4:25-cv-116

PLAINTIFF BURBAGE’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS

Plaintiff Christy Burbage alleges that Defendants U.S. Anesthesia Partners, Inc. (“USAP Inc.”), U.S. Anesthesia Partners of Texas P.A., (“USAP Texas”) and U.S. Anesthesia Partners Holdings (“Holdings”) (collectively, “USAP” or “Defendants”) executed a serial acquisition scheme that violated both Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. Specifically, Plaintiff alleges that Defendants monopolized the hospital-only anesthesia market and attempted to expand that monopoly to the market for anesthesia services provided at ambulatory surgical centers (“ASCs”), specialized clinics, and similar non-hospital locations (referred to as the ASC-based anesthesia market). Plaintiff further alleges that Defendants entered into price-fixing agreements with certain acquisition targets.

Each of Defendants’ three challenges to Plaintiff’s First Amended Complaint (“FAC”) fails. First, Defendants argue that Plaintiff’s allegations against USAP Texas and Holdings are improper group pleading. Mot. to Dismiss (“Mot.”) at 5–10, ECF No. 130. With respect to Holdings, the Court recently rejected Defendants’ arguments challenging the same allegations in the related case, *Electrical Medical Trust v. U.S. Anesthesia Partners*, Case No. 4:23-cv-4398 (S.D. Tex.) (“*EMT*”). And although the Court dismissed claims against USAP Texas in *EMT*, Plaintiff’s additional allegations here support the inference that USAP Texas was a direct participant in both the

acquisition and unlawful pricing aspects of Defendants’ anticompetitive scheme. Second, Defendants challenge Plaintiff’s standing to bring claims on behalf of a class of patients who were charged unlawfully inflated prices for anesthesia services at ASCs. Mot. at 11–12. It is undisputed, though, that Plaintiff has standing for unlawful overcharges in the hospital setting, and Plaintiff alleges that any anticompetitive overcharge in the ASC setting flows from the same unlawful scheme, regarding the same underlying anesthesia services. The site of service is the only distinction between Ms. Burbage and other class members. To the extent that distinction has any relevance with respect to Ms. Burbage’s role in this case, it is an issue properly addressed at the class certification stage, not on a motion to dismiss. Finally, Defendants argue that Plaintiff’s ASC-based anesthesia services claims are time-barred. Mot. at 12–19. But those claims arise from precisely the same unlawful conduct alleged in the initial pleading. Defendants’ motion to dismiss should be denied in its entirety.

BACKGROUND

On February 10, 2026, Plaintiff Christy Burbage filed the FAC, making three relevant changes to the original complaint. First, she substituted herself for the prior named plaintiff, Basel Musharbash, alleging that she paid USAP unlawfully inflated prices for anesthesia services at Texas Health Presbyterian Hospital Plano and that USAP’s ability to charge that supracompetitive price is directly attributable to its monopoly power. FAC ¶¶ 15, 168–187.

Second, the FAC adds two USAP entities as Defendants, as did the amended complaint filed in *EMT*. *EMT*, ECF No. 127. The FAC incorporates the *EMT* Plaintiffs’ allegations against Holdings, which the Court recently sustained, and bolsters the allegations regarding USAP Texas. Specifically, Plaintiff alleges that “USAP Texas (d/b/a Greater Houston Anesthesiology)” violated Section 1 of the Sherman Act by entering into an unlawful agreement with Baylor College of Medicine. FAC ¶ 219. Plaintiff also alleges that USAP Texas and Holdings [REDACTED]

[REDACTED]
[REDACTED], ¶ 62, [REDACTED], ¶ 67, [REDACTED], ¶ 74, [REDACTED], ¶ 77, [REDACTED], ¶ 79, and [REDACTED] ¶ 81. Of these acquired practices, [REDACTED]. *See id.* ¶ 20.

Third, the FAC adds allegations that Defendants attempted to monopolize the ASC-based market by leveraging their monopoly in the related hospital-only services market. *Id.* ¶¶ 101–107.

STANDARD OF REVIEW

A court assessing a motion to dismiss under Rule 12(b)(6) accepts all well-pled allegations as true and construes them in the light most favorable to the plaintiff. *Tesla, Inc. v. La. Auto. Dealers Ass’n*, 113 F.4th 511, 522 (5th Cir. 2024). Dismissal is inappropriate if a complaint “contains enough facts to state a claim to relief that is plausible on its face.” *Gulf Coast Hotel-Motel Ass’n v. Miss. Gulf Coast Golf Course Ass’n*, 658 F.3d 500, 504 (5th Cir. 2011).

ARGUMENT

I. The Complaint States Claims Against Holdings and USAP Texas.

Defendants Holdings and USAP Texas move to dismiss on the ground that the Complaint relies on “group pleading” and fails to allege their independent liability. This argument ignores the single-enterprise doctrine, which this Court applied in its order sustaining the same claims against Holdings in *EMT*. It also ignores specific allegations that distinguish the FAC from the complaint this Court found insufficient as to USAP Texas in *EMT*.

Ms. Burbage alleges that USAP Inc., Holdings, and USAP Texas operated as a single enterprise to monopolize hospital anesthesia services in Texas. Holdings [REDACTED]
[REDACTED]. FAC ¶¶ 23–25. USAP Texas [REDACTED]
[REDACTED], *id.* ¶¶ 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, 81 n.9, [REDACTED]

██████████, *id.* ¶ 20. USAP Texas also entered into a price-fixing agreement with Baylor College of Medicine, under which it billed for that competitor’s anesthesia services at its own supracompetitive rates. *Id.* ¶ 219.

This Court already sustained nearly identical allegations against Holdings just weeks ago in *EMT*. As to USAP Texas, the FAC addresses the deficiencies this Court identified in *EMT* by alleging specific pricing conduct. Defendants’ motion should be denied.

A. The Single-Enterprise Doctrine Governs.

When related corporate entities participate in an anticompetitive scheme, their collective conduct “must be viewed as that of a single enterprise.” *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984). Affiliated entities cannot conspire with each other under Section 1, “the enterprise is fully subject to § 2 of the Sherman Act.” *Id.* at 777. Each defendant must have “independently participated” in the scheme, but each defendant need not independently satisfy every element of a claim. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1236–37 (10th Cir. 2017). To hold otherwise “would all but eviscerate the [antitrust laws] with respect to sophisticated competitors” who spread their scheme “over multiple subsidiaries.” *Id.* at 1236.

This Court applied this framework in *EMT*, finding that the plaintiffs there adequately alleged that USAP Inc. and Holdings operated as “a single enterprise” but that *EMT* did “not sufficiently allege independent participation by Texas P.A.” Order at 11, *EMT*, ECF No. 216 (“*EMT* Order”).

Defendants focus much of their brief on group pleading, the alter ego doctrine, and the premise that Plaintiff must allege conduct by each Defendant in establishing the elements of each claim. Mot. at 5–8. None of these arguments directly addresses the single-enterprise doctrine. The cases Defendants cite involved tort, copyright, constitutional, and state common law claims with

no equivalent framework for application of enterprise liability to antitrust claims. Veil-piercing and alter ego theories “operate independently of the single-enterprise theory.” *Lenox*, 847 F.3d at 1237.

Nor does the single-enterprise framework require a parent-subsidary relationship. In *Lenox*, the Tenth Circuit addressed claims against parent, subsidiary, and sister corporations within the same enterprise and framed the inquiry around whether each entity “independently participated in the enterprise’s scheme,” not whether it occupied a particular position within the corporate structure. 847 F.3d at 1236–37; *see also Chandler v. Phoenix Servs.*, 2020 WL 1848047, at *14 (W.D. Tex. Apr. 10, 2020) (adopting this participation-based framework); *see also Belnap v. Steward Health Care Sys. LLC*, 2020 WL 619402, at *6 (D. Utah Feb. 10, 2020) (collecting cases recognizing *Copperweld* applies even where the subsidiary is not wholly owned). Here, USAP Texas is structured as a “Texas professional association,” owned by physicians rather than USAP Inc. or Holdings directly, which enables funds to flow from the acquired practices to USAP Inc. while maintaining compliance with the Corporate Practice of Medicine regulations in Texas. If the enterprise could avoid antitrust liability by routing its conduct through such an entity simply because it sits outside the parent/wholly owned subsidiary chain, that would allow the type of evasion *Lenox* warned against. *See* 847 F.3d at 1236.

B. This Court Already Sustained the Allegations Against Holdings in *EMT*.

This Court sustained claims against Holdings in *EMT* based on allegations largely identical to those in the FAC. *EMT* Order at 6–8. There, the Court found the *EMT* Plaintiffs adequately alleged that Holdings independently participated in the scheme by claiming that Holdings and USAP Inc. “share the same directors, managers, and officers” who “negotiated and implemented” the anticompetitive merger agreements. *Id.* at 6. The Court emphasized that acquiring anesthesia practices “goes to the very heart of the challenged conduct in this case,” because *EMT* Plaintiffs’

core allegation is that “Defendants obtained a monopoly because of these acquisitions and then used their power to raise prices.” *Id.* at 7.

The FAC alleges these same facts. Holdings [REDACTED]

[REDACTED] FAC ¶¶ 23–25. The FAC identifies [REDACTED] FAC ¶¶ 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, 81 n.9. That is two more than the four this Court addressed in *EMT*. Defendants identify no basis for why a different result should be reached here.

C. The Complaint Adequately Alleges USAP Texas’s Independent Participation.

In *EMT*, this Court dismissed claims against USAP Texas because the complaint there did not allege that USAP Texas negotiated or implemented the mergers to which it was a party, or identify any specific reimbursement contracts or allege that USAP Texas used negotiating leverage to raise prices. *EMT* Order at 8–9. The FAC addresses these concerns. Although the *EMT* complaint referenced the Baylor collaboration agreement, it attributed that agreement to ‘USAP’ collectively. *See id.* at 9. The FAC, by contrast, identifies “USAP Texas (d/b/a Greater Houston Anesthesiology)” as the specific counterparty to this alleged price-fixing agreement. FAC ¶ 219.

1. USAP Texas Reached a Price-Fixing Agreement with Baylor.

The FAC alleges that “USAP, through its affiliate USAP Texas (d/b/a Greater Houston Anesthesiology),” entered into an “Anesthesia Services Collaboration Agreement” with Baylor College of Medicine on October 23, 2014. FAC ¶ 219. Under that agreement, USAP Texas billed for anesthesia services provided by Baylor physicians as if it were the provider, charged its own higher rates, and received all resulting payments. *Id.* USAP “faithfully executed this agreement until its termination in 2020.” *Id.*; *see also id.* ¶ 222. The Complaint further alleges that this arrangement constituted horizontal price-fixing, *id.* ¶¶ 218–222, while also constituting

anticompetitive conduct as relevant to Plaintiffs’ monopolization and attempted monopolization claims. This is not a vague allegation about unidentified contracts, nor is it a group-pleaded allegation attributed to “USAP” collectively. USAP Texas is specifically identified as the contracting party. USAP Texas is the only USAP entity identified in the Baylor agreement. It billed under its own identity, charged its own rates, and collected payments. The counterparty is identified, the date is alleged, and the anticompetitive pricing mechanism is described.

In the *EMT* Order, the Court noted that the complaint there “does not identify any of the alleged reimbursement contracts” and “does not clarify whether [USAP Texas] used ‘negotiating leverage’ against commercial payors to raise reimbursement prices.” *EMT* Order at 9. The Court’s inquiry focused on whether USAP Texas played an independent role in the pricing component of the scheme, as opposed to merely appearing on documents. As set forth in the FAC, USAP Texas in fact affirmatively exercised pricing authority over a competitor’s anesthesia services pursuant to the Baylor agreement and billed at its own supracompetitive rates. FAC at ¶ 219. These allegations constitute independent participation in the enterprise’s anticompetitive scheme, regardless of whether the arrangement is ultimately found to violate Section 1.

The Ninth Circuit’s decision in *Arandell* is instructive. In that case, a subsidiary sold natural gas at prices set by its parent through a coordinated price-fixing scheme. *Arandell Corp. v. Centerpoint Energy Servs., Inc.*, 900 F.3d 623 (9th Cir. 2018). The subsidiary did not set prices or orchestrate the conspiracy. *Id.* at 631. Nevertheless, the Ninth Circuit held that its conduct was sufficient to withstand a summary judgment challenge because its “role was essential to securing the benefit of the other Reliant defendants’ price-fixing” and its “acts were the immediate cause of Plaintiffs’ injuries.” *Id.* at 634–35; *see EMT* Order at 5 (citing *Arandell*). The same applies with even more force here, where Plaintiff’s standard—at the motion to dismiss phase—is lower. USAP

Texas is the entity through which USAP billed for anesthesia services at supracompetitive rates under the Baylor agreement. Like the subsidiary in *Arandell*, USAP Texas’s conduct was the mechanism through which the enterprise monetized its market power. Furthermore, the relevant inquiry here is whether USAP Texas participated in the pricing conduct that caused injury to Plaintiff and the proposed class, since Plaintiff and the proposed class are patients who were charged supracompetitive prices for anesthesia services.

2. *USAP Texas* [REDACTED].

USAP Texas [REDACTED]

[REDACTED]

[REDACTED]. FAC ¶ 20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

3. *USAP Texas* [REDACTED].

The Complaint identifies [REDACTED], in which USAP Texas [REDACTED]

[REDACTED] FAC ¶¶ 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, 81 n.9.

This Court found in *EMT* that being “a party to” mergers, without more, was insufficient. *EMT* Order at 9. But as noted above, the FAC alleges further that USAP Texas [REDACTED] [REDACTED], FAC ¶ 20, and entered a price-fixing agreement through which it exercised pricing authority over a competitor, *Id.* ¶ 219. These allegations must be considered together and not in isolation. *See Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (Plaintiffs are entitled to “the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.”).

Moreover, no single allegation need independently establish USAP Texas’s liability. Under *Lenox*, the relevant inquiry is whether the “aggregated conduct” of the enterprise members supports liability, and not whether each defendant “independently satisfied each necessary element.” 847 F.3d at 1236; *see also Chandler*, 2020 WL 1848047, at *14 (adopting same framework); *Jones v. Varsity Brands, LLC*, 618 F. Supp. 3d 713, 724–25 (W.D. Tenn. 2022) (explaining that enterprise members need not have “participated in each act or transaction” and independent participation established where defendants played a role in “maintaining and expanding” the enterprise’s market share). Here, USAP Texas entered a price-fixing agreement with a competitor through which it exercised pricing authority, FAC ¶ 219; [REDACTED] *id.* ¶ 20; [REDACTED] *id.* ¶¶ 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, 81 n.9. That is sufficient to establish independent participation. *See EMT* Order at 7 (observing that the acquisitions go to “the very heart of the challenged conduct in this case”).

In *EMT*, this Court distinguished *Syngenta* because USAP Texas was alleged only to be “a party to” the merger agreements. *EMT* Order at 9; *see FTC v. Syngenta Crop Prot. AG*, 711 F. Supp. 3d 545, 585–86 (M.D.N.C. 2024) (holding the complaint sufficiently alleged coordinated activity where affiliated entity was “the Syngenta entity that signed the agreement” and its executives were involved in the challenged conduct). The FAC addresses that concern, because USAP Texas is identified as the entity that entered into the alleged Baylor price-fixing agreement and billed at its own supracompetitive rates. FAC ¶ 219.

These allegations are also timely. The Baylor agreement remained in effect until 2020. *Id.* ¶ 222. [REDACTED], were completed in September 2019 and January 2020, respectively. *Id.* ¶¶ 81, 79. Furthermore, [REDACTED]

[REDACTED]. *Id.* ¶ 20.

D. Alternatively, Plaintiff Requests Leave to Amend.

Should the Court conclude that additional factual specificity is required as to USAP Texas, Plaintiff respectfully requests leave to amend. “The Federal Rules of Civil Procedure ‘generally favor amendment of pleadings, especially in class actions.’” *Lee v. Samsung Elecs. Am., Inc.*, 2024 WL 1366831, at *7 (S.D. Tex. Mar. 31, 2024) (quoting *Arevalo v. Fid. Nat’l Fin., Inc.*, 2007 WL 9712070, at *2 (W.D. Tex. Feb. 14, 2007)). “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). Amendment should be granted where the plaintiff shows “good cause.” *Tredinnick v. Jackson Nat’l Life Ins. Co.*, 2018 WL 11352338, at *2 (E.D. Tex. May 9, 2018) (citing *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003)). Courts assessing whether a plaintiff has demonstrated “good cause” to justify amendment consider: “(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.” *EMT Order* at 10 (quoting *S&W Enters., L.L.C.*, 315 F.3d at 536). Were the Court to grant Defendants’ Motion, there would be good cause to grant Plaintiff leave to amend. The FAC was filed on February 10, 2026, before this Court’s March 26, 2026, *EMT Order* identified deficiencies in the allegations against USAP Texas.

Additionally, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. These facts, if required, can be added to the FAC, and Defendants are already in possession of these documents.

This Court granted leave on this issue in *EMT*, finding that the amendment was “important because it pertains to single enterprise theory.” *EMT* Order at 10. As in *EMT*, there is no prejudice because amendment would not change the nature of the claims against Holdings and USAP Texas.

II. Ms. Burbage Has Article III Standing.

Ms. Burbage has Article III standing because she personally paid supracompetitive prices as a result of USAP’s anticompetitive conduct. USAP nevertheless contends that she lacks standing to bring the same claims for the same injury suffered in connection with anesthesia services the same Defendants rendered in ASCs. This argument fails because it improperly conflates the inquiry into whether Ms. Burbage has standing with whether she is a proper representative for class members who received ASC-based anesthesia services. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“The standing determination is quite separate from certification of the class.”).

A plaintiff has Article III standing if she alleges (1) “an injury in fact” that is (2) “fairly traceable to the challenged action of the defendant,” and (3) likely to be “redressed by a favorable decision.” *Parada v. Sandhill Shores Prop. Owners Ass’n*, 604 F. Supp. 3d 567, 576 (S.D. Tex. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

USAP does not dispute that Ms. Burbage has standing to bring claims based on her alleged injury. *See Mot.* at 11. The FAC alleges a single anticompetitive scheme by the same Defendants,

implemented through the same serial-acquisition strategy, resulting in the same type of injury: supracompetitive prices for anesthesia services rendered in a hospital or ASC setting. The FAC alleges that USAP monopolized hospital-only anesthesia through a roll-up of smaller practices, supplemented by unlawful horizontal agreements, [REDACTED]. FAC ¶¶ 101, 107. At a minimum, Ms. Burbage’s asserted injury is fairly traceable to the same overarching course of conduct that allegedly injured absent class members in both settings. Ms. Burbage and all absent class members all purchased the same category of service—anesthesia services—and allegedly suffered the same type of economic injury from the same anticompetitive scheme. This satisfies the pleading-stage requirement where Plaintiff must demonstrate merely that she was harmed by the same alleged anticompetitive conduct as absent class members.

USAP argues, however, that Ms. Burbage cannot represent class members injured in the ASC-based anesthesia market because she received anesthesia in a hospital.¹ That argument concerns the fit between the named plaintiff and absent class members, which is a class certification issue and procedurally improper at the pleading stage; standing is “primarily concerned with ensuring that a real case or controversy exists,” whereas “Rule 23 is designed precisely to address concerns about the relationship between the class representative and the class.” *Williams v. Steward Health Care Sys., LLC*, 2021 U.S. Dist. LEXIS 254179, at *137–38 (E.D. Tex. Dec. 16, 2021) (quoting *Earl v. Boeing Co.*, 2021 U.S. Dist. LEXIS 167384, 2021 WL 4034514, at *7 (E.D. Tex. Sept. 3, 2021)), *R. & R. adopted, Johnson v. Steward Health Care Sys.*, 2022 U.S.

¹ USAP uses this distinction as both a sword and a shield. When it sues USAP’s legal strategy—as when contesting its monopoly power—it characterizes hospital-only and ASC-based anesthesia as a single, unified market. See USAP Mot. for Summ. J. at 18, *Fed. Trade Comm’n v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-3560 (S.D. Tex.), ECF No. 303.

Dist. LEXIS 33745, at *5 (E.D. Tex. Feb. 25, 2022); *see also Wilson v. Centene Management Co., L.L.C.*, 144 F.4th 780, 788–90 (5th Cir. 2025) (holding that, after the court determines the named plaintiff demonstrated individual standing, “the sufficiency of the relationship between the class representative’s harm and the harms suffered by class members” should be reserved for class certification). Therefore, USAP’s standing-approach argument should be rejected because it prematurely raises issues that can be resolved only on a fuller factual record, with expert testimony: market-definition and Ms. Burbage’s adequacy as a class representative. Neither warrants dismissal for lack of Article III standing at the pleading stage.

Courts confronting analogous class-standing objections have likewise held that “a plaintiff has standing to assert claims for unnamed class members based on products he or she did not purchase” provided the products are “substantially similar.” *Franklin v. Apple Inc.*, 569 F. Supp. 3d 465, 473–75 (E.D. Tex. 2021) (collecting cases) (denying motion to dismiss for lack of standing claims brought by a plaintiff who “admitted to only buying the iPhone 6,” and sought “to represent consumers who own not only the iPhone 6, but also consumers who own the iPhone 6 Plus, iPhone 6s, and iPhone 6s Plus”); *Ault v. J.M. Smucker Co.*, 2014 U.S. Dist. LEXIS 67118, at *22 (S.D.N.Y. May 15, 2014) (refusing to dismiss plaintiff’s claim for lack of standing because “she alleges to have purchased several of the Crisco Oil products” at issue even though she represented a class containing members who bought Crisco Oil products that she did not). While these cases concern consumer-protection claims, they reinforce the same principle relevant here: if the named plaintiff alleges the same defendants, the same general course of conduct, and the same type of economic injury, the motion to dismiss should be denied and differences between the products purchased by the named plaintiff and absent class members are properly addressed at class certification.

Williams v. Steward Health Care System, LLC is particularly instructive. 2021 U.S. Dist.

LEXIS 254179, at *108 (E.D. Tex. Dec. 16, 2021). There, the defendants argued that the named plaintiffs could not pursue class claims on behalf of patients treated at non-party hospitals where the plaintiffs themselves were never treated and never billed. *Id.* at *104. The court rejected that pleading-stage standing challenge, holding that because plaintiffs had standing for their own claims, “Rule 23, not Article III standing, is the better framework for analyzing differences between the named Plaintiffs and the absent class members.” *Id.* at *150.

USAP’s reliance on *Kjessler v. Zaappaaz, Inc.* is misplaced. 2019 U.S. Dist. LEXIS 119296 (S.D. Tex. Apr. 24, 2019). In *Kjessler*, the named plaintiffs purchased wristbands and pin buttons but sought to represent a class that also included purchasers of lanyards—a categorically distinct product that the named plaintiffs had never bought and with respect to which they had no personal stake. *Id.* at *17–24. The court’s concern was straightforward: a plaintiff who purchased one type of promotional item cannot adequately represent purchasers of a different type of promotional item where the products are meaningfully distinct consumer goods, purchased through different decisions, at different price points, and potentially subject to different defenses. *Id.*

Here, Plaintiff and all absent class members purchased the same service: anesthesia. The fact that anesthesia was administered in a hospital setting for some class members and in an ASC for others does not sever the traceability of both types of injuries to USAP’s alleged anticompetitive conduct. The hospital/ASC distinction is a function of the clinical determination of where a given procedure can safely be performed—not a consumer choice between meaningfully different goods or services. Unlike the promotional products in *Kjessler*, anesthesia services administered in a hospital and those administered in an ASC are functionally identical from the patient’s perspective and, critically, directly caused harm to Plaintiff and the proposed class as a result of the same anticompetitive conduct by Defendants. The service received does not

change; only the facility backdrop does. *Cf. Kjessler*, 2019 U.S. Dist. LEXIS 119296, at *19 n.9 (“Here, by contrast, certain putative class members purchased products *entirely* different from those purchased by the named plaintiffs.”) (emphasis added). Plaintiff, therefore, has standing to represent all class members who were overcharged for anesthesia services, regardless of the clinical setting in which those services were rendered.²

The Court should reject USAP’s attempt to shoehorn Rule 23 arguments into an Article III challenge. Ms. Burbage alleges an economic injury traceable to USAP’s overarching scheme to monopolize the market for hospital-only anesthesia services and leverage that power to monopolize the market for ASC-based anesthesia services. Any remaining differences between Ms. Burbage and absent class members must be addressed, if necessary, at class certification.

If, however, the Court dismisses the ASC-based claims for lack of standing, Plaintiff respectfully requests leave to amend. Plaintiff promptly filed the Amended Complaint within the deadline to do so only after Defendants produced documents showing they sought to monopolize the ASC-based anesthesia services market. Amendment is important because it would preserve the ability of patients who paid supracompetitive prices for USAP’s ASC-based anesthesia services to recover these damages. Granting leave to amend would also promote efficiency by ensuring these patients’ claims are resolved alongside those who received USAP’s anesthesia services in a hospital setting. And Defendants would not be prejudiced, because they received notice of these

² USAP’s other cases are likewise inapposite. *See Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982) (plaintiffs had standing to pursue claims based on some medical transfers but not others because “conditions under which such transfers occur are sufficiently different from those for which respondents do have standing to challenge”); *Daves v. Dall. Cty.*, 22 F.4th 522, 544 (5th Cir. 2022) (plaintiffs lacked standing because claimed injury “was too speculative to support standing”); *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 551 (5th Cir. 1988) (plaintiffs lacked standing to “obtain relief already obtained by employees” that were included in the class); *Donovan Constr. Co. v. Fla. Tel. Corp.*, 564 F.2d 1191, 1192–93 (5th Cir. 1977) (plaintiff lacked antitrust standing, not Article III standing, because it “did not in any way deal in” the geographic market in question).

claims four months before the close of fact discovery, leaving sufficient time to tailor their discovery strategy in response. Indeed, much of the evidence probative of the ASC-based claims is in Defendants' possession. Finally, a short continuance to allow targeted discovery into Plaintiff's ASC-based claims would cure any minimal prejudice to Defendants.

III. Plaintiff's Amended Market Definition Does Not Render Her Claims Untimely.

USAP's final argument, which asserts that Ms. Burbage's ASC-based claims are untimely, fares no better.³ Ms. Burbage's claims regarding the ASC market are based on the same USAP scheme that has been alleged in the *FTC* Case, the *EMT* Case, and the original Complaint in this case. The only difference is that the FAC alleges USAP's scheme affected not only the hospital-only anesthesia services market but also the closely related ASC-based anesthesia services market. Such a minor expansion of the alleged markets is still subject to FTC tolling, particularly when the claims are based on the same course of conduct by the same defendants. USAP's contrary arguments are based on the wrong standard, misread the case law, and contradict the statute's plain language. The Court should reject them accordingly.

Section 16(i) suspends the statute of limitations for private civil antitrust claims "based in whole or in part on any matter complained of" in a civil antitrust action brought by the government. 15 U.S.C. § 16(i). The provision was enacted "to assist private litigants in utilizing any benefits they might cull from government antitrust actions." *See Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 317 (1965). Recognizing that "effect must be given to the broad terms of the statute itself," the Supreme Court requires only a "real relation" between "the matters

³ USAP argues only that Plaintiff's claims based on the ASC market are untimely and, with the exception of Count 3 (Conspiracy), does not challenge—on any grounds—Plaintiff's claims based on the hospital-only anesthesia market. USAP accordingly has no basis to assert, as it does in footnote 1 of its Motion, that Counts 2, 4, and 6 should be dismissed in their entirety.

complained of” in each suit. *Leh v. Gen. Petroleum Corp.*, 382 U.S. 54, 59 (1965). “If there is a significant, although incomplete, overlap of subject matter, the statute is tolled even as to the differences.” *Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc.*, 198 F.3d 823, 830 (11th Cir. 1999), *amended in part on other grounds*, 211 F.3d 1224 (11th Cir. 2000).

Plaintiff’s additional allegations covering ASC-based anesthesia services are, at a minimum, based “*in part on*,” and “*related*” to, matters complained of in the FTC action. They are based on the same anticompetitive scheme over the same time period in the same geographic market, and its effects in a related service market. Both Plaintiff and the FTC allege that USAP engaged in an anticompetitive scheme to acquire anesthesia practices that harmed the market for hospital-only anesthesia services in Houston, Dallas-Fort Worth, and Austin. *See, e.g.*, Compl. at ¶¶ 102–173, *Fed. Trade Comm’n v. U.S. Anesthesia Partners, Inc.*, No. 4:23-cv-3560 (S.D. Tex.) (“FTC”), ECF No. 69 (“*FTC Compl.*”); FAC ¶¶ 35–81. Both Plaintiff and the FTC likewise allege that USAP violated Section 1 of the Sherman Act when it entered into market-division agreements [REDACTED] and price-fixing agreements with the Methodist Hospital Physician Organization, Dallas Anesthesiology Associates, and Baylor College of Medicine. *FTC Compl.* ¶¶ 208–215, 403–412; FAC ¶¶ 225–237, 288–306. The only new aspect of Plaintiff’s Amended Complaint is that she alleges the effects of that same anticompetitive scheme extended to the “related but distinct” market for ASC-based anesthesia services. FAC ¶¶ 101–07, 269, 282, 299.

“The fact that [Plaintiff] claims that the same conduct has a greater anti-competitive effect” than Defendants “does not make the conduct challenged any less a matter complained of in the government action.” *Minn. Mining*, 381 U.S. at 323. Consistent with the plain text of the statute and Supreme Court guidance, courts recognize the tolling provision applies where, as here, “the plaintiff incorporates the entire Government case and alleges more in addition.” *See In re Antibiotic*

Antitrust Actions, 333 F. Supp. 317, 321 (S.D.N.Y. 1971).⁴ Similarly, courts have “disregarded the difference in the markets” in finding the tolling provision applies. *See Morton’s Mkt., Inc.*, 198 F.3d at 831 (tolling where government action concerned “the wholesale market to *schools*” and private action concerned “the wholesale market to *groceries*” (emphasis added)).⁵

The cases Defendants rely on do not support denying tolling in cases like this one, where the new market (ASC-based anesthesia services) is related to the government’s market (hospital-only anesthesia services), involves the same category of product (anesthesia services), and is tied to the same anticompetitive scheme (acquiring anesthesia practices, jacking up anesthesia prices, and dividing the market). *See Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 322 n.27 (4th Cir 2007) (distinguishing cases where tolling provision applied to actions with different product markets because “a broader market definition could have included both” the government and the private plaintiff’s product markets). Rather, Defendants’ cases merely stand for the uncontroversial position that tolling is improper where the complaints “allege wholly different actions on the part of the defendants,” *see Charley’s Tour & Transp., Inc. v. Interisland Resorts, Ltd.*, 618 F. Supp. 84,

⁴ *See also, e.g., Hinds Cnty. v. Wachovia Bank N.A.*, 885 F. Supp. 2d 617, 627 (S.D.N.Y. 2012) (citations omitted) (“A private action that is substantially broader than a prior Government action may still benefit from § 16(i) tolling where the allegations in the private action incorporate the subject matter of the Government action.”); *In re Master Key Antitrust Litig.*, 70 F.R.D. 29, 33 (D. Conn. 1976) (rejecting claim “that these broader allegations, which include and add to the allegations in the government’s suits, are outside the scope of” the tolling provision); *see also Univac Dental Co. v. Dentsply Int’l, Inc.*, 268 F.R.D. 190, 200 (M.D. Pa. 2010) (reasoning “tolling provisions should apply whenever a private plaintiff brings an antitrust action arising out of the same course of conduct as the government’s litigation”).

⁵ *See also In re Ariz. Dairy Prods. Litig.*, 1984 WL 21984, at *2–3 (D. Ariz. Nov. 5, 1984) (tolling where government action alleged defendants fixed wholesale milk prices and private action alleged defendants “fixed wholesale *and* retail prices” and “the retail-level conspiracy was [allegedly] an eventual outgrowth of the wholesale-level conspiracy”); *Antibiotic Antitrust Actions*, 333 F. Supp. at 322 (tolling where government’s action was “limited to the domestic human consumption market” and private actions alleged effects of “conspiracy similar in nature and operation . . . extended around the world and into the agricultural market as well”).

86 (D. Haw. 1985), are “based on different conduct occurring during a different time period,” *see Go Computer, Inc. v. Microsoft Corp.*, 437 F. Supp. 2d 497, 502–03 (D. Md. 2006), have “no overlap whatsoever,” *see In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 782 F. Supp. 481, 486 (C.D. Cal. 1991), or allege “entirely different” conspiracies, *see Peto v. Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967).

The cases on which USAP relies denied tolling for the same fact-specific reason: the later-filed case was meaningfully different than the FTC’s because the later-filed case challenged markets unrelated to those challenged by the FTC. *Charley’s Tour* concerned a hotel market versus charter bus market, 618 F. Supp. at 86; *Go Computer* concerned a computer software market versus computer hardware accessories market, 437 F. Supp. at 502–03; *Petroleum Products* concerned two separate geographic markets on opposite coasts of the United States, 782 F. Supp. at 486; and *Peto* concerned a market for airing boxing matches versus a market for hockey arenas, 384 F.2d at 683. Those are far cries from the closely related markets alleged here. And *Novell’s* holding was primarily driven by the court’s rejection of the assertion that the new claims overlapped with the DOJ’s prior complaint. 505 F.3d at 321–322. The *Novell* plaintiff could cite only a few similar paragraphs within the two complaints. *Id.* at 521. The Fourth Circuit held that was not enough to warrant “entirely new vistas” of litigation. *Id.* at 522 (quoting *Novell, Inc. v. Microsoft Corp.*, 2005 U.S. Dist. LEXIS 11520, at *14 (D. Md. June 10, 2005)). Here, in contrast, Plaintiff has “repackage[d] the allegations” in the FTC complaint, so their subject matter is virtually identical. *See* USAP’s Mtn. to Dismiss Orig. Complaint at 1 (ECF No. 49).

There will be no “new vistas” opened by denying USAP’s motion. USAP itself has contended in the FTC case—and likely will do so in this case—that the markets for hospital-only anesthesia and ASC-based anesthesia are one and the same. *See supra* note 2. USAP now contends

that markets are so separate and unrelated that tolling does not apply. USAP cannot have it both ways. And assessing whether USAP's anticompetitive actions have affected anesthesia services in ASCs will necessarily be part of this litigation as a result of USAP's defense.

CONCLUSION

Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss.

/s/ Brice Wilkinson

Barrett H. Reasoner, *Attorney-in-Charge*

Federal No. 14922

Texas State Bar No. 16641980

Brice Wilkinson

Federal No. 1277347

Texas State Bar No. 24075281

Michael R. Davis

Texas State Bar No. 24109793

Federal No. 3588027

Sarah M. Chavey

Federal No. 3936657

Texas State Bar No. 24142776

Annie F. Fogel

Federal No. 3955970

Texas State Bar No. 24142906

GIBBS & BRUNS LLP

1100 Louisiana, Suite 5300

Houston, TX 77002

Phone: (713) 751-5244

breasoner@gibbsbruns.com

bwilkinson@gibbsbruns.com

mdavis@gibbsbruns.com

schavey@gibbsbruns.com

afogel@gibbsbruns.com

Kellie Lerner (Pro Hac Vice)

Michael E. Keramidas (Pro Hac

Vice pending)*

**SHINDER CANTOR LERNER
LLP**

14 Penn Plaza, Fl. 19

New York, NY 10122

Phone: (646) 960-8608

kellie@scl-llp.com

mkeramidas@scl-llp.com

* *Admitted to practice in*

Pennsylvania. Not admitted in NY.

Keagan H. Potts (Pro Hac Vice)

**SHINDER CANTOR LERNER
LLP**

600 14th St. NW, 5th Fl.

Washington, DC 20005

Tel.: (646) 960-8601

Fax: (646) 960-8625

kpotts@scl-llp.com

Kimberly A. Justice (Pro Hac
Vice)

**JUSTICE JAGHER
LONDON & MILLEN LLC**

923 Fayette Street

Conshohocken, PA 19428

Phone: (224) 632-4500

kjustice@jjlmlaw.com

Robert J. Wozniak (Pro Hac
Vice)

**JUSTICE JAGHER
LONDON & MILLEN LLC**

100 Tri-State International
Drive, Suite 128 Lincolnshire,
IL 60069

Phone: (224) 632-4500

rwozniak@jjlmlaw.com

Justin S. Nematzadeh (Pro Hac
Vice)

NEMATZADEH PLLC

101 Avenue of the Americas,
Suite 909

New York, NY 10013

Phone: (646) 799-6729

jsn@nematlawyers.com

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2026, the foregoing document was filed with the Court and served on all counsel of record through the Court's electronic filing system.

/s/ Michael R. Davis

Michael R. Davis