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

BASEL MUSHARBASH, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC., WELSH, CARSON, ANDERSON & STOWE XI, L.P., et al., Defendants.	§ § § § § § § § § § §	Civil Action No. 4:25-cv-116

MOTION TO DISMISS OF THE WELSH CARSON ENTITIES

Despite two prior actions from which the Welsh Carson entities[1] were dismissed with prejudice, Plaintiff brings a third. The alleged facts are the same. The claims are the same. And the result should be the same: Dismissal.

In this third ill-conceived action, Plaintiff asserts antitrust claims against the Welsh Carson entities and U.S. Anesthesia Partners, Inc. ("USAP"). No Welsh Carson entity has held a majority stake or had any right to control USAP's conduct for more than seven years. But Plaintiff again alleges, like the two already-dismissed actions, that the Welsh Carson entities are liable for alleged antitrust violations by USAP.

The Complaint here is virtually identical to the complaint in *Electrical Medical Trust et al. v. U.S. Anesthesia Partners, Inc., et al.*, No. 4:23-cv-04398 (the "EMT Action"), from which this Court dismissed the Welsh Carson entities with prejudice because the claims were time-barred. The EMT Action was, in turn, a copycat of the Federal Trade Commission's September 2023

[1] Welsh, Carson, Anderson & Stowe XI, L.P. ("Fund XI"), WCAS Associates XI, LLC, Welsh, Carson, Anderson & Stowe XII, L.P. ("Fund XII"), WCAS Associates XII, LLC, WCAS Management Corporation, WCAS Management, L.P., and WCAS Management, LLC.

complaint (the "FTC Action"), which the Honorable Kenneth M. Hoyt also dismissed with prejudice as against the Welsh Carson entities. Undeterred by two federal judges' well-reasoned decisions, Plaintiff filed virtually the same Complaint, even admitting that its allegations are "substantially the same" as the EMT and FTC Actions.

As in the EMT Action, Plaintiff's claims against the Welsh Carson entities face insurmountable statute-of-limitations hurdles. Only two allegedly anticompetitive USAP transactions are potentially within the four-year statute of limitations. The only alleged nexus between those two transactions and any Welsh Carson entity is the conclusory allegation that two "Welsh Carson-appointed board members of USAP . . . approved th[em]." But no authority supports holding a minority investor liable merely because it appointed two (out of fourteen) board representatives who voted on a company's actions. Moreover, under the Supreme Court's *Bestfoods* decision, those "dual-hatted" directors are presumed to have acted on behalf of *USAP*, not Welsh Carson, and no plausible allegations in the Complaint overcome that presumption.

Not only does the Complaint fail to allege any conduct by Welsh Carson within the limitations period, but it also fails to allege any kind of "continuing violation" that would support liability for the Welsh Carson entities based on USAP's conduct during the limitations period. USAP's acquisitions themselves do not constitute a continuing violation under well-settled law. And the Complaint fails to allege any conspiracy that would allow USAP's alleged conduct during the limitations period to be attributed to the Welsh Carson entities. As this Court recognized in the EMT Action, under *Copperweld*, the Welsh Carson entities and USAP were legally incapable of conspiring with each other because they were never competitors and instead shared a "complete unity of interest." Moreover, any such conspiracy necessarily ended in 2017, when the Welsh Carson entity that initially invested in USAP sold its stake. The Complaint also fails to establish

any basis for tolling the statute of limitations, offering only vague and conclusory assertions of misstatements by *USAP* that do not allege fraudulent concealment with the requisite particularity.

Time bar aside, Plaintiff's claims are legally implausible. Plaintiff ignores basic distinctions among the seven Welsh Carson entities and seeks to hold those entities liable based on their exercise of customary equity-holder supervision. This theory contradicts fundamental and longstanding principles of corporate separateness—principles reaffirmed both by this Court in the EMT Action and by Judge Hoyt in the FTC Action. Every one of Plaintiff's claims fails on that basis as well.

BACKGROUND

USAP is an anesthesia physician services organization formed with the goal of establishing a physician-centric business and providing high-quality anesthesia services. Compl. ¶ 3. USAP uses a partnership model, and its many physician partners collectively hold the largest share of USAP's stock. *Id.* ¶¶ 4, 19. Since its founding, USAP has been a separate legal entity with separate management and employees from the Welsh Carson entities. *Id.* ¶¶ 137–38.

Fund XI provided startup capital to USAP at its founding in 2012. *Id.* ¶ 34. Consistent with its initial 50.2% interest in USAP, Fund XI received typical shareholder rights, including the *right*—that it never exercised (and Plaintiff does not allege otherwise)—to fill a majority of USAP's board of directors. *Id.* ¶ 18. After USAP's founding, Fund XI's equity interest in USAP fell below 50% as equity was issued to new USAP physician partners. *Id.* ¶ 19. In 2017, Fund XI sold its entire stake in USAP to other investors, including in part to Fund XII, which acquired a 23% interest. *Id.* Plaintiff alleges that the Welsh Carson entity currently invested in USAP—not identified as Fund XII in the complaint, though that fact is readily apparent in public filings in the FTC and EMT Actions—has the right to appoint two (of fourteen) directors to the USAP board, less than its proportional equity interest in USAP. *Id.* ¶ 18. No Welsh Carson entity has had the

authority to control USAP at any time since 2017, and Plaintiff pleads no facts to the contrary.

These are the same facts alleged in the predecessor FTC and EMT Actions—both still pending against USAP, and both fully dismissed against the Welsh Carson entities (which Plaintiff conveniently omits). *Id.* ¶ 189. On September 21, 2023, the FTC sued USAP and the Welsh Carson entities under Section 13(b) of the FTC Act, which allows the FTC to obtain injunctive relief if a defendant "is violating, or is about to violate," the antitrust laws. 15 U.S.C. § 53(b); *Fed. Trade Comm'n v. U.S. Anesthesia Partners, Inc.* ("*FTC*"), 2024 WL 2137649, at *3 (S.D. Tex. May 13, 2024); Compl. ¶ 189. In dismissing the Welsh Carson entities, Judge Hoyt concluded that "the FTC does not allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation." *FTC*, 2024 WL 2137649, at *5. Judge Hoyt went on: "The only sense in which the scheme still exists is that USAP still exists, and that USAP still consolidates the market and reduces competition," "[b]ut that goes to USAP's violations, not Welsh Carson's." *Id.*

On November 20, 2023, two private plaintiffs brought a putative class action alleging virtually (and admittedly) identical claims as the FTC (the EMT Action). Compl. ¶ 190. The Welsh Carson entities again moved to dismiss, arguing (among other things) that the claims were time-barred. This Court agreed, reaching the same conclusion as Judge Hoyt that plaintiffs "failed to allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation." *Elec. Med. Tr. v. U.S. Anesthesia Partners, Inc.* ("*EMT*"), 2024 WL 5274650, at *6 (S.D. Tex. Sept. 27, 2024).

The facts have not changed since those decisions, yet Plaintiff *again* attempts to implicate the Welsh Carson entities in USAP's allegedly anticompetitive acquisitions of anesthesia practices in Texas geographies and in alleged market allocation and price-setting agreements between USAP and certain competitors. *Again*, Plaintiff does not allege that a Welsh Carson entity was party to

the acquisitions or signed any of the allegedly anticompetitive agreements at issue. And even though this Court found that the *EMT* complaint did not "plead with clarity the distinction" between the Welsh Carson entities and "mostly lump[ed] them all together," 2024 WL 5274650 at *2 n.1, Plaintiff does exactly the same. It further conflates all seven Welsh Carson entities with USAP, without elaboration as to the role of any Welsh Carson entity. *See, e.g.*, Compl. ¶¶ 6, 58, 64–65, 169. Dismissal is again required.

STANDARD OF REVIEW

Claims may be dismissed under Rule 12(b)(6) "if the complaint does not contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019).[2] Thus, a motion to dismiss may be granted on a limitations defense "where it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling." *Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014). Further, a complaint with only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" cannot survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT AND AUTHORITIES

I. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. This Court Dismissed Virtually Identical Claims Against the Welsh Carson Entities as Time-Barred in *EMT*.

In *EMT*, this Court dismissed "substantially the same" (Compl. ¶ 190) claims against the Welsh Carson entities as time-barred. 2024 WL 5274650 at *6. There, the Court held that the same Welsh Carson entities were not liable for USAP's alleged conduct during the limitations

[2] Unless noted, alterations and internal citations/quotations are omitted; emphases are added.

period based on either a conspiracy or a "single enterprise" theory. *Id.* at *5-6. The same result should obtain here.

Under the Supreme Court's *Copperweld* decision, this Court reasoned, antitrust co-conspirators must be "separate economic actors pursuing separate economic interests." *Id.* at *5. USAP and the Welsh Carson entities were exactly the opposite: they "had common objectives with respect to USAP's success" and were never competitors but instead "shared a complete unity of interest." *Id.* Thus, "Welsh Carson and USAP cannot conspire with each other," and the Welsh Carson entities "cannot be held liable for USAP's actions after the limitations period based on an alleged conspiracy between them." *Id.*

The Court also held that liability under a "single enterprise" theory was precluded because the EMT Action failed to allege any "independent participation" in the alleged scheme by any Welsh Carson entities during the limitations period. *Id.* at *6. The Court stated that "[a]lmost all of the alleged wrongful conduct in the Complaint occurred prior to September 2019—which is when the limitations period began to run." *Id.* By then, "Welsh Carson's involvement with USAP had dwindled considerably," amounting only to one Welsh Carson fund's minority interest in USAP and "scant" or nonexistent involvement in two USAP acquisitions in 2019 and 2020. *Id.*

The Court therefore concluded that "Plaintiffs, like the FTC, have failed to allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation," and that the claims against the Welsh Carson entities were time-barred. *Id.*

B. As in *EMT*, Plaintiff Fails to Allege Any Welsh Carson Conduct Within the Limitations Period That Is a "Plausible Antitrust Violation."

The Complaint fails to allege any involvement in an antitrust violation by a Welsh Carson entity during the limitations period. At best for Plaintiff, the limitations period begins on September 21, 2019. *See* 15 U.S.C. § 16(i); Compl. ¶ 128. Plaintiff must therefore allege that a

Welsh Carson entity committed "some injurious act actually occurring" on or after this date—and not "merely the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975).

1. *Plaintiff Alleges No Welsh Carson Conduct Relating to Any Challenged Acquisitions Accruing Within the Limitations Period* (Counts I-IV).

As a matter of law, Plaintiff's claims relating to the allegedly anticompetitive acquisitions accrued on the respective dates of those acquisitions. *See Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 604 (6th Cir. 2014).

The Complaint challenges the same acquisitions as the EMT Action. Nearly all of those acquisitions are alleged to have occurred well outside the limitations period, some as early as 2012. Compl. ¶¶ 56, 60–63, 66, 69, 136. This Court reached exactly that conclusion in *EMT*, noting that just two arguably fall within the limitations period—USAP's acquisition of Star Anesthesia in September 2019, and USAP's acquisition of Guardian Anesthesia Services in January 2020. *See* 2024 WL 5274650 at *6; Compl. ¶¶ 68, 70.[3] By the time these acquisitions took place, the Welsh Carson entities' "involvement with USAP had dwindled considerably." *EMT*, 2024 WL 5274650 at *6; *see* Compl. ¶ 19. Indeed, the Complaint concedes that no Welsh Carson entity held a majority interest in USAP or had any legal authority to control USAP in 2019 or 2020. Compl. ¶ 139. Plaintiff therefore fails to allege any actionable conduct by any Welsh Carson entity. *See FTC*, 2024 WL 2137649, at *5 (rejecting "novel interpretation" of antitrust laws that would "expand liability to minority investors whose subsidiaries reduce competition").

Plaintiff attempts to differentiate the Complaint from the time-barred *EMT* complaint primarily by asserting that two "Welsh Carson-appointed board members of USAP . . . voted to

[3] The Complaint does not allege a date in September 2019 for the Star acquisition. Compl. ¶ 70. If it occurred before September 21, 2019, it too falls outside the limitations period.

approve [the 2019 and 2020] acquisitions, which was required for those acquisitions to proceed." *Id.* ¶ 138. The approval of the two WCAS-affiliated USAP board members was "required," Plaintiff asserts, because of an alleged statement in USAP's "Business Development Playbook" ***from 2013*** that a USAP deal "must be reviewed and approved by Welsh Carson." *Id.* ¶ 42. Plaintiff further asserts that, "on information and belief"—meaning without factual basis and in conclusory fashion—such requirement "remained in effect during the 2019-2020 timeframe." *Id.*

As an initial matter, nothing in the Complaint supports any inference that an alleged approval requirement from 2013—years before the limitations period, when Fund XI held a controlling interest in USAP—somehow "remained in effect" after Fund XI's divestment in 2017, when a different entity purchased a 23% interest and no Welsh Carson entity held a majority stake or any right to control USAP's operations. Regardless, the vote of two Welsh Carson-affiliated board members (out of USAP's fourteen-member board) in favor of a USAP acquisition cannot state a claim against any Welsh Carson entity. Under the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 69–70 (1998), "dual-hatted" board members are presumed to act on behalf of USAP; the Complaint does not rebut that presumption. *See infra* Section II.B.2; *see also In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 688 (E.D. Pa. 2009) (neither parent's "ownership and control" of subsidiary nor "[a]pproval and assent" of subsidiary's alleged anticompetitive conduct sufficed to state claim against parent).

The only other attempt the Complaint makes to connect a Welsh Carson entity to the 2019 or 2020 acquisitions is to misleadingly characterize a statement by a Welsh Carson–affiliated USAP director in 2016, as having been made three years later, in 2019. The Complaint alleges that a Welsh Carson–affiliated USAP director "was the one who determined that USAP needed to 'kick [Star] out of town.'" Compl. ¶ 138. In fact, this statement is from an email (expressly

incorporated by reference in the pleading) dated March 11, 2016—well outside the limitations period. Moreover, the only reasonable inference from the director's statement is that USAP intended to compete with Star, not acquire it. The claim that "kick[ing]" a competitor "out of town" somehow means acquiring it is inherently implausible. In any event, no factual allegation rebuts the well-established *Bestfoods* presumption that the USAP director made the alleged statement while acting in his capacity as a USAP director.

Plaintiff's attempts to manufacture additional allegations from the same facts that were insufficient to state a timely claim in the EMT Action fail: the Complaint does not allege timely claims against the Welsh Carson entities based on USAP's 2019 and 2020 acquisitions.

2. *Plaintiff Fails to Allege Any Agreement-Based Violation Within the Limitations Period* (Counts V, VI).

Like the *EMT* plaintiffs and the FTC before them, Plaintiff includes a handful of allegations of market allocation and "price-fixing" in connection with billing arrangements. *See* Compl. ¶¶ 169–86. As an initial matter, these claims are implausible and fail as a matter of law. *See infra* Section II.A.2. They are also time-barred: As in the EMT Action, the allegations relating to these agreements are devoid of *any* act taken by a Welsh Carson entity, let alone an act within the limitations period. *See TCA Bldg. Co. v. Nw. Res. Co.*, 861 F. Supp. 1366, 1377–78 (S.D. Tex. 1994) (price-fixing and conspiracy allegations time-barred where plaintiff alleges no "injurious act" or "active participation" in alleged conspiracy within limitations period).

C. Plaintiff Has Not Plausibly Alleged Any Continuing Violation or Conspiracy.

Unable to point to any Welsh Carson conduct within the limitations period that would amount to a plausible antitrust violation, Plaintiff follows the EMT Action's playbook and asserts that the Court should look beyond the limitations period on the basis of a "continuing" violation of the antitrust laws or a supposed conspiracy. Compl. ¶ 168. "[T]he continuing conspiracy or

continuing violation exception . . . permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust violation." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982). But the Complaint's allegations compel the same conclusion as in *EMT* that neither a "continuing violation" nor conspiracy is plausibly alleged on these facts.

1. *Plaintiff Has Not Plausibly Alleged a Continuing Violation*.

Notwithstanding the Complaint's conclusory assertion that "[t]he impact of Defendants' conduct continues to be felt in every anesthesia reimbursement for which USAP receives higher rates than it would have absent this consolidation," Compl. ¶ 168, it is black-letter law that mergers themselves do not constitute a continuing violation. "Once a merger is completed, there is no continuing violation . . . that would justify extending the statute of limitations beyond four years." *Midwestern Mach. v. Nw. Airlines*, 392 F.3d 265, 271 (8th Cir. 2004); *see also Z Techs.*, 753 F.3d at 598–600 (extending the same principle to merger-acquisition claims under Sherman Act); *Complete Ent. Res. LLC v. Live Nation Ent., Inc.*, 2016 WL 3457177, at *1 (C.D. Cal. May 11, 2016) (rejecting use of continuing-violation doctrine as a "backdoor around the Clayton Act statute of limitations for challenging a merger"). Any "continuing violation" predicated on the alleged acquisitions here therefore fails.

2. *Plaintiff Has Not Plausibly Alleged an Antitrust Conspiracy*.

Plaintiff also cannot evade the statute of limitations on conspiracy grounds.

First, as the Court already determined in *EMT*, the Welsh Carson entities were legally incapable of conspiring with USAP. An antitrust conspiracy requires "concerted activity" between two "separate economic actors pursuing separate economic interests." *Copperweld Corp. v. Indep. Tube*, 467 U.S. 752, 768–69 (1984); *see also Am. Needle, Inc. v. Nat'l Football League*, 560 U.S.

183, 196 (2010) (concerted action inquiry is informed by "competitive reality"). The Complaint contains no allegations whatsoever that the Welsh Carson entities had interests that diverged from USAP's, or that the Welsh Carson entities and USAP are (or ever were) actual or potential competitors. To the contrary, as in *EMT*, the very premise of the Complaint is that the economic interests of the Welsh Carson entities and USAP were aligned at all times. *See, e.g.*, *EMT*, 2024 WL 5274650 at *5 (complaint alleged "complete unity of interest" and "common objectives" between Welsh Carson entities and USAP); *Top Rank, Inc. v. Haymon*, 2015 WL 9948936, at *3, *16 (C.D. Cal. Oct. 16, 2015) (deciding on motion to dismiss that investor firms and portfolio company could not conspire under *Copperweld*); *see also PostX Corp. v. Secure Data in Motion, Inc.*, 2005 WL 8177634, at *4–5 (N.D. Cal. Aug. 17, 2005) (20% investor could not conspire with company because they had shared economic interests and were not competitors). Accordingly, this Court's holding in *EMT* that USAP and the Welsh Carson entities "cannot conspire with each other" applies equally here.

Nor is this conclusion undermined by allegations of a supposed conspiracy prior to USAP's formation among John Rizzo, Kristen Bratberg, and the generic moniker "Welsh Carson." Compl. ¶¶ 24–27. The Complaint itself alleges that Rizzo and Bratberg were acting on behalf of New Day Anesthesia, which was USAP's original name. *See id.* ¶ 24 ("New Day would be renamed USAP just before acquiring Greater Houston Anesthesiology."). Thus, these allegations do not establish any separate conspiracy from the one alleged among USAP and the Welsh Carson entities.

Second, even if the Welsh Carson entities and USAP were capable of forming the alleged conspiracy (they were not), the Complaint itself establishes that any Welsh Carson participation in such a conspiracy ceased in 2017, before the limitations period started. The Complaint attempts to muddy the waters by conflating distinct Welsh Carson entities, but it is clear that Fund XI is the

sole Welsh Carson entity alleged to have initially invested in USAP (*i.e.*, to have formed the supposed conspiracy with USAP), that Fund XI sold its stake in 2017, and that a different Welsh Carson entity then acquired a minority interest in USAP. *See* Compl. ¶¶ 34–35, 18–19, 139; *EMT*, 2024 WL 5274650, at *6. Divestment would serve to withdraw "Welsh Carson" from any antitrust conspiracy. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 8669891, at *8, *13 (N.D. Cal. Aug. 22, 2016) (sale of stake in allegedly conspiring businesses established withdrawal, even where related entities retained 25% stake). Plaintiff's "conspiracy" theory therefore fails on this basis as well.

D. Plaintiff Pleads No Facts to Support Tolling of the Statute of Limitations.

Finally, Plaintiff's conclusory allegations of fraudulent concealment do not support tolling the statute of limitations. To properly plead fraudulent concealment, a plaintiff must allege that (i) the defendant took affirmative action to conceal the conduct complained of, and (ii) the plaintiff failed, despite exercising due diligence, to discover the facts forming the basis of its claim. *See Chandler v. Phoenix Servs., L.L.C.*, 45 F.4th 807, 815 & n.7 (5th Cir. 2022). Allegations of fraudulent concealment must satisfy Rule 9(b)'s particularity requirement. *See In re Pool Prod. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 400 (E.D. La. 2013).

Nothing in the Complaint plausibly suggests fraudulent concealment by any Welsh Carson entity consistent with Rule 8's requirements, let alone offers sufficient factual detail to satisfy the strict standard of Rule 9(b). The Complaint states merely that unspecified "Defendants" made "repeated public statements that acquisitions would result in a better quality of care and efficiencies in the provision of that care," but that these statements were "false" and that "Defendants" therefore "deceptively described" USAP's acquisitions "as procompetitive." Compl. ¶¶ 121, 125. The two examples of such statements that the Complaint cites are generic USAP (not Welsh Carson) press releases from 2014 and 2015 announcing certain transactions. *See id.* ¶ 125 (stating

that USAP's investment in Anesthesia Consultants of Dallas will "position[] the practice for continued growth and success"); *id.* (stating that the transaction is "consistent with our strategy of partnering with high quality groups in the markets we serve . . . positioning them for continued growth and success in their markets").

As an initial matter, neither of these public statements establishes a basis for tolling the statute of limitations based on any act of fraudulent concealment by any Welsh Carson entity. Moreover, the Complaint does not plausibly allege that these press releases—issued by USAP—were "false" or made to conceal supposed wrongdoing. *See Smith v. Palafox*, 728 F. App'x 270, 277 (5th Cir. 2018) (no fraudulent concealment where plaintiff "offer[ed] no evidence, direct or circumstantial, that [defendant] actually knew these statements were in fact false when he made them, let alone that [defendant's] purpose in making them was deceit"); *McElvy v. Sw. Corr., LLC*, 2021 WL 4476762, at *3 (N.D. Tex. Sept. 29, 2021) (no fraudulent concealment where plaintiffs did "not explain how" the alleged false statements were fraudulent). Nothing about another party publicly expressing a desire for "continued growth and success" so much as hints at concealment of a conspiracy. *See In re Pork Antitrust Litig.*, 495 F. Supp. 3d 753, 774 (D. Minn. 2020) ("It is difficult to reconcile the Plaintiffs['] belief that Defendants conducted this conspiracy via public statements with its assertion that Defendants were also concealing it.").

Accordingly, Plaintiff has failed to allege any of the elements of fraudulent concealment—not under Rule 8, and certainly not under the more demanding requirements of Rule 9(b). The Complaint points to no false statement or other concealment and no intent to conceal supposed wrongdoing. Nor has Plaintiff plausibly alleged that he could not discover the facts forming the basis of his claims earlier through the exercise of reasonable diligence. As such, there is no basis for tolling the statute of limitations due to fraudulent concealment. *See Adams v. Nissan N. Am.,*

Inc., 395 F. Supp. 3d 838, 851 (S.D. Tex. 2018) (rejecting fraudulent concealment allegation under Rule 8 for failure to plead that defendant "had a fixed purpose to conceal" wrongdoing).

II. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO STATE AN ANTITRUST VIOLATION BY A WELSH CARSON ENTITY.

In addition to being untimely, the Complaint suffers from other pleading failures that demonstrate the basic legal implausibility of the claims. First, it fails to differentiate the seven distinct Welsh Carson entities, engaging in improper group pleading under Rule 8. Second, it seeks to attribute the actions of USAP to the Welsh Carson entities, ignoring the fundamental legal distinctions between investors and the companies in which they invest. As a result, the Complaint fails to state a claim that any Welsh Carson entity violated any antitrust law.

A. The Complaint Relies on Improper Group Pleading.

Rather than make a meaningful effort to plead the elements of each claim as to each of the seven Welsh Carson entities, as is required, Plaintiff conclusorily asserts that the Welsh Carson entities "function as a single entity," Compl. ¶ 17, and indiscriminately refers to all seven entities as "Welsh Carson," *e.g.*, *id.* ¶¶ 2, 3, 6, 18–40. As a result, the Complaint is unintelligible as to what any particular Welsh Carson entity is alleged to have done. Indeed, Plaintiff mimics the improper group pleading tactic used in the *EMT* complaint, which this Court found "does not plead with clarity the distinction between" the Welsh Carson entities. 2024 WL 5274650 at *2 n.1. And Plaintiff does so despite having access to information distinguishing the entities, such as the fact—recognized by this Court in *EMT*—that only two of these entities held stakes in USAP, and they were different stakes at different times. *See id.* (plaintiffs "effectively conceded that Fund XI was the entity [that] held the initial 50.2% interest in USAP and sold its remaining interest in 2017" and "Fund XII then separately purchased a 23% interest in USAP in 2017").

This repeated and improper group pleading fails under Rule 8's notice pleading

requirements, and dismissal is required on this ground alone. *See Gurgunas v. Furniss*, 2016 WL 3745684, at *5 (N.D. Tex. July 13, 2016) ("group pleading" failed under Rule 8 because it was "impossible to ascertain which particular [d]efendant(s) [we]re supposedly responsible" for each alleged act); *ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411, 421 (S.D. Tex. 2023) (dismissing claims where group pleading "fail[ed] to delineate the acts that [one member of the corporate family] specifically committed distinguished from the acts that [another member of the corporate family] committed as Rule 8 requires").

B. The Welsh Carson Entities Cannot Be Liable for USAP's Alleged Violations.

Even more critically, the Complaint fails because it alleges no facts establishing that any Welsh Carson entity—let alone the blanket "Welsh Carson" group of all seven—engaged in any unlawful conduct. As both Judge Hoyt and this Court found with respect to the *FTC* and *EMT* complaints, respectively, this Complaint does not "allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation." *FTC*, 2024 WL 2137649, at *6; *see also EMT*, 2024 WL 5274650, at *3 (plaintiffs "failed to allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation"). Nor does the Complaint allege at *any* time that any Welsh Carson entity was party to any of the alleged acquisitions or agreements to fix prices or that any Welsh Carson entity was even a competitor in any relevant market for anesthesia services.

Because Plaintiff cannot allege any such conduct by any Welsh Carson entity, Plaintiff seeks, without basis in corporate or antitrust law, to impute liability to all seven Welsh Carson entities (without distinction) for the alleged conduct of USAP. But this ignores long-established principles of corporate law which affirm distinctions between investors and the companies in which they invest. *See, e.g.*, *Bestfoods*, 524 U.S. at 52 ("It is a general principle of corporate law that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries."); *see also United States v. Jon-T Chems., Inc.*,

768 F.2d 686, 691 (5th Cir. 1985) (noting that "limited liability remains the norm in American corporate law").

Indeed, this Court's decision in *EMT* and Judge Hoyt's decision in *FTC* were premised on the fundamental separateness of USAP from the Welsh Carson entities. Both decisions squarely rejected the incorrect theory that USAP's conduct may be attributable to one or more of the Welsh Carson entities. Although Judge Hoyt dismissed the Welsh Carson entities on Section 13(b) grounds in *FTC*, and this Court dismissed the Welsh Carson entities on the basis of the statute of limitations in *EMT*, both decisions reinforced the same basic corporate law principle: USAP is a legally distinct entity whose conduct cannot be imputed to any Welsh Carson entity by virtue of a mere ownership interest. *See FTC*, 2024 WL 2137649, at *5 (distinguishing "USAP's [alleged] violations" from "Welsh Carson's"); *EMT*, 2024 WL 5274650, at *6 (alleged misconduct of USAP was not attributable to Welsh Carson).

The same principle compels dismissal of all claims against the Welsh Carson entities here. To state a claim, Plaintiff must plead independent conduct by each Welsh Carson entity. *See, e.g.*, *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1237 (10th Cir. 2017) (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"); *Chandler v. Phoenix Servs.*, 2020 WL 1848047, at *14 (N.D. Tex. Apr. 13, 2020) (same), *aff'd*, 45 F.4th 807 (5th Cir. 2022). Plaintiff has not done so.

The Complaint is bereft of any facts that would allow any of USAP's or its directors' conduct to be properly attributed to any particular Welsh Carson entity, much less to *all* of the Welsh Carson entities. The vast majority of Plaintiff's allegations about the Welsh Carson entities amount to unremarkable assertions of the Welsh Carson entities' customary equity-holder

supervision, which is a legally inadequate basis to impute liability to an investor. Nor can Plaintiff carry his pleading burden based on conduct alleged to have pre-dated USAP's formation or on alleged conduct by a USAP director appointed by a Welsh Carson investor, who is legally presumed under clear Supreme Court precedent to act on USAP's behalf. Well-established principles of corporate law and separateness compel dismissal of Plaintiff's claims against the Welsh Carson entities.

1. *The Welsh Carson Entities' Alleged Activities Incidental to Their Investments Do Not Constitute Independent Conduct.*

As detailed above, an entity cannot be liable for violations of the antitrust laws unless it participated in those violations through some "independent conduct." *See, e.g.*, *Chandler*, 2020 WL 1848047, at *14 ("[A] plaintiff is . . . required to 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."); *In re LIBOR-Based Financial Instruments Antitrust Litig*., 2019 WL 1331830, at *38 (S.D.N.Y. Mar. 25, 2019) (dismissing claims where complaint did not allow an "inference that [defendants'] subsidiaries and affiliates independently participated in [the alleged misconduct]" or "actually played a role in the scheme"). Conduct "typical of any parent and subsidiary" is insufficient to make that showing. *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 689; *see also Masimo Corp. v. Wireless*, 2020 WL 7260660, at *16 (S.D. Cal. Dec. 10, 2020) (liability only attaches to a parent where its authority over a subsidiary is "so extensive that the subsidiary becomes only a means through which the parent acts").

Yet that type of conduct is the only type alleged here. The Complaint alleges nothing more than the typical relationship between an investor and its portfolio or subsidiary company. *See, e.g.*, Compl. ¶ 23 (pursuant to contracts, Welsh Carson "regularly provided USAP with various operational support . . . , including services related to corporate finance, acquisition due diligence,

and strategic planning"); *id.* ¶ 27 (Welsh Carson helped recruit a USAP executive); *id.* ¶¶ 33–34 (Fund XI provided financing and secured third-party financing for USAP). These allegations of basic equity-holder rights and assistance are typical of, and incidental to, Fund XI and then Fund XII's status as investors in USAP. They are insufficient to show independent participation in unlawful conduct. *See, e.g.*, *Arnold Chevrolet LLC v. Trib. Co.*, 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006) (dismissing claims against parent where plaintiff failed to "delineate [parent's] role in any alleged anticompetitive conduct").

Nor may independent conduct be established based on claims that "Welsh Carson" collectively "controlled" or "directed" USAP. *See* Compl. ¶¶ 16, 18, 21, 139. ***First***, non-factual, legal conclusions are entitled to no weight on a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). ***Second***, the Complaint affirmatively admits that the Welsh Carson entities have held a minority share for most of USAP's existence and for more than the last seven years. Compl. ¶ 19. ***Finally***, in any event, the Complaint's conclusory allegations of control do not amount to independent participation in any alleged antitrust violation. *See In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 688 (failure to plead independent participation where parent entities "had ownership and control of their respective subsidiaries"); *Invamed, Inc. v. Barr Lab'ys, Inc.*, 22 F. Supp. 2d 210, 218–19 (S.D.N.Y. 1998) (allegation that affiliate entities had "ownership and control" of subsidiary did not suffice where no independent conduct was alleged).

2. *None of Plaintiff's Remaining Allegations Properly Pleads Independent Conduct by the Welsh Carson Entities.*

Pre-USAP Conduct. Plaintiff's allegations that a Welsh Carson entity provided start-up capital and strategy proposals leading up to USAP's formation in 2012, Compl. ¶ 34, do not come close to forming a basis for liability. There is no allegation that there was anything improper, let

alone unlawful, about such pre-formation funding and strategizing. Rather, Plaintiff suggests that this pre-formation conduct resulted in *USAP* (not the Welsh Carson entities) eventually making a series of acquisition and management decisions purportedly consistent with that strategy over the course of the next decade. Such allegations of purportedly unlawful conduct focus exclusively on USAP, not on any Welsh Carson entity. *See, e.g.*, *id.* ¶ 6 ("USAP acquired sixteen anesthesia groups."); *id.* ¶ 8 ("Upon each acquisition, USAP raised prices . . . ."); *id.* at ¶ 168 ("USAP also agreed to fix prices with at least three groups."); *id.* at ¶ 190 ("USAP also agreed to allocate a market."). Plaintiff's apparent theory—that the Welsh Carson entities can be held liable for a more-than-a-decade-old *idea* that USAP allegedly put into practice at some later time—is no basis for a claim.

USAP Director Conduct. Most of Plaintiff's allegations regarding "Welsh Carson" conduct concern the alleged conduct of a USAP director, Mr. Regan, who is affiliated with "Welsh Carson." These allegations do not establish the independent conduct of any Welsh Carson entity. It is a "well established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately," and "courts generally presume 'that the directors are wearing their "subsidiary hats" and not their "parent hats" when acting for the subsidiary.'" *Bestfoods*, 524 U.S. at 69. Dual-hatted directors must "depart so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary." *Id.* at 71. A USAP director is therefore presumed to act on behalf of USAP despite any Welsh Carson affiliation. Plaintiff pleads no facts to rebut this presumption, which is his burden. *See id.* at 70 & n.13 (plaintiff bears the burden of "show[ing] that dual officers or directors were in fact acting on behalf of the parent"); *In re Alper Holdings USA, Inc.*, 398 B.R. 736, 752–54 (S.D.N.Y. 2008) (parent

not liable for subsidiary's conduct absent specific actions by subsidiary for the benefit of parent but *not* subsidiary).

CONCLUSION

All claims against the Welsh Carson entities should again be dismissed with prejudice.

Dated: February 14, 2025

Respectfully submitted,

/s/ R. Paul Yetter

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CERTIFICATE OF CONFERENCE

I, the undersigned, hereby certify that counsel for the Welsh Carson entities conferred with counsel for Plaintiff regarding the substance of the relief requested. Counsel for Plaintiff indicated that Plaintiff opposes this motion.

/s/ R. Paul Yetter
R. Paul Yetter

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on February 14, 2025, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ R. Paul Yetter
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