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**

MOTION TO DISMISS PLAINTIFF CHRISTY BURBAGE'S COMPLAINT

On February 10, 2026, more than a year after Basel Musharbash filed his original complaint against U.S. Anesthesia Partners, Inc. ("USAP"), Plaintiff's counsel filed an entirely new complaint ("Burbage Complaint") on behalf of a different plaintiff, Christy Burbage ("Burbage" or "Plaintiff"). They also added two new defendants: whereas Musharbash had alleged conduct solely by USAP, Burbage attributes that same conduct to a combination of USAP and new Defendants U.S. Anesthesia Partners Holdings, Inc. ("Holdings") and U.S. Anesthesia Partners of Texas, P.A. ("Texas, P.A."). Burbage lumps all three Defendants collectively under the label "USAP" without saying which specific defendant took which specific actions. She also mints brand new claims relating to an alleged market for anesthesia services at ambulatory surgical centers (the "ASC-based market"). Burbage's complaint should be dismissed in its entirety as to Holdings and Texas, P.A., and in its substantial majority as to USAP.

First, as in the parallel *EMT* class action, Burbage cannot establish liability by copy-paste. Burbage has to allege some basis why each defendant should be liable for her claims. She fails to do so for the new Defendants, Holdings and Texas, P.A., so all claims against them should be dismissed. *See infra* Part I.

Second, Burbage lacks Article III standing to pursue her claims (in Counts Two, Four, and Six) relating to an alleged "ASC-based" anesthesia services market. Putative class representatives can only pursue claims relating to markets in which they were actually injured. Burbage alleges that her injuries arose from the allegedly "distinct" market for "hospital-only" anesthesia services, not the alleged "ASC-based" market, so she cannot bring claims relating to it. *See infra* Part II.

Third, even if she had standing, Burbage's claims based on the alleged "ASC-based" anesthesia services market are time-barred under the Clayton Act's four-year statute of limitations. These claims do not benefit from FTC tolling under 15 U.S.C. § 16(i). The most recent conduct Burbage alleges occurred in 2020, yet the Burbage Complaint was not filed until 2026. Because Burbage alleges that the "ASC-based market," is distinct from the "hospital-only" anesthesia services market as alleged in the FTC's pending action, the FTC tolling provision does not apply, and Burbage has no other basis for excusing the untimeliness of these claims. *See infra* Part III.

Fourth, to the extent Burbage attempts in Count Three to allege a conspiracy between Defendants and the Welsh Carson entities, this Court has already held – twice – that such a claim fails. As a matter of law, an investment firm and its own portfolio company cannot conspire with each other. The Court should dismiss that claim, now for the third time. *See infra* Part IV.[1]

BACKGROUND

More than a year after filing a complaint against USAP on behalf of putative class representative Basel Musharbash, a self-described "antimonopoly lawyer," Plaintiff's counsel has now dropped him from the case entirely and replaced him with a new plaintiff and putative class

[1] For clarity, only Count One and Count Five would remain, and only as against USAP.

representative, Christy Burbage. Burbage is now the latest in the line of private plaintiffs to file tag-along cases following the FTC's antitrust action against USAP.[2]

Burbage's complaint recycles many allegations from the other private plaintiffs and the FTC. She alleges that USAP's "acquisitions of at least sixteen anesthesiology groups across Texas" harmed competition in the "market for hospital-only anesthesia services," in violation of Section 2 of the Sherman Act and Section 7 of the Clayton Act. Burbage Compl. ¶¶ 262-263, ECF No. 114; *see id.* ¶¶ 270, 275, 277, 282. And she alleges USAP violated Section 1 of the Sherman Act by entering into agreements to "fix prices" for anesthesia services and to "allocate the market" for those services in the Dallas-Fort Worth area. *Id.* ¶¶ 288-306. Burbage also recycles a futile conspiracy claim between USAP and Welsh Carson, despite this Court's prior holdings that USAP and Welsh Carson are not capable of conspiring. *See Musharbash*, Order at 11 n.3, ECF No. 90; *EMT*, 2024 WL 5274650, at *5 (S.D. Tex. Sept. 27, 2024).

But Burbage also includes new defendants and new allegations going well beyond both Musharbash's and the FTC's complaints. As for new defendants, Burbage adds Holdings and Texas, P.A., alleging generally that any actions Musharbash (and the FTC) had attributed to USAP were actually undertaken by all three defendants "function[ing] as a single entity." Burbage Compl. ¶¶ 18-26. Those allegations are copied (largely verbatim) from the *EMT* action, where a motion to dismiss those group pleading allegations is now pending. *See EMT*, Am. Compl. ¶¶ 17-21, ECF No. 127; *EMT*, Holdings and Texas, P.A.'s Mot. To Dismiss, ECF No. 146.

Additionally, Burbage introduces a new, alternative product market: "the related but distinct market for anesthesia services provided at ambulatory surgery centers ('ASCs'),

[2] *See 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*"); *Musharbash v. U.S. Anesthesia Partners, Inc.*, No. 4:25-cv-00116 (S.D. Tex.) ("*Musharbash*").

specialized clinics, and similar non-hospital locations at which medical procedures requiring anesthesia services are performed." Burbage Compl. ¶ 101. This is a "market" that both the FTC and earlier private plaintiffs expressly disavowed. *See FTC*, Compl. ¶ 220, ECF No. 69 ("The relevant service market appropriately excludes anesthesia services that can be provided outside a hospital setting."); *Musharbash*, Compl. ¶ 71, ECF No. 1 ("The relevant service market can be appropriately limited to hospital-only anesthesia."). Burbage also introduces a "Second Class" comprised of patients who paid for "ASC-based anesthesia services provided by USAP," for which she seeks to serve as class representative. Burbage Compl. ¶ 243.

Also new to Burbage's complaint is her alleged injury: she alleges that she paid USAP $915.55 for anesthesiology services provided at Texas Health Presbyterian Hospital Plano (though she is notably silent about when that happened). *See id.* ¶ 15. She does not allege that she was personally injured by any of the "price-fixing" agreements she alleges in the Houston market, nor that she suffered any injury related to the market for ASC-based anesthesia services.

LEGAL STANDARD

To defeat a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). That "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

A "statute of limitations defense may be properly asserted in a Rule 12(b)(6) motion." *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 141 (5th Cir. 2007) (citing *Jones*

v. Alcoa, 339 F.3d 359, 366 (5th Cir. 2003)). If it is "evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling," the statute of limitations "support[s] dismissal under Rule 12(b)(6)." *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 758 (5th Cir. 2015) (quoting *Jones*, 339 F.3d at 366).

ARGUMENT

I. Burbage Cannot Establish Liability Against Defendant Holdings and Defendant Texas, P.A. Through Group Pleading.

Holdings and Texas, P.A. have already moved to dismiss the amended complaint in *EMT* on the basis that it failed to "sufficiently allege" each defendant's "independent participation in the post-limitations period conduct." *EMT*, 2024 WL 5274650, at *5; *see EMT*, Holdings and Texas, P.A.'s Mot. To Dismiss, ECF No. 146. That motion is currently pending before this Court. Here, the Burbage Complaint relies on the same group pleading and the same basic allegations about Holdings and Texas, P.A. as in the *EMT* amended complaint, often verbatim. But "lumping together multiple defendants without identifying who is responsible for which acts" does not suffice to state a claim. *Del Castillo v. PMI Holdings N. Am. Inc.*, 2016 WL 3745953, at *13 (S.D. Tex. July 13, 2016). Accordingly, for the same reasons that Holdings and Texas, P.A. previously explained in their *EMT* motion to dismiss, Burbage's allegations against Holdings and Texas, P.A. fail to state a claim under Rule 8 and *Twombly* and so should be dismissed.

A. Burbage's Group-Pleaded Allegations Must Be Disregarded.

Burbage's blanket use of the group label "USAP" obscures which defendant allegedly monopolized, conspired, or fixed prices – indeed, it obscures which defendant allegedly did *anything*. Rule 8 forbids such everyone-did-everything pleading, as a "complaint must give 'fair notice of what the claim is and the grounds upon which it rests.'" *Sims v. City of Madisonville*, 894 F.3d 632, 643 (5th Cir. 2018) (quoting *Iqbal*, 556 U.S. at 698-99). And this Court's prior

orders confirm that antitrust liability must be evaluated defendant-by-defendant. *See Musharbash* Order at 9-11, ECF No. 90; *EMT*, 2024 WL 5274650, at *5. Indeed, when former plaintiff Musharbash lumped seven Welsh Carson entities together, the Court asked, "would not your allegations have to be against each of the seven with some specifics, as opposed to this overarching belief that the board of directors did something that guided all seven?" *Musharbash*, Hr'g Tr. 20:1-5 (May 28, 2025), ECF No. 88. The answer was yes there, and it is yes here: Burbage's improperly group-pleaded "USAP" allegations should thus be ignored because they cannot support any claim against Holdings or Texas, P.A.

1. The "USAP" Allegations State No Claim Against Holdings or Texas, P.A.

Burbage cannot state a claim against Holdings or Texas, P.A. by "lumping together multiple defendants without identifying who is responsible for which acts." *Del Castillo*, 2016 WL 3745953, at *13. Even under a pre-*Twombly* understanding of Rule 8, courts rejected such group pleading. *See*, *e.g.*, *Taylor v. IBM*, 54 F. App'x 794 (5th Cir. 2002) (per curiam) (faulting copyright plaintiff for failing "to allege specific acts of infringement by each defendant"); *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct," plaintiff's complaint failed to satisfy the "minimum standard" of Rule 8). Among other things, treating all defendants as a single unit flouts the "basic tenet of American corporate law" that corporations and their owners or affiliates "are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

A plaintiff "must allege factual information of some specificity as to each Defendant." *Dell, Inc. v. This Old Store, Inc.*, 2007 WL 1958609, at *2-3 (S.D. Tex. July 2, 2007). So to state claims under the Sherman and Clayton Acts, Burbage must plausibly allege, for example, that each

defendant engaged in exclusionary or predatory conduct to monopolize a well-pleaded market (Section 2), each defendant's transactions significantly increased market concentration (Section 7), or each defendant engaged in a horizontal price-fixing agreement (Section 1). *See EMT*, 2024 WL 5274650, at *8-9 (detailing these elements).

Burbage does not even try to meet these requirements. Instead, her complaint simply lumps Holdings, Texas, P.A., and USAP together as "USAP," a joint label used nearly 500 times. In 289 of the 306 paragraphs in her complaint,[3] Burbage makes no effort to distinguish between the roles or involvement of any of the three entities tagged with the "USAP" label. Such undifferentiated allegations of group liability must be disregarded because they give no notice of what *each* entity did that establishes *each* entity's alleged liability.

2. No Exception to the Rule Against Group Pleading Applies.

There is no basis to excuse Burbage's impermissible group pleading. At the pleadings stage, courts permit group pleading despite corporate formalities only in limited circumstances that do not apply here – for example, in cases where a subsidiary is the alter ego of the parent. *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998); *Gundle Lining Constr. Corp. v. Adams Cnty. Asphalt, Inc.*, 85 F.3d 201, 208-09 (5th Cir. 1996). But Burbage comes nowhere near alleging facts that would justify applying this equitable doctrine.

The alter-ego doctrine provides "an equitable remedy which prevents a company from avoiding liability by abusing the corporate form." *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 594 (5th Cir. 1999). The Fifth Circuit consults a "laundry list of factors . . . when determining whether a subsidiary is the alter ego of the parent": (1) common stock ownership; (2) common directors or officers; (3) common business departments; (4) consolidated financial statements and

[3] I.e., all except paragraphs 16-26, 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, and 81 n.9, which are addressed below. *See infra* Part I.B.

tax returns; (5) parent financing of the subsidiary; (6) the parent caused the subsidiary's incorporation; (7) the subsidiary operates with grossly inadequate capital; (8) the parent pays the subsidiary's salaries and expenses; (9) the subsidiary receives no business except from the parent; (10) the parent uses the subsidiary's property as its own; (11) daily operations are not kept separate; and (12) the subsidiary does not observe basic corporate formalities, such as keeping separate books and records. *Gundle*, 85 F.3d at 208-09. Of the twelve, "undercapitalization is a critical factor." *Gardemal*, 186 F.3d at 594.

Here, Burbage alleges no facts regarding capitalization, let alone that Holdings or Texas, P.A. are "grossly undercapitalized." Indeed, Burbage alleges no facts at all regarding 10 of the 12 factors; she does not plead, for instance, that the entities failed to observe corporate formalities, commingled assets, or siphoned funds. At most, Burbage alleges that Holdings and USAP share common officers and are at the top and bottom, respectively, of a vertical ownership chain. *See* Burbage Compl. ¶¶ 23-24. But common ownership and shared officers are insufficient, standing alone, to plead that a subsidiary is the alter ego of its parent. *See Gundle*, 85 F.3d at 208-09. And she does not even offer those insufficient allegations as to Texas, P.A. All she alleges about Texas, P.A. is that it is "an Affiliated Practice Group under the [Holdings] corporate umbrella." Burbage Compl. ¶ 19. Thus, Burbage's "pleadings are not sufficient to establish alter ego" because she "provides nothing more than bald assertions and conclusory allegations of an alter ego relationship." *Del Castillo*, 2016 WL 3745953, at *12. Respecting basic pleading rules and corporate formalities here means disregarding Burbage's hundreds of group-pleaded allegations.

B. The Few Allegations Specific to Holdings and Texas, P.A. State No Claim.

The few complaint paragraphs that offer any allegations specific to Holdings and Texas, P.A. do not allege a prima facie case of antitrust liability.

First, just like the flawed *EMT* complaint, Burbage's few allegations about Holdings and Texas, P.A. state no Sherman Act or Clayton Act claim against either entity. As to Holdings: Paragraph 23 merely lists Holdings at the top of a corporate family tree, 13 degrees removed from USAP Inc. Paragraph 25 says Holdings was a "party to various of the anticompetitive merger agreements," yet fails to specify Holdings' role in those transactions, identify resulting market share, or allege any specific anticompetitive conduct or effect attributable to Holdings. The allegations about Texas, P.A. fare no better. Paragraph 20 alleges only that Texas, P.A. owns five physician PLLCs. And paragraph 21 asserts that Texas, P.A. was a "party to various of the anticompetitive agreements and acquisitions," without providing specifics as to its role in any of those alleged contracts (which counterparty or acquired entity, when, in what market, and the like).

Nor do the miniscule differences between Burbage's complaint and the *EMT* complaint salvage her claims. The only substantive difference is that Burbage alleges in six footnotes that Holdings or Texas, P.A. "signed" some contracts. *See* Burbage Compl. ¶¶ 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, 81 n.9. But there are no allegations that plead (i) a relevant market in which Holdings or Texas, P.A. possesses power; (ii) exclusionary or predatory conduct by either entity; or (iii) a transaction likely "to lessen competition" within the meaning of Section 7 – and Burbage had to plead those elements to state an antitrust claim against each entity. *See EMT*, 2024 WL 5274650, at *8-9 (detailing these elements). Simply pointing to contracts that these entities signed falls far short.

Second, the few paragraphs specific to Holdings or Texas, P.A. fail to plead that Holdings and Texas, P.A. should be liable as part of a single enterprise with USAP. As this Court has recognized, the antitrust laws do not permit "a theory of unbounded vicarious liability for the acts of legally distinct entities." *EMT*, 2024 WL 5274650, at *5 (quoting *Arandell Corp. v. Centerpoint*

Energy Servs., 900 F.3d 623, 632 (9th Cir. 2018)). Instead, a so-called single-enterprise theory applies only where each corporate affiliate has "independently participated in the enterprise's scheme." *Id.* "As with any antitrust defendant, Plaintiffs must put forth evidence that [each defendant] engaged in anticompetitive conduct." *Arandell*, 900 F.3d at 633 (quoting *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1237 (10th Cir. 2017) (emphasis omitted); *see Lenox*, 847 F.3d at 1237 (an antitrust plaintiff must "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").

The Burbage Complaint – whether in Paragraphs 18 through 25 or elsewhere – alleges no facts suggesting anticompetitive conduct by Holdings or Texas, P.A. As detailed above, Holdings and Texas, P.A. are alleged only to have been "named parties to the agreement[s] and plan[s] of merger," Burbage Compl. ¶¶ 62 n.4, 67 n.5, 74 n.6, 77 n.7, 79 n.8, 81 n.9, not to have engaged in the core challenged conduct of growing an "anesthesia empire," "acquiring thirteen anesthesia practices," "raising prices," "fixing prices," and affecting the prices of "commercial insurance plans," *id.* ¶¶ 1, 8-10, 62 (cleaned up). Burbage did not allege that either Holdings or Texas, P.A. "controlled, dictated, or encouraged" anticompetitive activity, nor that either did "*something* independently to aid or contribute" to such activity. *Lenox*, 847 F.3d at 1238-39 (describing the parties' competing standards for affiliated-entity liability in an inter-corporate scheme, but "leav[ing] its resolution for another day"). Much less did she allege that either's conduct "substantially . . . lessen[ed] competition." 15 U.S.C. § 18. That is not enough to state a claim under *Twombly*.[4]

[4] To the extent the Court declines to dismiss the claims against Holdings and Texas, P.A. for improper group pleading, each remaining argument asserted below applies with equal force to, and is independently asserted on behalf of, those two Defendants.

II. Plaintiff Lacks Standing as to Claims Based on an Alleged Market for "ASC-Based" Anesthesia Services (Counts Two, Four, and Six).

Departing from the FTC and Musharbash complaints, Burbage alleges that USAP monopolized not only an alleged "hospital-only" anesthesia services market, but also the "distinct market for anesthesia services provided at ambulatory surgery centers ('ASCs')." Burbage Compl. ¶ 101. But Burbage lacks Article III standing to pursue the claims (in Counts Two, Four, and Six) related to that alleged "ASC-based" market.

To establish Article III standing, a plaintiff must have "personally [ ] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (citation omitted). As a result, a class representative "lacks standing to litigate injurious conduct to which he was not subjected." *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 550 (5th Cir. 1988); *see*, *e.g.*, *Donovan Constr. Co. of Minn. v. Fla. Tel. Corp.*, 564 F.2d 1191, 1192 (5th Cir. 1977); *Daves v. Dallas Cnty.*, 22 F.4th 522, 542 (5th Cir. 2022) (en banc) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.") (citation omitted).

For example, in *Kjessler v. Zaappaaz, Inc.*, 2019 WL 3017132 (S.D. Tex. Apr. 24, 2019), the plaintiffs brought price-fixing claims on behalf of a nationwide purchaser class, alleging the defendants conspired to fix prices for three categories of "customized promotional products": wristbands, pin buttons, and lanyards. *See id.* at *1-4. But because "no named plaintiff allege[d] he or she was personally injured by Defendants' alleged lanyard price fixing, 'none may seek relief on behalf of himself or any other member of the class' for Defendants' lanyard price fixing." *Id.* at *6 (quoting *Johnson v. City of Dallas*, 61 F.3d 442, 445 (5th Cir. 1995)). Even though the plaintiffs had alleged "a single conspiracy covering all three" products, the court dismissed their lanyard price-fixing claim "for lack of Article III standing." *Id.* at *5.

Those principles are fatal to Burbage's claims relating to an alleged ASC-based market. Burbage expressly alleges that she was treated in a hospital, not an ASC: specifically, Texas Health Presbyterian Hospital Plano. *See* Burbage Compl. ¶ 15. She specifically alleges that hospitals are "not interchangeable" with ASCs, and therefore not part of her alleged "ASC-based" market. *Compare id.* ¶ 84 ("Hospital-only anesthesia services are not interchangeable with those administered outside of a hospital."), *with id.* ¶ 101 (confining the ASC-based anesthesia services market to anesthesia services provided at "non-hospital locations"). The Burbage Complaint nowhere alleges that Burbage suffered any injury within her alleged market for ASC-based anesthesia services. Without that injury, she lacks Article III standing to pursue claims relating to the alleged ASC-based market. *See*, *e.g.*, *Bernard*, 841 F.2d at 550.

III. Plaintiff's Claims Are Untimely as to Her Newly Alleged Market for "ASC-Based" Anesthesia Services (Counts Two, Four, and Six).

Even if she had standing to pursue them, Burbage's unlawful acquisition, attempted monopolization, and horizontal agreement to divide market claims (Counts Two, Four, and Six) are untimely. That is because they allege anticompetitive conduct in a supposed market for "ASC-based anesthesia services," which Burbage characterizes as a "distinct product market" from the "hospital-only" market alleged in the prior Musharbash complaint and the FTC action. The federal antitrust laws provide a four-year statute of limitations. *See* 15 U.S.C. § 15b. The latest conduct Burbage alleges occurred in 2020 (USAP's acquisition of Guardian Anesthesia). *See* Burbage Compl. ¶ 79; *see also id.* ¶ 52 (alleging that "USAP consolidated its market share" "[b]etween 2013 and 2020"). Because she has alleged offenses arising from a distinct market from the FTC complaint, and done so purportedly on behalf of a new class of persons who directly paid all or a part of the cost of "hospital-only or ASC-based anesthesia services," her claims do not benefit from FTC tolling under 15 U.S.C. § 16(i) and do not relate back to the Musharbash complaint.

And Burbage's conclusory invocation of fraudulent concealment cannot save these untimely allegations.

A. The FTC Action Does Not Toll the Limitations Period.

Burbage alleges that her claims are timely because the FTC action suspended the statute of limitations under 15 U.S.C. § 16(i). *See* Burbage Compl. ¶ 154. That provision 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 "during the pendency" of the government's suit and "for one year thereafter." 15 U.S.C. § 16(i). But Section 16(i)'s scope is not unlimited. It tolls the limitations period "only where the private plaintiffs make claims in markets identical to, or completely encompassed by, those at issue in the earlier government suit." *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 321-22 (4th Cir. 2007); *see* 2 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 321a (updated Sept. 2025) (the statute of limitations "is not tolled" when a comparison of the "two complaints on their face" "shows that the government and subsequent private suits assert different offenses or arose in distinct markets"). Because defendants may "do[ ] business in different markets," the existence of a government suit as to one market cannot empower plaintiffs to bring expired claims as to any and all markets. *Charley's Tour & Transp., Inc. v. Interisland Resorts, Ltd*, 618 F. Supp. 84, 86 (D. Haw. 1985) (explaining Section 16(i) does not "extend" so far).

Accordingly, courts consistently hold that Section 16(i) does not apply when private plaintiffs allege geographic or product markets different from the markets challenged in the government action on which they seek to piggyback. *See*, *e.g.*, *Novell*, 505 F.3d at 321 (affirming dismissal of claims as time-barred where private plaintiff and government alleged markets for different types of computer programs); *GO Comput., Inc. v. Microsoft Corp.*, 437 F. Supp. 2d 497, 502-03 (D. Md. 2006) (similar, for computer software and accessories); *Peto v. Madison Square*

Garden Corp., 384 F.2d 682, 683 (2d Cir. 1967) (the two complaints both concerned the same defendants' anticompetitive conduct in the professional sports industry, but the specific sporting activities differed); *In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig.*, 782 F. Supp. 481, 486 (C.D. Cal. 1991) (government's alleged market excluded "any area west of the Rockies," but private plaintiff's alleged market was not so limited); *Charley's Tour*, 618 F. Supp. at 86 (the two complaints alleged markets for different services, although both targeted "the same clientele," i.e., Oahu tourists).

In *Novell*, the plaintiff argued that Section 16(i) tolled its otherwise-untimely antitrust claims against Microsoft "because its complaint overlaps significantly with" the Department of Justice's action against Microsoft. 505 F.3d at 321. The Fourth Circuit rejected that argument. The DOJ's complaint "only expressly allege[d] harm to the markets for PC operating systems and for Internet browsers" while the plaintiff claimed Microsoft harmed the "office-productivity-applications market." *Id.* Because that market was "neither identical to nor completely encompassed by the PC operating-system market at issue in the government action," Section 16(i) did not apply, and the Fourth Circuit affirmed the district court's dismissal of the plaintiff's claims as time-barred under Rule 12(b)(6). *Id.* at 322.

"A straightforward application of the different-markets rule also bars application of the tolling provision here." *Id.* at 321. Burbage's "Second Class" and the claims associated with it (Counts Two, Four, and Six) concern what she alleges is a "distinct market for anesthesia services provided at ambulatory surgery centers." Burbage Compl. ¶ 101; *see id.* ¶¶ 271-272, 281-282, 299. The FTC labored to *distinguish* its alleged "hospital-only" market from a supposed ASC market. *See FTC*, Compl. ¶ 220 ("The relevant service market appropriately excludes anesthesia

services that can be provided outside a hospital setting.").[5] And Burbage herself alleges they are different. *See*, *e.g.*, Burbage Compl. ¶¶ 93 ("The healthcare industry recognizes that hospital-only anesthesia services are distinct."), 101 (alleging "the distinct product market for hospital-only anesthesia services" and the "distinct market for anesthesia services provided at ambulatory surgery centers"), 104 (describing "[t]he distinction between hospital-only anesthesia services and ASC-based anesthesia services"). Because it is clear from the Burbage Complaint that her alleged market for ASC-based anesthesia services is "neither identical to nor completely encompassed" by the market the FTC alleged, Burbage cannot rely on Section 16(i) tolling. *Novell*, 505 F.3d at 322.

Burbage's claims relating to the market for ASC-based anesthesia services are therefore timely only if they relate to conduct occurring on or after February 10, 2022. They do not: Burbage does not allege that *any* Defendant took *any* independent actions having anything to do with ASCs any time after *2020*, meaning Burbage missed the limitations window by more than a year for these claims. *See* Burbage Compl. ¶ 202 (alleging "[m]ost recent[ ]" conduct in 2020).

B. Rule 15 Does Not Salvage Burbage's ASC-Related Claims.

In the absence of FTC tolling, Burbage cannot rescue her untimely ASC-related claims by invoking the relation-back doctrine to the filing date of the Musharbash complaint under Federal Rule of Civil Procedure 15(c). Even assuming a limitations period that extends back from January 9, 2025 – the date the Musharbash complaint was filed – to January 9, 2021, Burbage alleges no conduct in the "ASC-based" anesthesia services market on or after January 9, 2021.

[5] *See also*, *e.g.*, *FTC*, Compl. ¶¶ 216 ("The relevant service market . . . is the market for hospital-only anesthesia services . . . ."), 48 (distinguishing "[h]ospitals" from "ambulatory surgical centers or outpatient surgery centers"), 223 ("outpatient facilities are not viable alternatives to hospitals"), 229 ("hospital-only and non-hospital or outpatient anesthesia services are not substitutes"), 340-412 (all claims limited to "hospital-only anesthesia services").

But in any event, Rule 15(c) relation back does not apply in the first place because the ASC-related allegations in the Burbage Complaint are well beyond the scope of the Musharbash complaint. Musharbash did not make any allegations about USAP's conduct relating to Burbage's newly alleged "ASC-based" anesthesia market. *See* Fed. R. Civ. P. 15(c)(1)(B) (amendment relates back to the original complaint only if it "arose out of the conduct, transaction, or occurrence set out . . . in the original pleading"); *see also*, *e.g.*, *Leal v. Gov't Emps. Ins. Co.*, 2009 WL 4852670, *6 (S.D. Tex. Dec. 14, 2009) (Rule 15(c) did not allow relation back where plaintiff brought a "new claim" arising from newly alleged conduct that was based on "a contract that did not form the basis for liability in prior pleadings"). The central inquiry under Rule 15(c) is whether the original complaint provides a defendant fair notice of the "nature and scope of the plaintiff's claim," such that a "reasonable defendant . . . would have imagined that plaintiffs were in fact suing over" the alleged product market in the amended complaint. *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc*., 902 F.3d 735, 741 (7th Cir. 2018). Where, as here, the market allegations are "distinct" from those at issue in the prior complaint, and "the original complaint did not give defendants fair notice of the nature and scope of the claims set out in the amended complaint, the amendments do not relate back under Rule 15(c)." *Id*. at 742; *see also EnerQuest Oil & Gas, LLC v. Plains Expl. & Prod. Co*., 981 F. Supp. 2d 575, 614 (W.D. Tex. 2013) (finding that a plaintiff's claims do not relate back because the original complaint "simply did not put [defendant] on notice regarding those claims").

C. Plaintiff's Other Conclusory Theories Cannot Save Her ASC-Related Claims.

Burbage makes a nominal attempt to plead fraudulent concealment to toll the statute of limitations on her ASC-related claims. *See* Burbage Compl. ¶¶ 146-153. That effort fails because, to the extent Burbage alleges that USAP's acquisitions permitted it to acquire monopoly power in that market, the public had notice of USAP's acquisitions outside the limitations period and she

does not allege either concealment by USAP or her own diligence. To plead fraudulent concealment, a plaintiff must allege that (1) "the defendants concealed the conduct complained of"; (2) the plaintiff exercised "due diligence" in pursuing the discovery of her claim; but (3) "failed . . . to discover the facts that form the basis of [her] claim." *Torrey v. Infectious Diseases Soc'y of Am.*, 2018 WL 10124894, at *17 (E.D. Tex. Sep. 27, 2018); *see Rx.com v. Medco Health Sols., Inc.*, 322 F. App'x 394, 397 (5th Cir. 2009). These elements must be pleaded with particularity under Rule 9(b). *See In re Energy Transfer Partners Nat. Gas Litig.*, 2009 WL 2633781, at *13 (S.D. Tex. Aug. 26, 2009). Burbage has not satisfied any of the required elements, much less to the level Rule 9(b) requires.

First, Burbage fails to plead concealment. Her complaint alleges the opposite: that USAP made "repeated public statements" about its acquisitions. Burbage Compl. ¶ 151 & nn.12-13 (describing press releases about mergers). Fraudulent concealment ceases to toll the limitations period when the plaintiff "learn[s] of facts 'calculated to excite inquiry.'" *Chandler v. Phoenix Servs., L.L.C.*, 45 F.4th 807, 816 (5th Cir. 2022) (quoting *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1171 (5th Cir. 1979)); *see SEC v. Jackson*, 908 F. Supp. 2d 834, 871 (S.D. Tex. 2012) (finding SEC failed to plausibly allege fraudulent concealment in part because defendant's disclosures put SEC on "inquiry notice of potential misconduct"). The Burbage Complaint alleges that USAP acquired 16 anesthesia provider groups across Texas – "including the dominant providers in Houston, Dallas-Fort Worth, and Austin," Burbage Compl. ¶ 6 – in under a decade, and it alleges that USAP publicized those mergers, *see id.* ¶ 151. That should "have invited, rather than lulled, skeptical attention." *In re Int. Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 488 (S.D.N.Y. 2017); *see Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 993 (N.D. Cal. 2020) (finding plaintiffs "have not plausibly alleged that they were without actual or

constructive knowledge of the facts giving rise to their claim" because "Facebook's acquisitions . . . were widely publicized").[6] Burbage's allegation that USAP concealed its "anticompetitive intent," Burbage Compl. ¶ 147, is irrelevant to the tolling analysis. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (per curiam) (the antitrust laws focus on "the effect of [the alleged] conduct, not upon the intent behind it").

Second, Burbage failed to plead that she "acted diligently in gathering the facts that form the basis of [her] claims." *Jackson*, 908 F. Supp. 2d at 871. Burbage does not allege that she did anything to discover her claim; she just asserts that she "exercised reasonable diligence." Burbage Compl. ¶ 149. This absence of any plausible fact allegation precludes equitable tolling. *See Torrey*, 2018 WL 10124894, at *17 (no tolling where plaintiff did "no[t] allege any facts . . . that would support an inference [of] due diligence"); *Jackson*, 908 F. Supp. 2d at 871 (same); *see also Twombly*, 550 U.S. at 555 (a "formulaic recitation" of elements "will not do").

Burbage also cursorily alleges that her claim is timely because "[t]he impact of Defendants' conduct continues to be felt" when USAP gets paid allegedly supracompetitive amounts. Burbage Compl. ¶ 202. This appears to be an attempt to invoke the so-called "continuing violation" doctrine, which provides that each new "overt act" in an ongoing scheme is subject to a new limitations clock. *See*, *e.g.*, *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 598-601 (6th Cir. 2014). But even assuming arguendo that doctrine can apply in cases challenging acquisitions (and it does not, *e.g.*, *id.*; *Complete Ent. Res. LLC v. Live Nation Ent., Inc.*, 2016 WL 3457177, at *1

[6] *See also Hawaiian Host, Inc. v. Citadel Pac. Ltd.*, 637 F. Supp. 3d 1083, 1114 (D. Haw. 2022) (no fraudulent concealment where merger "was done through public filings, not hidden from anyone"); *Shuffle Tech Int'l, LLC v. Sci. Games Corp.*, 2015 WL 5934834, at *14 (N.D. Ill. Oct. 12, 2015) (finding fraudulent concealment did not save Section 7 claim because defendant's conduct did "not . . . prevent discovery that a merger occurred"); *Int. Rate Swaps*, 261 F. Supp. 3d at 488 (alleged misconduct "occurred in plain sight" so was not concealed).

(C.D. Cal. May 11, 2016), Burbage does not even try to allege any new overt acts after 2020. Burbage never alleges that she paid USAP anything for alleged "ASC-based" anesthesia services at all, *see supra* pp. 3-4; and even in her separate alleged "hospital-only" market, she does not allege that she paid USAP anything within four years of filing her complaint. *See*, *e.g.*, *Internet Corporativo S.A. de C.V. v. Bus. Software All., Inc.*, 2004 WL 3331843, at *6 (S.D. Tex. Nov. 15, 2004) (granting motion to dismiss when plaintiff "has not pleaded facts that allege antitrust injury" within limitations period). All she offers is the bare label that there was a "continuing impact," and that flunks *Twombly*. 550 U.S. at 555 (offering a legal "label[ ]" or reciting a "legal conclusion couched as a factual allegation" does not suffice).

IV. Plaintiff Fails To State a Conspiracy Claim as a Matter of Law (Count Three).

Count Three of the Burbage Complaint should be dismissed because it does not validly plead a conspiracy. This count alleges a conspiracy to monopolize under Section 2 of the Sherman Act. But the conspiracy it alleges is between "USAP and Welsh Carson[ ]." Burbage Compl. ¶ 276. This Court has already held, twice, that "Welsh Carson and USAP are not capable of conspiring with each other under *Copperweld* because the Complaint does not allege that they are 'separate economic actors pursuing separate economic interests.'" *Musharbash*, Order at 11 n.3 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)); *accord EMT*, 2024 WL 5274650, at *5. It should reaffirm that holding a third time and dismiss this conspiracy claim.

As with the prior plaintiffs whose claims failed, the face of the Burbage Complaint makes clear that as a matter of law, Welsh Carson and USAP could not conspire with one another. Burbage expressly alleges that "Welsh Carson has controlled . . . USAP since its founding through the present." Burbage Compl. ¶ 32; *see also id.* ¶¶ 33 ("Welsh Carson employees . . . facilitate[d] USAP's consolidation scheme by identifying attractive acquisitions, securing funding, and negotiating with insurers."), 34 ("Welsh Carson regularly provided USAP with various operational

support since USAP was founded, including services related to corporate finance, acquisition due diligence, and strategic planning."). Because Burbage's own allegations establish that Welsh Carson "controlled" USAP such that USAP could not have been "pursuing separate interests," *Copperweld*, 467 U.S. at 771, Count Three of her complaint must be dismissed.

CONCLUSION

The Court should dismiss all claims against Holdings and Texas, P.A. In addition, and independently, the Court should dismiss Counts One through Four and Count Six of Burbage's Complaint in their entirety, and Count Five insofar as it relates to alleged agreements in Houston.

Dated: March 20, 2026

Respectfully submitted,

/s/ *Geoffrey M. Klineberg*

Geoffrey M. Klineberg (*pro hac vice*)
Attorney-in-Charge
Bradley E. Oppenheimer (*pro hac vice*)
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036
Tel: (202) 326-7900
Fax: (202) 326-7999
gklineberg@kellogghansen.com
boppenheimer@kellogghansen.com

David J. Beck (TX Bar No. 00000070)
(Federal I.D. No. 16605)
Garrett S. Brawley (TX Bar No. 24095812)
(Federal I.D. No. 3311277)
BECK REDDEN LLP
1221 McKinney Street, Suite 4500
Houston, TX 77010
Tel: (713) 951-3700
Fax: (713) 951-3720
dbeck@beckredden.com
gbrawley@beckredden.com

Karl S. Stern (TX Bar No. 19175665)
(Federal Bar No. 04870)
Julianne Jaquith (TX Bar No. 24134925)
(Federal Bar No. 3921126)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
700 Louisiana Street, Suite 3900
Houston, TX 77002
Tel: (713) 221-7000
Fax: (713) 221-7100
karlstern@quinnemanuel.com
juliannejaquith@quinnemanuel.com

Counsel for Defendants U.S. Anesthesia Partners, Inc., U.S. Anesthesia Partners Holdings, Inc., and U.S. Anesthesia Partners of Texas, P.A.

CERTIFICATE OF SERVICE

I hereby certify that, on March 20, 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.

/s/ *Geoffrey M. Klineberg*
Geoffrey M. Klineberg

Counsel for Defendants U.S. Anesthesia Partners, Inc., U.S. Anesthesia Partners Holdings, Inc., and U.S. Anesthesia Partners of Texas, P.A.