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

REPLY IN SUPPORT OF THE WELSH CARSON ENTITIES' MOTION TO DISMISS

The Opposition cannot distinguish this Court's decision in *EMT*. In *EMT*, this Court dismissed virtually the exact same claims asserted here as time-barred. Plaintiff's only argument to avoid the same outcome relies on the same legally defective conspiracy theory asserted and rejected in *EMT*. The Opposition also fails to point to any independent participation by any Welsh Carson entity in any alleged violation within the limitations period—conceding there was none. In sum, the Opposition fails to rescue Plaintiff's untimely claims against the Welsh Carson entities, so they must be dismissed with prejudice.

I. THE OPPOSITION'S TIMELINESS ARGUMENTS RELY ON THE SAME CONSPIRACY THEORY THIS COURT REJECTED IN *EMT*.

The Opposition's timeliness arguments rely on one faulty and already-rejected premise: that the Welsh Carson entities can be liable as USAP's co-conspirators, and that the conspiracy asserted in the Complaint—allegedly formed in 2012 prior to USAP's formation—is not barred by *Copperweld*. Opp. at 5-8. This is the same exact "continuing conspiracy" theory that this Court rejected in *EMT*. Indeed, the Opposition appears to have lifted its arguments wholesale from the *EMT* plaintiffs' already-rejected opposition, which claimed that "[t]his is not the prototypical

Copperweld fact pattern" because "the complaint . . . alleges that the conspiracy began before the creation of USAP." *EMT*, No. 4:23-cv-04398, Opp. to Mot. to Dismiss, at 27 (ECF 64); *see also id.*, Tr. 34:21-35:2 (ECF 103) (plaintiffs' counsel contending that a conspiracy was formed "when Welsh Carson and John Rizzo and New Day. . . agreed to embark on a strategy of consolidating Texas Anesthesiology" and that "[w]henever they reached that agreement in 2012 to do that thing which we allege, that was when [the] conspiracy started").

That argument should be rejected here for the same reason as in *EMT*. As this Court explained, an antitrust conspiracy requires "concerted action" between "separate economic actors pursuing separate economic interests." 2024 WL 5274650, at *4 (S.D. Tex. Sept. 27, 2024) (quoting *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010)). Because the Welsh Carson entities, John Rizzo, and USAP (including its predecessor, New Day Anesthesia), have never been competitors and instead "had common objectives with respect to USAP's success," they "shared a complete unity of interest" and thus, "under *Copperweld*," they "cannot conspire with each other." *Id.* at *5 (citing *Copperweld Corp. v. Indep. Tube*, 467 U.S. 752, 768–69 (1984)). This Court thus concluded the Welsh Carson entities "cannot be held liable for USAP's actions after the limitations period." *Id.*

The Opposition's failure to cite *EMT* by name cannot obscure its dispositive impact. Plaintiff concedes his copycat claims are "substantially the same" as in that case, Compl. ¶ 190, which alleged virtually the same "original conspiracy . . . prior to the formation of New Day and USAP." *See* Opp. at 2. Unable to distinguish *EMT*, the Opposition instead suggests the Court got it wrong. According to Plaintiff, where a defendant "affiliates with a co-conspirator via an anticompetitive agreement *before* any unity of interest is created"—the theory alleged here and in *EMT*—*Copperweld* cannot apply. *Id.* at 6. Plaintiff is wrong, not the Court.

As the Supreme Court has held: "Not every instance of cooperation between two people is a potential contract, combination . . ., or conspiracy, in restraint of trade." *Am. Needle*, 560 U.S. at 189–90 (cleaned up). "The relevant inquiry . . . is whether there is a contract, combination . . ., or conspiracy [that] ***deprives the marketplace of . . . actual or potential competition***." *Id*. at 195 (emphasis added).[1] Here, Plaintiff does not (and cannot) allege that anyone on his list of alleged "original" conspirators—"Welsh Carson," Greater Houston Anesthesiology, Rizzo, Kristen Bratberg, Scott Mackesy—would have competed in any relevant market had USAP not been formed. The mere fact that these supposed conspirators may have once been "independent decisionmakers" does not defeat *Copperweld*.

The cases that the Opposition cites confirm that dismissal is compelled. Opp. at 6-8. They involve ***competitors with discordant interests*** who decided to form a conspiracy, thereby depriving the market of actual or potential competition. *See Omnicare v. Unitedhealth Grp.*, 524 F. Supp. 2d 1031, 1038 (N.D. Ill. 2007) (pre-formation conspiracy involved merger agreement between "two separate firms that had *acted as competitors* . . . [that] enabled them to coordinate their decisionmaking" (emphasis added)); *Dodge Data & Analytics v. iSqFt*, 183 F. Supp. 3d 855, 870-71 (S.D. Ohio 2016) (each alleged conspirator "existed as a separate legal entity, maintained separate and distinct websites, and continued to appear as *separate, competitive entities* in the marketplace" (emphasis added)). Here, as in *EMT*, the Complaint alleges a unity of interest and lack of competition among the supposed conspirators at all times, including at the time of the

[1] *See also Copperweld*, 467 U.S. at 776 ("The appropriate inquiry . . . is not whether the coordinated conduct of [two or more persons] may ever have anticompetitive effects . . . . [Otherwise,] a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved."); Areeda & Hovenkamp ¶ 1462b, at 193–94 (the "central evil" addressed by Section 1 is the "elimin[ation of] competition that would otherwise exist").

alleged conspiracy's formation.[2] *See Mt. Pleasant v. Associated Elec. Co-op.*, 838 F.2d 268, 276 (8th Cir. 1988) (diversity of interests means "interests which tend to show that any two of the defendants are, or have been, actual or potential competitors"). Discussions among non-competitors about forming a company cannot constitute an antitrust conspiracy.[3]

Finally, because Plaintiff's "continuing conspiracy" argument fails, his alternative fraudulent concealment argument—implausible and insufficiently pleaded in any event, *see* Br. at 12-14—also fails. The Opposition concedes (Opp. at 14) that the only conduct that the Complaint alleges in support of concealment are public statements *made by USAP*, not Welsh Carson. Compl. ¶ 125. And the only argument for why USAP statements could toll the limitations period as to the Welsh Carson entities is that Welsh Carson and USAP were allegedly co-conspirators (Opp. at 12, 14 & n.6), an argument foreclosed by *EMT* (along with *Copperweld* and its progeny), as detailed above.

II. THE OPPOSITION CONFIRMS THAT NO WELSH CARSON ENTITY INDEPENDENTLY PARTICIPATED IN ANY ANTITRUST VIOLATION.

The Opposition makes no argument that any Welsh Carson entity engaged in any conduct within the limitations period that would independently violate the antitrust laws. Indeed, the only alleged conduct it cites within the limitations period is the supposed "approval" of two USAP acquisitions by two Welsh Carson directors sitting on USAP's 14-person board. Opp. at 16-17. Plaintiff makes no argument that such conduct supports holding any Welsh Carson entity

[2] When the alleged conspiracy formed, the Welsh Carson entities were part of a private equity firm, Compl. ¶ 2; Rizzo and Bratberg were "healthcare executives," *id.* ¶ 3; and New Day (later renamed USAP) did not yet exist, *id.* ¶ 24. Greater Houston Anesthesiology is the only purported conspirator alleged to have participated in the anesthesia services market at that time.

[3] Nor does the Opposition rebut the argument that Fund XI's 2017 divestment withdrew "Welsh Carson" from any alleged pre-USAP conspiracy. Br. at 12. It cites no support for its assertion that "Welsh participated extensively in the scheme throughout the conspiracy," because the Complaint does not allege any such participation, particularly after 2017.

independently liable. Regardless, that argument is foreclosed by the Supreme Court's decision in *Bestfoods*, because "dual-hatted" directors are presumed to act on behalf of USAP, *see* 524 U.S. 51, 69–70 (1998).

Plaintiff merely asserts that this claimed "approval" is an "overt act" in furtherance of the supposed conspiracy between the Welsh Carson entities and USAP. *See* Opp. at 2, 16-17. But, as detailed above, Plaintiff fails to plead the existence of a conspiracy, and he points to no other alleged conduct by any Welsh Carson entity within the limitations period that would support any of his claims. Because there is none, dismissal is required.

CONCLUSION

All Plaintiff's claims against the Welsh Carson entities should be dismissed with prejudice, for the same reasons this Court dismissed *EMT* with prejudice. The Opposition's request for leave to amend should similarly be denied as futile.

Dated: March 14, 2025

Respectfully submitted,

/s/ R. Paul Yetter

R. Paul Yetter (State Bar No. 22154200)
pyetter@yettercoleman.com
Matthew C. Zorn (State Bar No. 24106625)
mzorn@yettercoleman.com
Tyler P. Young (State Bar No. 24129144)
tyoung@yettercoleman.com
YETTER COLEMAN LLP
811 Main Street, Suite 4100
Houston, Texas 77002
Telephone: (713) 632-8000
Facsimile: (713) 632-8002

David B. Hennes (admitted *pro hac vice*)
Jane E. Willis (admitted *pro hac vice*)
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

Kathryn Caldwell (admitted *pro hac vice*)
Elena Weissman Davis
(*pro hac vice* forthcoming)
Rory T. Skowron
(*pro hac vice* forthcoming)
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199
Telephone: (617) 951-7000
Facsimile: (617) 951-7050

Counsel for Defendants 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

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on March 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
R. Paul Yetter