UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BASEL MUSHARBASH, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC., WELSH, CARSON, ANDERSON & STOWE XI, L.P., WCAS ASSOCIATES XI, LLC, WELSH, CARSON, ANDERSON & STOWE XII, L.P., WCAS ASSOCIATES XII, LLC, WCAS MANAGEMENT CORPORATION, WCAS MANAGEMENT, L.P., and WCAS MANAGEMENT, LLC, Defendants.	Case No. 4:25-cv-116

PLAINTIFF'S OPPOSITION TO WELSH CARSON'S MOTION TO DISMISS

Plaintiff alleges that private equity firm Welsh Carson ("Welsh") conspired to monopolize certain hospital anesthesia markets in Texas for at least the last 13 years. Welsh hatched the conspiracy with two independent economic actors, healthcare executives John Rizzo and Kristen Bratberg, and later recruited the largest anesthesia practice in Houston, Greater Houston Anesthesia ("GHA"), another independent economic actor, to join the scheme. After retaining three consulting groups, securing debt financing, and developing the acquisition strategy, the co-conspirators created an entity, New Day Anesthesia ("New Day") (later renamed, U.S. Anesthesia Partners, or "USAP"), to acquire and "roll-up" competing anesthesia groups to facilitate the conspiracy and dominate the target markets. Their plan worked: today, USAP is insulated from competition in three major metropolitan markets in Texas where it charges monopoly prices to

patients for in-hospital anesthesia services.

In response to Plaintiff's well-pled complaint, Welsh recycles arguments that were successful in a related but distinguishable class action. Those arguments fail here. First, Plaintiff's claim against Welsh is timely. Plaintiff alleges a continuing conspiracy to monopolize hospital anesthesia markets through the serial acquisition of competing anesthesia practices, a conspiracy from which Welsh never withdrew. As the Complaint explains, Welsh initially created this conspiracy with other independent healthcare actors, which *then* led to the creation of New Day. That defeats Welsh's attempt to immunize itself based on *Copperweld*—which holds that companies cannot conspire with their wholly owned subsidiaries—for at least two reasons: (1) Welsh's *Copperweld* defense is inapplicable when a unitary interest flows from an illegal conspiracy, as it did here; and (2) because Welsh launched the conspiracy to monopolize *prior* to forming New Day and the merger with its first anesthesia practice. The Complaint adequately pleads that independent actors joined together in the conspiracy. So, *Copperweld* and its progeny support (rather than bar) Plaintiff's conspiracy claim.[1]

Other of Plaintiff's allegations preclude Welsh's limitations challenge. The Complaint identifies overt acts by Welsh within the limitations window that are sufficient to restart the statute of limitations under black-letter law. Those overt acts include Welsh's agents approving two USAP acquisitions in 2019 and 2020 as members of USAP's board of directors. Welsh contends that board votes cannot support an independent violation of the antitrust laws. But Plaintiff does not allege that such votes are a distinct conspiracy; rather, Welsh's conduct constitutes overt acts in furtherance of the original conspiracy. Welsh fails to address these allegations, much less any of

[1] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 760–62 (1984) ("Common ownership and control [are] irrelevant [when] restraint of trade was the primary object of the combination . . .") (internal quotations omitted).

the other overt acts identified in the Complaint. Additionally, Plaintiff alleges a valid and specific basis for fraudulent concealment tolling, which Welsh fails to rebut.

Finally, Welsh argues that Plaintiff asserts derivative liability against the shell companies controlled by Welsh.[2] Again, Welsh misapprehends Plaintiff's allegations: Plaintiff asserts *direct* liability against the Welsh defendants based on the conduct of *Welsh's agents*, including partners Brian Regan and D. Scott Mackesy, the individuals who formed and most actively participated in the conspiracy. If Regan and Mackesy are not agents of certain Welsh entities—contrary to the allegations of the Complaint—then those Welsh arguments rely on facts outside the pleadings that are irrelevant under Rule 12.

BACKGROUND

In 2012, a former executive at a large national anesthesia group, John Rizzo, invited Welsh to undertake an "aggressive buy and build consolidation strategy" to establish a new nationwide anesthesia practice. Compl. ¶ 24, ECF No. 1. Welsh partners Regan and Mackesy described Rizzo's idea as an "anesthesiology consolidation strategy," with the "goal" of "build[ing] a platform with national scale by consolidating practices with high market share in a few key markets." *Id.* ¶ 25. The plan was to acquire enough competitors, through a "roll-up strategy," to obtain market share and scale sufficient allow the new entity to have "negotiating leverage with commercial payors"—*i.e.*, to exercise monopoly power to raise prices. *See id.* ¶¶ 3, 25. Welsh agreed to the scheme and recruited another healthcare executive, one with experience "rolling up" physician practices, Kristen Bratberg, to join the conspiracy. *Id.* ¶ 27.

[2] The Welsh Carson defendants are Welsh, Carson, Anderson & Stowe XI, L.P.; WCAS Associates XI, LLC; Welsh, Carson, Anderson & Stowe XII, L.P.; WCAS Associates XII, LLC; WCAS Management Corporation; WCAS Management, L.P.; and WCAS Management, LLC. For simplicity, this brief refers to these entities collectively as "Welsh" unless otherwise noted.

Consistent with the plan, the conspirators then sought an anesthesia practice to join the conspiracy. Welsh and its co-conspirators evaluated acquisition targets based on size, existing long-term exclusivity agreements, and the ability to increase prices in the Houston market. *Id.* ¶ 32. In June 2012, Welsh, represented by Regan, signed a letter of interest with GHA, then the largest anesthesia practice in Houston. *Id.* ¶ 30. In obtaining GHA's assent, the conspirators pitched GHA on the plan to roll up competing practices, by highlighting their "plan for aggressive consolidation." *Id.* ¶ 30. Over the coming months, Welsh entered another agreement with GHA, providing exclusivity to negotiate details of the deal. *Id.* ¶ 31. Welsh then incorporated New Day Anesthesia and installed Regan, Mackesy, Bratberg, and Rizzo as directors. *Id.* ¶ 31. In December 2012, the merger with GHA was announced after New Day was renamed USAP. *Id.* ¶ 35.

With Welsh's resources, expertise, and commitment to the unlawful scheme, USAP acquired sixteen anesthesia groups, enabling it to unlawfully monopolize at least the Houston, Dallas-Fort Worth, and Austin metropolitan markets. This agglomeration spree included the acquisitions of Guardian Anesthesia Service in 2019 and Star Anesthesia in 2020. *Id.* ¶ 138. Moreover, Welsh, again with Regan acting on its behalf, oversaw price-fixing agreements with several competing anesthesiology practices, and an agreement to allocate markets with a competitor. *See id.* ¶¶ 169, 183–84.

Welsh would have this Court believe that it was a passive bystander to this unlawful conduct. To be sure, for every unlawful act alleged by Plaintiff, Welsh: (1) voted on it, through its agents Regan, Mackesy, and others, using its seats on the USAP Board of Directors; (2) required and provided its approval before USAP issued a letter of intent to acquire a competitor anesthesia practice; (3) insisted it be fully informed by USAP on all major decision-making; and (4) required multiple memos, decks and presentations for most, if not all, acquisitions. *Id.* ¶¶ 42, 138.

And critically, Welsh substantially profited from its unlawful conspiracy. As USAP's dominance expanded, prices for anesthesia services increased by double-digits. *Id.* ¶¶ 8, 98, 105, 111, 142. Despite these price increases, an associate at Welsh bragged to lenders that USAP's contract retention rate had "effectively been 100%," illustrating its dominance. *Id.* ¶ 159. Plaintiff Basel Musharbash was overcharged for in-hospital anesthesia services as a result of the Welsh conspiracy and brought this suit on behalf of other similarly injured patients. *Id.* ¶¶ 10, 14.

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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

DISCUSSION

I. PLAINTIFF'S CONSPIRACY CLAIM AGAINST WELSH IS ACTIONABLE AND TIMELY.

Contrary to both the law and the Complaint, Welsh argues that Plaintiff's conspiracy claim is barred by *Copperweld* and is otherwise untimely. Where, as alleged here, a conspiracy was initiated *before* any combination of separate actors, a *Copperweld* defense is unavailable. Thus, Welsh was capable of conspiring, as alleged, with Rizzo, Bratberg, and GHA—all economically distinct actors—to form and effectuate the conspiracy *through* USAP. And because Welsh itself committed numerous overt acts to further the conspiracy during the limitations period, the statute of limitations does not bar Plaintiff's conspiracy claim against Welsh.

A. Welsh is not immunized by *Copperweld*.

Welsh misreads *Copperweld*: a single-entity defense is not available where a defendant affiliates with a co-conspirator via an anticompetitive agreement *before* any unity of interest is created. In *Copperweld*, the Supreme Court recognized that a merger or "affiliation 'flowing from an illegal conspiracy' would not avert sanctions" under the antitrust laws. 467 U.S. 752, 761–62 (1984). Where "the original acquisitions [are] *themselves* illegal," any "affiliation of the defendants [is] irrelevant." *See id.* (emphasis in original); *see also id.* ("It has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.").[3]

Courts evaluating conspiracies among entities that later merged, or conspired while merging, have followed this aspect of *Copperweld* and subjected such conspiracies to antitrust scrutiny. In *Dodge Data & Analytics LLC v. iSqFt, Inc.*, the plaintiff alleged a conspiracy to monopolize between companies that later merged. 183 F. Supp. 3d 855, 861–62, 870 (S.D. Ohio 2016). The court rejected the defendants' *Copperweld* defense, holding that "where the original purpose of the merger was to restrain trade or monopolize a market (as is alleged here), the prohibition against intra-company conspiracies no longer applies." *Id.* at 870 (citing *Copperweld*, 467 U.S. at 761). Beyond the defendants' anticompetitive intent, the court emphasized the timing of the alleged conspiracy: "Even if the original purpose of the merger were not to unreasonably

[3] What matters is Welsh's *pre*-conspiracy independence, not its *post*-conspiracy incentives. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) ("The key is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decisionmakers.") (internal marks omitted). Welsh contends that it is legally incapable of conspiring with Rizzo and Bratberg (and USAP) because, after the conspiracy had been set in motion, Welsh's economic incentives became aligned with USAP's. But all co-conspirators are mutually incentivized to ensure their conspiracy's success after its creation. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003). ("A commonality of interest exists in every cartel.") (internal quotations omitted).

restrain trade or to monopolize a market, a merger does not insulate parties from joint actions taken before the merger." *Id.*

Separately, in *Omnicare, Inc. v. UnitedHealth Group, Inc.*, the plaintiff alleged that the defendants entered into an anticompetitive pre-merger agreement and acted consistent with that agreement "before the merger was complete." *See* 524 F. Supp. 2d 1031, 1036 (N.D. Ill. 2007). The court likewise rejected the *Copperweld* defense and denied the motion to dismiss, finding that the complaint sufficiently alleged an antitrust conspiracy, as the plaintiff had alleged that the "merger agreement . . . was itself an unlawful agreement." *Id.* at 1038.[4]

The correct inquiry is thus whether Welsh and its co-conspirators were independent decisionmakers ***before*** the alleged conspiracy was formed. Here, Welsh conspired with Rizzo, Bratberg, and GHA to combine as USAP and monopolize key markets through acquisitions before any of those deals were finalized. First, Welsh conspired with Rizzo and Bratberg in the first half of 2012, before New Day was formed in August 2012, and before it created USAP in November 2012. Compl. ¶¶ 24–29 (describing conspiracy in early 2012); *id.* ¶ 31 (New Day formed on Aug. 13, 2012); *id.* ¶ 35 (USAP formed on November 19, 2012). Similarly, Welsh pitched the consolidation strategy to GHA, and GHA indicated its intent to merge, as early as June 2012, roughly six months before the merger was agreed upon on December 12, 2012, and finalized in the weeks after. *Id.* ¶ 30 (GHA and Regan sign a letter of intent in June 2012); *id.* ¶ 31 (GHA, Welsh, and New Day agree to exclusivity period); *id.* ¶ 35.

The early-2012 agreement between Welsh, Rizzo, and Bratberg is the germ of the at-issue conspiracy. At that time, Rizzo was an independent actor, a former executive at a large anesthesia

[4] The Seventh Circuit in *Omnicare* reviewed the district court's later decision at the summary judgment phase and similarly assessed the existence of a pre-merger conspiracy. 629 F.3d 697, 709–10 (7th Cir. 2011) (affirming grant of summary judgment based on lack of evidence).

group, who solicited Welsh to launch the conspiracy. Compl. ¶¶ 24–26. Prior to agreement, Rizzo, Bratberg, and Welsh did *not* have aligned incentives, were *not* operating as a single entity, and constituted wholly separate decisionmakers. Thus, Welsh was both a potential investor *and* a potential competitor of Rizzo. *See id.* ¶¶ 24–25. Instead of competing, however, Welsh, Bratberg, and Rizzo formed New Day via a "sudden joining of economic resources that had *previously* served different interests"—precisely the type of agreement that *Copperweld* held deserving of scrutiny. *See* 467 U.S. at 771 (emphasis added). GHA, the dominant anesthesia practice in Houston, then joined the initial conspiracy after Welsh pitched GHA on the consolidation strategy. GHA's assent to the consolidation scheme, starting with a merger between it and New Day, a potential competitor, raises clear anticompetitive concerns. *See Fed. Trade Comm'n v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53 (D.D.C. 2022) ("Indeed, there is no shortage of authorities observing that historically and today, merging viable competitors to create a monopoly is a clear § 2 offense." (internal quotations omitted)).

B. Plaintiff's continuing conspiracy claim is timely.

Defendants committed numerous acts in furtherance of the conspiracy since September 2019, the earliest date that the statute of limitations began to run. If any conspirator commits an overt act in support of the scheme, the statute of limitations restarts. *United States v. Therm-All, Inc.*, 373 F.3d 625, 633 (5th Cir. 2003) ("The statute of limitations runs from the last overt act."). It is undisputed that USAP committed overt acts within the limitations period, and Welsh is fully liable for those acts as a conspirator. *See* Compl. ¶¶ 68, 70; *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 844 (5th Cir. 2015). Welsh also independently acted in furtherance of the conspiracy during the limitations window.

Antitrust claims accrue at the time of the plaintiff's injury. *See* 15 U.S.C. § 15b; *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971). Courts have recognized two criteria

for an overt act: "(1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff." *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1202 (9th Cir. 2014) (internal quotations omitted). An overt act need "not, itself, be unlawful" to support conspiracy liability. *United States v. Archbold-Newball*, 554 F.2d 665, 684 (5th Cir. 1977); *see also Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2010 U.S. Dist. LEXIS 92236, at *83 (E.D. Cal. 2010) (same) (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946)). Other courts have held overt acts to be established in a variety of situations involving relatively minor conduct (including inaction) that evidences an ongoing conspiracy. *See, e.g.*, *Acad. of Allergy & Asthma in Primary Care v. Quest Diag., Inc.*, 998 F.3d 190, 198 (5th Cir. 2021) (email regarding continued collaboration is an overt act); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172–73 (3d Cir. 1993) (citing *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117 (5th Cir. 1975)); *see also Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968) (each refusal to sell pursuant to monopolistic lease-only policy an overt act).

Welsh committed numerous actions in furtherance of the scheme that qualify as overt acts. For instance, Welsh's board votes in favor of acquisitions are overt acts—both were new, independent actions in furtherance of the monopolization scheme resulting in injury to patients. *See Acad. of Allergy*, 998 F.3d at 198.[5] Both the 2019 and 2020 acquisitions were part and parcel

[5] Courts treat board votes and other corporate actions similarly to any other affirmative acts: if made in furtherance of the conspiracy, they qualify as sufficient "overt acts." *See, e.g.*, *United States v. Potter*, 2005 WL 2367677, at *6 (D.R.I Sept. 27, 2005) (evidence supported jury's conspiracy verdict because "attendance" at either of two board meetings at which acts in furtherance of the conspiracy were taken "satisfied the overt act requirement"); *Tavakoli v. Doronin*, 2019 WL 1242669, at *9 (S.D. Fla. Mar. 18, 2019) (plaintiff adequately "allege[d] substantial overt acts by [defendant's] co-conspirators" including "carr[ying] out their plan" through action taken at a "Miami Board meeting").

of Welsh's "roll-up" strategy to consolidate the hospital anesthesia markets. And both acquisitions removed a competitor from the market, increasing Welsh's market share and giving USAP additional leverage to maintain elevated prices. That the board votes themselves were not unlawful or sufficient to form a new conspiracy is immaterial—the actions demonstrate Welsh's continued commitment to the *original* conspiracy that it launched prior to the formation of New Day and USAP.

Welsh argues that its agents' board votes in furtherance of the conspiracy cannot independently support a claim for conspiracy against Welsh. But that is not what Plaintiff alleges—Plaintiff asserts that Welsh conspired *before* it could have formed a single-entity relationship with USAP. Welsh's later actions are overt actions justifying the tolling of the statute of limitations. Welsh relies on the inapposite case of *United States v. Bestfoods*, a decision involving the Supreme Court's interpretation of CERCLA's "owner or operator" provision. 524 U.S. 51, 59–60 (1998) (citing 42 U.S.C. § 9601(20)(A)(ii)). *Bestfoods* has no bearing on Welsh's liability for continued participation in an antitrust conspiracy, and it certainly does not allow Welsh to undo well-pleaded facts in the Complaint when all presumptions run in Plaintiff's favor. Plaintiff's allegations attribute those actions to Welsh—the directors held those seats on Welsh's behalf and voted as Welsh directed—and thus Welsh's argument is also inappropriate on a motion to dismiss. *See Garrett v. Commonwealth Mortg. Corp.*, 938 F.2d 591, 594 (5th Cir. 1991) (dismissal based on affirmative defense inappropriate if defense is inconsistent with complaint's allegations).

C. Plaintiff's allegations do not support Welsh's withdrawal from the conspiracy.

Welsh further contends that it "withdrew" from the conspiracy in 2017, when one Welsh entity sold its stake to another. Mot. at 11–12, ECF No. 35. But the Complaint contains no admission of withdrawal—on the contrary, the Complaint alleges that Welsh remained an active participant in the conspiracy even after 2017. And in any event, such an affirmative defense is not

properly decided on a motion to dismiss. *See Smith v. United States*, 568 U.S. 106, 110 (2013) (defendant bears burden of proving withdrawal); *United States v. Hoffman*, 901 F.3d 523, 544 (5th Cir. 2018) ("Withdrawal from a conspiracy is an affirmative defense . . .").

To effectively withdraw from a conspiracy, a defendant must show that it took "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464 (1978); *see also In re Catfish Antitrust Litig.*, 908 F. Supp. 400, 414 (N.D. Miss. 1995) ("The act of withdrawal must be affirmative, for merely ceasing participation in the conspiracy, even for extended periods of time, is not enough to evidence withdrawal.") (internal quotations omitted). Here, where Plaintiff alleges that Welsh participated extensively in the scheme throughout the conspiracy, there is no basis to find that Welsh withdrew.

More importantly, Welsh cites no authority for the proposition that merely swapping out funds and reducing its ownership stake constitutes a "withdrawal." Rather, courts have held that, where a defendant continues to benefit from a conspiracy, there can be no defense of withdrawal. *Osborn v. Visa, Inc.*, 797 F.3d 1057, 1067 (D.C. Cir. 2015) (citing *United States v. Eisen*, 974 F.2d 246, 269 (2d Cir. 1992)). The cited case in Welsh's motion (Mot. at 12) is consistent and holds precisely *the opposite* of what Welsh contends. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 8669891, at *7 n.6 (N.D. Cal. Aug. 22, 2016) ("HDP fails to meet the elements of withdrawal as a matter of law, in part, because it continued to own a 25 percent stake in a coconspirator."). Withdrawal requires complete disassociation (if not more).

D. Welsh Carson fraudulently concealed its monopolization scheme.

Even if the Court disagrees with Plaintiff's other timeliness arguments, Plaintiff's claims against Welsh remain actionable due to fraudulent concealment, which tolls the Clayton Act's statute of limitations. *See In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1169 (5th Cir. 1979).

Welsh does not accurately describe the pleading standard for fraudulent concealment. For an antitrust claim, a plaintiff must show first "that defendants concealed the conduct complained of," and second, "that [the plaintiff] failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim." *Id.* at 1169. In the Fifth Circuit, "there is no requirement for the acts of concealment to be independent of the conspiracy." *See In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1031 (N.D. Miss. 1993). When the statute of limitations begins to run on a plaintiff's cause of action is a question of fact. *See In re Beef*, 600 F.2d at 1170. Indeed, "courts routinely refuse to rule out fraudulent concealment at the motion-to-dismiss stage." *Burge v. Teva Pharm. Indus., Ltd.*, 2024 WL 4692050, at *4 (D. Kan. Nov. 6, 2024) (listing cases).

Here, the Complaint details how Defendants[6] concealed their antitrust violations and how Plaintiff, despite reasonable due diligence, was unable to discover the facts forming the basis for his claims until they became public in the FTC's lawsuit. *See* Compl. ¶¶ 120–123. The Complaint further identifies multiple press releases regarding USAP's acquisitions that falsely claim those acquisitions would improve service and benefit consumers. These misleading attempts to paint the roll-up scheme as pro-competitive were designed to "exclude suspicion and prevent inquiry" by concealing the monopolistic intentions and expected price increases that are the foundation of Plaintiff's claims. *See Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1532 (5th Cir. 1988). Unlike "mere silence," these affirmative misrepresentations are the sort of "trick or contrivance" that warrants fraudulent-concealment tolling. *See Wood v. Carpenter*, 101 U.S. 135, 143 (1879). Indeed, creating such a "false impression" about the "competitive[]" nature of alleged antitrust

[6] As addressed below, fraudulent concealment by any conspirator is sufficient to toll limitations against all of them. *See Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989) ("[A]ffirmative acts of concealment by one or more of the conspirators can be imputed to their co-conspirators for purposes of tolling the statute of limitations.") (collecting cases).

conduct is "precisely the sort of affirmative act[] of deception required by the jurisprudence." *Ingram Corp. v. J. Ray McDermott & Co.*, 1980 WL 1819, at *4 (E.D. La. Jan. 10, 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983). Courts around the country agree.[7]

Welsh argues that this is still not enough to satisfy Rule 9(b)'s pleading requirements, but this too is wrong. For claims involving omission of facts, "Rule 9(b) typically requires the claimant to plead the type of facts omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the representations misleading." *Carroll v. Fort James Corp*., 470 F.3d 1171, 1174 (5th Cir. 2006) (internal quotations omitted). Plaintiff here has met those requirements: (1) the omitted facts were Defendants' awareness and intent that consolidation in the relevant markets would allow them to achieve their goal to increase prices without providing any commeasurable improvement in services, contrary to the representations of anticipated quality improvements; (2) those omissions should have appeared in the identified press releases; and (3) the omitted facts made the representations misleading because they were designed to dupe consumers (and regulators) into thinking that these acquisitions would lead to procompetitive rather than anticompetitive results. That is more than sufficient at the pleading stage. *See, e.g.*, *Lee v. Samsung Elecs. Am., Inc.*, 2022 WL 4243957, at *12 (S.D. Tex. Sept. 13, 2022) (denying motion to dismiss based on similarly detailed allegations); *In re Catfish*, 826 F. Supp. at 1030 ("Proof of fraudulent concealment is found with *any* evidence of efforts designed to keep [anticompetitive]

[7] *See, e.g.*, *E.W. French & Sons, Inc. v. Gen. Portland*, 885 F.2d 1392, 1399–1400 (9th Cir. 1989) (fraudulent concealment supported by defendants' having "attributed the uniformity [in prices] to competition, not price fixing"); *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1475–76 (6th Cir. 1988) (fraudulent concealment supported by defendant's statement that refusal to deal was "related to efficiency considerations," in light of evidence that "the defendants had misrepresented their reasons" for refusing to deal); *In re Fragrance Direct Purchaser Antitrust Litig.*, 2025 WL 579639, at *12 (D.N.J. Feb. 21, 2025) (fraudulent concealment adequately pleaded based on statements falsely attributing price hikes to market forces rather than anticompetitive causes).

activities secret.") (emphasis added).

That the cited press releases came from USAP is no defense. Concealment by one defendant triggers tolling as to all of them. *See, e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 538 (6th Cir. 2008) ("Fraudulent concealment, however, may be established through the acts of co-conspirators."); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1236 (10th Cir. 2017) ("[T]he related entities' coordinated conduct must be treated as the unitary conduct of the single enterprise which together they form, and it is that aggregated conduct which must be scrutinized under § 2."); *see also In re Vitamins Antitrust Litig.*, 2000 WL 1475705, at *3 (D.D.C. May 9, 2000) ("The court also rejects defendants' argument that plaintiffs have not alleged any affirmative acts of concealment attributable to specific companies.").

Welsh also raises the fact that the identified fraudulent statements were from 2014 and 2015—before the current limitations window. That gets the analysis backward. "A plaintiff claiming fraudulent concealment need not prove that a defendant continuously took affirmative actions throughout the concealment period." *Abecassis v. Wyatt*, 902 F. Supp. 2d 881, 904 (S.D. Tex. 2012) (Rosenthal, J.). "Fraudulent concealment tolls limitations from the initial act of fraudulent concealment until a plaintiff exercising reasonable diligence would become aware of her claim, whether the defendants affirmatively take steps to deny their actions or simply maintain silence." *Id.* Put differently, the statute of limitations here was tolled beginning no later than June 2014, when the first misleading press release was made, and that tolling continued until the FTC's lawsuit was filed and statutory tolling took over, *see* 15 U.S.C. § 16(i). Plaintiff's claims are therefore timely.

II. PLAINTIFF'S CLAIMS SATISFY RULE 12(b)(6).

Plaintiff sufficiently alleges his claims against all Welsh defendants based on the conduct of Welsh's agents, including Regan and Mackesy in particular. Welsh's motion does not

demonstrate otherwise.

A. The Complaint includes specific allegations regarding Welsh's participation in a conspiracy to monopolize.

Welsh argues that Plaintiff cannot maintain its claim because USAP and Welsh are separate entities. But as discussed, Welsh does not face liability for investing in USAP—Welsh's liability stems from the conduct of its agents, in particular Regan and Mackesy, who conspired with separate actors in 2012 to monopolize Texas anesthesia markets. *See Jones v. Varsity Brands, LLC*, 618 F. Supp. 3d 713, 719 (W.D. Tenn. 2022) (denying private equity firms' motion to dismiss § 2 conspiracy claim where one of several conspirators was a separate actor). The Complaint alleges in detail how Welsh intentionally conspired to monopolize with Rizzo and Bratberg, and later, Welsh obtained GHA's assent to the plan. Welsh continuously supported the conspiracy, including by securing funding for the scheme, Compl. ¶ 130, and by devoting time and resources to New Day and the consolidation strategy, with its partners initially providing "$1-$2 million to set-up shop, develop a market roadmap, and diligence acquisition candidates." *Id*. ¶ 131.[8]

Plaintiff's allegations support all four elements of a conspiracy to monopolize claim. *See Dexon Comput., Inc. v. Cisco Sys., Inc.*, 2023 WL 2730656, at *17 (E.D. Tex. Mar. 31, 2023) ("(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect

[8] Plaintiff respectfully disagrees with the Court's ruling in the *EMT* case that *Copperweld* means that a partial owner cannot conspire with their investee company under Section 2 of the Sherman Act and, alternatively, that Welsh is not a common enterprise with USAP. *See* 467 U.S. at 771, 777 ("unity of interest" among corporate affiliates means "the enterprise is fully subject to" monopolization claims under federal antitrust law). *See also Lenox*, 847 F.3d at 1233 ("[I]n a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a monopolization or attempted monopolization claim.") (emphasis in original). For the sake of efficiency, this brief focuses on new arguments not addressed by the Court's prior decision. Plaintiff reserves all such arguments for future purposes, including appeal.

upon a substantial amount of interstate commerce.") (citing *N. Miss. Commc'ns, Inc. v. Jones*, 792 F.2d 1330, 1335 (5th Cir. 1986)). The allegations demonstrate Welsh's and its initial conspirators' specific intention was to obtain a monopoly through acquisitions, *e.g.*, Compl. ¶ 130, an intent that GHA understood and acquiesced to, *id.* ¶¶ 30, 135. *See Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir. 1983) (inferring specific intent to monopolize from conduct).

Plaintiff alleges that Welsh, through Regan and Mackesy, hatched a conspiracy with Rizzo to obtain market share and raise prices. *See* Compl. ¶¶ 24–25, 129. After recruiting Bratberg to join the conspiracy, Welsh enlisted GHA. ¶¶ 30, 32–35. Specifically, Regan, representing Welsh, signed a letter of interest with GHA, *id.* ¶ 30, and Welsh confirmed GHA's market power would enable it to serve as a springboard to spread supracompetitive prices across the at-issue markets. *Id.* ¶¶ 32–35. Further, Plaintiff alleges that in pitching the deal to GHA, Welsh "highlight[ed] their plan for aggressive consolidation," so GHA had knowledge its merger with New Day was part of a broader plan to acquire share. *See* ¶ 30. These allegations also establish the existence of a combination or conspiracy between Welsh, Rizzo, Bratberg, and GHA. *See United States v. MMR Corp. (LA)*, 907 F.2d 489, 495 (5th Cir. 1990) ("It is enough" to "show[] that the defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade.").

Welsh committed overt acts in furtherance of this conspiracy by recruiting Bratberg, forming New Day, identifying GHA as New Day's first acquisition, hiring consultants to analyze the acquisition, signing a letter of interest and later a letter of intent to purchase GHA, and fundraising to finance the acquisition—all before New Day or USAP was formed—and by then actually funding USAP's acquisition of GHA. *Id.* ¶¶ 29–35, 132–136. Welsh has continued to commit overt acts in furtherance of the conspiracy, requiring that each acquisition be reviewed and approved by Welsh and voting as board members to approve each acquisition, including the

Guardian and Star acquisitions in September 2019 and January 2020, respectively. *Id*. ¶ 42, 138. Regan continued to serve on USAP's board until 2022 and as of September 2023, Welsh retained 23% ownership in USAP. *Id.* ¶¶ 139, 140. Notably, Welsh's motion does not contend that the business development playbook defining Welsh's role in USAP's operations is no longer in effect. *See* Mot. at 8. Even if that were true, Plaintiff adequately alleges that Welsh never withdrew from the conspiracy. *Supra* 10–11. Moreover, the roll-up scheme Welsh planned and executed was successful and has had a substantial effect on interstate commerce: USAP uses its dominance across the three markets to charge supracompetitive prices to this day. Compl. ¶¶ 142–168.

B. The Welsh Defendants operate as a unified entity.

As alleged in the Complaint and discussed above, Welsh conspired with then-independent economic actors to form USAP, provided funding for USAP, and continuously participated in and directed USAP's business operations through five Welsh management organizations and two Welsh investment funds. Compl. ¶ 16. Those Welsh Defendants "function as a single entity with a shared identity," including a shared business address, trademarks, and corporate officers. *Id*. ¶ 17. Indeed, Welsh and its various shell companies, led by Regan and Mackesy, meet all the requirements of a "common enterprise" both in forming USAP and in helping direct and operate the company as a monopolist of hospital anesthesia services in the pleaded markets. Welsh ignores this reality, portraying its shell companies as independent entities for which Plaintiff must allege specific acts separately. Welsh both misstates the applicable law and fails to identify any allegations indicating that the named Welsh Defendants do *not* act as a common enterprise.

In *Commodity Futures Trading Commission v. Cartu*, 2023 WL 5246360 (W.D. Tex. Aug. 15, 2023), the CFTC alleged that several named defendants engaged in a fraudulent trading scheme. *See id*. at **1–2. The court held that the CFTC's allegations sufficiently asserted common

enterprise liability "because they show common control, shared office space and employees, and commingled funds" among defendants. *Id*. at *9 (internal citations omitted). While the "complaint does not always specify which Defendants performed which actions," the court reasoned that it includes "sufficient specificity" about "discrete actions" and does not constitute "impermissible group pleading." *Id*. The court explained that "[t]he share of responsibility for specific actions may be determined more precisely at a later stage." *Id*. Like the CFTC, Plaintiff's complaint identifies specific, discrete actions and alleges common control, office space, and trademarks.

Welsh again cites *Bestfoods* for the irrelevant principle that a corporate parent is not automatically liable for the acts of its subsidiaries. Mot. at 15.[9] But as the Supreme Court stated in *Bestfoods*, "derivative liability cases are to be distinguished from those in which the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management and the parent is directly a participant in the wrong complained of." 524 U.S. 51, 64 (1998)

[9] The other cases Welsh relies on to argue Plaintiff must plead independent conduct by each Welsh entity are inapposite. For instance, in *Lenox*, the Tenth Circuit abstained from answering "[t]he question of what must be shown in order to hold a particular affiliated corporation liable as part of an inter-corporate scheme" because plaintiff's claim there relied on a theory that was otherwise barred by claim preclusion. 847 F.3d at 1239. *Chandler v. Phoenix Services*, provided one answer to that same question but at summary judgment, holding that the parent lacked knowledge of the anticompetitive actions of its subsidiaries and therefore could not be held directly liable as a single enterprise with the subsidiary under the Sherman Act. 2020 U.S. Dist. LEXIS 63779, at *42 (N.D. Tex. Apr. 13, 2020) (quoting *Lenox*, 847 F.3d at 1237–38). But Plaintiff plausibly alleges that top executives at Welsh themselves participated in the conspiracy, through the act of forming the subsidiary and by directing the roll-up scheme. The other cases Welsh cites are distinguishable on similar grounds. *See In re LIBOR-Based Financial Instruments Antitrust Litig.*, 2019 U.S. Dist. LEXIS 49700, at *96 (S.D.N.Y. Mar. 25, 2019) (finding that plaintiffs had failed to allege that affiliates played an independent role in the scheme); *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 689 (E.D. Pa. 2009) (finding that "plaintiffs allege that parents merely acquiesced in their subsidiaries' conduct"); *In re Alper Holdings USA, Inc.*, 398 B.R. 736, 752 (S.D.N.Y. 2008) (plaintiffs failed to "identify in their pleadings any specific actions" undertaken); *Invamed, Inc. v. Barr Lab'ys, Inc.*, 22 F. Supp. 2d 210, 218–19 (S.D.N.Y. 1998) (dismissing a complaint because it failed to allege conduct supporting an inference that a subsidiary's owners and controllers committed anticompetitive acts, apart from those undertaken by the subsidiary).

(internal quotations omitted); *see also In re Packaged Seafood Prods. Antitrust Litig.*, 2022 WL 836951, at *59–62 (S.D. Cal. Mar. 21, 2022) (finding based on *Bestfoods* that plaintiffs adequately stated a claim against a private equity company that was the parent of other defendants because the parent company directed its dual agents). This is what Plaintiff alleges here: that the Welsh entities all acted in unison through the same personnel.

Indeed, Welsh's top executives formed the conspiracy, those same executives and other Welsh employees carried out the conspiracy (and continue to do so), and various Welsh employees entered into agreements on behalf of New Day and, subsequently, USAP. *See, e.g.*, Compl. ¶¶ 24–35. This is enough to allege each Welsh entity's involvement, particularly given that Welsh itself does not distinguish between any of those entities. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184–85 (N.D. Cal. 2009) (where individual participants in conspiracy did not distinguish between entities in a corporate family, allegations regarding each defendant's participation and factual basis for agency were sufficient). Indeed, Welsh refers to all its various shell companies as "the Firm" or "Welsh Carson" or "WCAS." Compl. ¶ 17; *see also* WCAS, *Our Firm*, https://wcas.com/firm/ (last accessed March 7, 2025). In short, just as *Copperweld* does not save Welsh from liability for conspiring to monopolize, *Bestfoods* does not save it from liability for the acts of its agents in forming and carrying out the alleged conspiracy.[10]

[10] Notably, despite being dismissed as a defendant in the federal court *FTC* action, Welsh recently entered into a settlement with the FTC as part of a separate administrative proceeding involving the same conduct at issue here. *See* Fed. Trade Comm'n, *FTC Secures Settlement with Private Equity Firm in Antitrust Roll-Up Scheme Case* (January 17, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-secures-settlement-private-equity-firm-antitrust-roll-scheme-case. The proposed consent order lists and applies to each Welsh entity named here by Plaintiff. *See* Decision & Order, Welsh, Carson, Anderson & Stowe XI, L.P., (F.T.C. No. C-2010031 January 17, 2025) (available at https://www.ftc.gov/system/files/ftc_gov/pdf/2010031USAPWelshCarsonOrder.pdf).

CONCLUSION

Welsh's motion to dismiss Plaintiff's claim should be denied. Alternatively, Plaintiff should be granted leave to amend the Complaint.

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Respectfully submitted,

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