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

MUSHARBASH, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC. et al. Defendants.	**FILED UNDER SEAL** Case No.: 4:25-cv-00116

DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S
MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Plaintiff Basel Musharbash is the latest private party to repackage the allegations in *FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-CV-03560-KH (Hoyt, J.), into a putative class-action complaint pending before this Court. Like the FTC and the plaintiffs in the first class-action case, *Electrical Medical Trust v. U.S. Anesthesia Partners, Inc.*, No. 4:-23-cv-04398 ("*EMT*"), Mr. Musharbash alleges that Defendant U.S. Anesthesia Partners, Inc. ("USAP") has unlawfully maintained a monopoly in putative antitrust markets limited to commercially insured hospital-only anesthesia services in certain geographic areas. *See* Compl. at 1 (alleging antitrust claims "based on" not only "his own knowledge and personal belief" and "the investigation of his counsel," but also on "the Federal Trade Commission's September 21, 2023, Complaint").

As in these other cases, USAP vigorously disputes Mr. Musharbash's allegations. The evidence being adduced even now in the earlier-filed cases will show that USAP has no monopoly in any properly defined antitrust market, and that USAP's rates – far from being supracompetitive – appropriately compensate USAP and its physician-owners for the high-quality care that USAP provides. But in light of the Court's holding that the *EMT* plaintiffs have

stated plausible antitrust claims based on similarly derivative allegations, USAP will not burden the Court with further contrary argument at this stage of the proceedings.

The Court nevertheless should dismiss Musharbash's complaint because it suffers from a unique deficiency. No different from any other plaintiff, Mr. Musharbash must establish Article III standing to sue USAP – that he has suffered a concrete "injury in fact" that is "fairly traceable to the challenged action of" USAP, and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (cleaned up). USAP has investigated Mr. Musharbash's narrow standing allegations (which turn on a single payment he made for one episode of treatment in 2024) and determined that the amount Mr. Musharbash paid to USAP did not have anything to do with USAP's purportedly supracompetitive contract rates. In other words, even if Mr. Musharbash's allegations about USAP's conduct were true, they still would have had no effect on the prices he paid. Because he thus cannot show that he has Article III standing, this Court "lack[s] subject matter jurisdiction" over this case and should therefore dismiss it under Rule 12(b)(1).

BACKGROUND

A. The Court is familiar with Mr. Musharbash's core allegations regarding USAP's conduct, because it has already reviewed them in *EMT*. There – two months after the FTC filed its Complaint – representatives of a putative class of self-funded payors filed their own tag-along complaint, likewise alleging a "multi-year anticompetitive scheme perpetrated by USAP and Welsh Carson," "a private equity firm" that had allegedly "helped create USAP," "to monopolize hospital anesthesia services in Texas." *EMT*, ECF No. 104 at 1. In an order filed September 27, 2024, the Court dismissed all claims against the Welsh Carson entities but permitted the *EMT* plaintiffs to proceed with claims under Section 2 of the Sherman Act and Section 7 of the

Clayton Act (focused on USAP's long-consummated acquisitions) and Section 1 of the Sherman Act (focused on alleged "price fixing" agreements between USAP and other anesthesia providers). *Id.* at 21.

On January 9, 2025, Mr. Musharbash filed his Complaint.[1] He alleges that both the FTC case and the *EMT* case concern "substantially the same misconduct as that which [he] alleges here." Compl. ¶¶ 189-90 (stating same regarding the FTC and *EMT* cases, respectively). He alleges that USAP's conduct has "caused Mr. Musharbash and other patients with commercial insurance plans" to "pay artificially inflated prices for hospital-only anesthesia services" in Houston, Dallas, Fort Worth, and Austin. *Id.* ¶ 10. Specifically, he alleges that "[w]ith respect to commercially insured patients, the price a patient pays for services under a healthcare plan is determined both by the price his or her insurer negotiated with the provider and the specific features of his or her health insurance plan." *Id.* ¶ 79. He then alleges that USAP's conduct "increased its negotiating leverage," which made USAP "able to raise its reimbursement rate" from insurers. *Id.* ¶ 116; *see also id.* ¶ 168 (alleging that USAP's conduct led to "additional negotiating leverage with insurers, resulting in higher costs for insured patients.").

Mr. Musharbash seeks to represent a putative class of individuals who "paid all or part of the cost of hospital-only anesthesia services provided by USAP" in Houston, Dallas, Forth Worth, and Austin. *Id.* ¶ 193.

Mr. Musharbash's standing to pursue this claim rests on a single paragraph in his Complaint. He alleges that he was an insured patient who, after applying his insurance plan's pricing arrangements, "paid USAP $637.10 for anesthesiology services provided at Medical City

[1] After some initial recusals, the matter was assigned to Judge Ellison, who then granted the parties' joint motion to transfer the case to this Court. *See* ECF No. 30.

Dallas Hospital. Insurance paid the remaining $135.39 that he was billed." *Id.* ¶ 14. He alleges no other theory of standing – for example, he does not allege that USAP restricted output in any way that prevented him from receiving treatment or that it provided him poor quality care on any occasion.

B. USAP has investigated Mr. Musharbash's claim and determined that the conduct he challenges – conduct that allegedly gave USAP improper market power allowing it to force insurers to accept supracompetitive reimbursement rates – had no effect on the rate that he paid.

Mr. Musharbash received the treatment he identifies in the Complaint [redacted]. *See* Decl. of Frank Burns ¶ 4, Ex. A. USAP then billed Mr. Musharbash's insurer, [redacted]. *See id.* ¶ 5. At the time, Mr. Musharbash was insured through an "exchange" plan that [redacted] offered on the Affordable Care Act Marketplace. *Id.* ¶ 4. [redacted] treats its exchange plans as outside the terms of [redacted] contract – meaning out-of-network – with USAP. *See id.* Because [redacted] treated Mr. Musharbash's plan as out-of-network, it did not pay USAP a contractually negotiated price. *See id.* ¶¶ 6-7. Instead, [redacted] unilaterally determined an amount that it would pay for the claim. *See id.* ¶ 6. That amount (the "allowed" amount) was [redacted]. *See id.*

USAP disputed the amount it received from [redacted] for Mr. Musharbash's claim. *See id.* ¶ 8. In June 2024, [redacted] and USAP resolved the dispute, and [redacted] agreed to reimburse USAP an additional [redacted] for Mr. Musharbash's claim. *See id.* ¶ 9. Mr. Musharbash's contribution remained the same. *See id.*

The amount that Mr. Musharbash personally paid on the sole occasion alleged in his Complaint therefore had nothing to do with the allegedly anticompetitive rates that USAP had negotiated with [redacted]. Instead, the amount that Mr. Musharbash paid to USAP was unilaterally set by his insurer, pursuant to the procedures under which his insurance plan covers out-of-network claims. *See id.* ¶ 4 (detailing same). To put it simply, Mr. Musharbash's payment to USAP was completely unrelated to the rates contained in the USAP-[redacted] contract.

LEGAL STANDARD

"A motion filed under Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge the subject matter jurisdiction of the district court to hear a case." *Lane v. City of Houston*, 2024 WL 4354116, at *1 (S.D. Tex. Sept. 30, 2024). Standing is one of the "essential components of federal subject-matter jurisdiction," and is appropriately "challenged under Rule 12(b)(1)." *Id.* (quoting *Rosa v. American Water Heater Co.*, 177 F. Supp. 3d 1025, 1032 (S.D. Tex. 2016)).

Rule 12(b)(1) permits a Defendant to mount a "factual attack" on a plaintiff's standing allegations: rather than taking those allegations as true, the parties may submit, and the Court must consider, "supporting affidavits, testimony, or other admissible evidence." *Flaming v. Alvin Cmty. Coll.*, 2018 WL 4600644, at *3 (S.D. Tex. Sept. 24, 2018) (Bennett, J.) (granting a "factual attack" motion upon finding the case moot), *aff'd*, 777 F. App'x 771 (5th Cir. 2019). The Court "is permitted to dismiss based on '(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Deutsch v. Annis Enters., Inc.*, 882 F.3d 169, 173 n.1 (5th Cir. 2018) (quoting *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009)); *see also Higgins v. Texas Dep't of Health Servs.*, 801 F. Supp. 2d 541, 550 (W.D.

Tex. 2011) (noting that the court should not decide "jurisdictional fact issues" that "overlap with the merits" before summary judgment, but nevertheless dismissing based both on the complaint and on undisputed extra-complaint evidence).

ARGUMENT

Mr. Musharbash has not suffered any injury fairly traceable to USAP's alleged anticompetitive conduct. He therefore lacks Article III standing, and the Court should dismiss the case for lack of jurisdiction.

"To prove Article III standing," Mr. Musharbash "must show that" he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Ortiz v. American Airlines, Inc.*, 5 F.4th 622, 628 (5th Cir. 2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)); *accord Lujan*, 504 U.S. at 560-61 (alleged injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court") (cleaned up). If the Court finds Mr. Musharbash has not carried that burden as to all of those requirements, it must dismiss the case. *See*, *e.g.*, *In re ESO Sols., Inc. Breach Litig.*, 2024 WL 4456703, at *5 (W.D. Tex. July 30, 2024) (granting Rule 12(b)(1) motion in relevant part where plaintiffs had failed to allege "specific facts linking the" harm they alleged "to" the challenged conduct).

Mr. Musharbash cannot carry that burden. On (again) his own account, his theory of anticompetitive harm is the same one asserted in the FTC and *EMT* cases: that "USAP's dominance in the Houston, Dallas-Fort Worth, and Austin MSAs gives it enormous bargaining power over insurers," that "USAP" has "exploited its leverage" over insurers "to raise prices," and that various agreements with other anesthesia practices likewise "enabled USAP to further

increase prices." Compl. ¶¶ 7-9. It is the reimbursement-rate increases allegedly caused by this conduct – what he calls "USAP's consolidation scheme and agreements with competitors" – that the Complaint alleges "caused Mr. Musharbash and other patients with commercial insurance plans, as well as uninsured individuals, to pay artificially inflated prices." *Id.* ¶ 10; *see also id.* ¶ 88 ("The price paid by a patient with a commercial healthcare plan is determined in part by the price that patient's insurer negotiates with the provider. Once that negotiated price is established, the patient's out-of-pocket expense is determined by applying the specific details of his or her health insurance plan, including the deductible, copay, coinsurance, and other factors.").

But as set forth above and in the accompanying Declaration of Frank Burns, the rate Mr. Musharbash paid had nothing to do with USAP's leverage over any insurer. On the contrary, his insurer, [redacted], treated his claim as an out-of-network claim – the amount Mr. Musharbash paid reflects the amount [redacted] unilaterally chose to initially allow for his claim in conjunction with his co-pay and deductible obligations as determined by [redacted], wholly apart from its dealings with USAP. Put differently, the contractual rates [redacted] and USAP agreed to for in-network claims – the rates that might plausibly be affected by the conduct alleged in the complaint – had no bearing on the amount Mr. Musharbash was charged and paid. This means "nothing about" Mr. Musharbash's "situation would change" but for the conduct challenged in the complaint, so his "injury is not fairly traceable to [that] conduct." *Reule v. Jackson*, 114 F.4th 360, 367-68 (5th Cir. 2024); *see also*, *e.g.*, *TF-Harbor, LLC v. City of Rockwall, Tex.*, 18 F. Supp. 3d 810, 821 (N.D. Tex. 2014) (explaining that "where the third party's conduct is not sufficiently dependent on the challenged action, courts generally hold that the plaintiff has not

satisfied the fairly traceable element"), *aff'd sub nom. TF-Harbor, L.L.C. v. City of Rockwall Tex.*, 592 F. App'x 323 (5th Cir. 2015)

Demartini v. Microsoft Corp., 662 F. Supp. 3d 1055 (N.D. Cal. 2023), another private case drafting behind a merger enforcement action, is instructive. There, after the FTC had sued to block Microsoft's acquisition of Activision, video gamers filed their own case pursuing a similar claim. *See id.* at 1059. The plaintiffs asserted that they had "standing to pursue a claim based on the" theory that the acquisition would harm a relevant "labor market." *Id.* at 1061. The court rejected that argument and granted Microsoft's Rule 12(b)(1) motion in relevant part. *See id.* Relying on the settled principle that "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek," the court explained that the plaintiffs lacked standing to pursue a labor-market claim because their alleged harms (as video game consumers) were unrelated to any "reduced competition in the labor market." *Id.* (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). The same result follows even more clearly here, as the *only* harm Mr. Musharbash alleges (his payment to USAP) likewise is unrelated to any reduced competition affecting the reimbursement rates USAP negotiates with insurers.

Mr. Musharbash may have a different, professional interest in this case. He is an "antimonopoly" lawyer by trade, and he has urged others to treat the FTC's Complaint as a "roadmap" for future litigation against private equity firms.[2] But the Complaint omits that

[2] *See About Us*, Antimonopoly Counsel, https://bit.ly/4ium8OI (providing Musharbash's biography and stating of his firm: "We are lawyers, policy experts, and investigators dedicated to helping ordinary people stand up to monopolistic corporations and their abuses of power in rural America."); Basel Musharbash, *Did a Private Equity Fire Truck Roll-Up Worsen the L.A. Fires*, BIG by Matt Stoller (Jan. 25, 2025), https://bit.ly/428Crey ("And if anyone wants guidance on what a lawsuit against AIP could look like, Lina Khan left us a roadmap just before she stepped

professional interest, and even if the Complaint had alleged it, Mr. Musharbash's professional interest in this case also supplies no basis for Article III standing. As he surely is aware, he can sue only for injuries that he personally has suffered and can fairly trace to USAP's conduct – not to act as a private attorney general directing litigation he hopes will become a "roadmap" for other cases. *See Federal Defs. of San Diego, Inc. v. U.S. Sent'g Comm'n*, 680 F. Supp. 26, 28 (D.D.C. 1988) (dismissing criminal defense lawyers' challenge to sentencing guidelines given "their lack of standing in their own right," rather than as advocates); *see also Dimartini*, 662 F. Supp. 3d at 1061 (explaining that the Clayton Act authorizes damages and injunctive relief only for the plaintiff's own interests).

In short, the rate Mr. Musharbash paid was not, and could not have been, determined by the reimbursement rates in his insurer's contracts with USAP. He therefore lacks Article III standing to sue based on conduct that allegedly inflated rates he never paid.

CONCLUSION

The Court should dismiss the Complaint and the case.

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down from the FTC last week – when she sued private-equity giant Welsh Carson for rolling up Texas anesthesiology practices to drive up the price of anesthesia services to Texas patients.").

Dated: March 17, 2025

Respectfully submitted,

/s/ *Geoffrey M. Klineberg*

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CERTIFICATE OF CONFERENCE

On March 6, 2025, counsel for the U.S. Anesthesia Partners, Inc. conferred with Plaintiff's counsel by email regarding this motion. Plaintiff is opposed to the relief requested herein.

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

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2025, I filed the foregoing document with the Court and served it on opposing counsel through the Court's CM/ECF system. All counsel of record are registered ECF users.

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

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MUSHARBASH, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC. et al. Defendants.	**FILED UNDER SEAL** Case No.: 4:25-cv-00116

DECLARATION OF FRANK BURNS

Pursuant to 28 U.S.C. § 1746, I, Frank Burns, hereby declare:

1. I joined U.S. Anesthesia Partners, Inc. ("USAP") in 2014 and am currently the Chief Administrative Officer. As Chief Administrative Officer, I am responsible for revenue cycle management operations as well as data analytics and service delivery. I have more than thirty years of healthcare management experience, with a focus on driving financial and operational performance.

2. I have reviewed the complaint filed in *Musharbash v. U.S. Anesthesia Partners, Inc.*, No. 4:25-cv-00116 (S.D. Tex. Jan. 9, 2025), Doc. No. 1. I understand that Basel Musharbash has filed antitrust claims against USAP on behalf of himself and others who "paid all or part of the cost of hospital-only anesthesia services provided by USAP" in Houston, Dallas, Fort Worth, or Austin. Compl. ¶ 193. I understand that the complaint alleges that USAP, through a series of acquisitions and other conduct, raised its reimbursement rates with health insurance companies, which in turn "caused Mr. Musharbash and other patients with commercial insurance plans" to "pay artificially inflated prices for hospital-only anesthesia services" in these cities. *Id.* ¶ 10. And I understand the complaint alleges that "Mr. Musharbash paid USAP

$637.10 for anesthesiology services provided at Medical City Dallas Hospital," with insurance paying "the remaining $135.39 that he was billed." *Id.* ¶ 14.

3. I have investigated Mr. Musharbash's claim. The amount Mr. Musharbash paid USAP has nothing to do with U.S. Anesthesia Partners of Texas, P.A.'s ("USAP-Texas") contract rate with his insurer, [redacted].

4. USAP's records show that a USAP-Texas provider treated Mr. Musharbash [redacted]. Mr. Musharbash was insured through an "exchange" plan offered by [redacted] on the Affordable Care Act Marketplace. [redacted] treats these exchange plans as out-of-network and therefore outside of the terms of [redacted] contract with USAP-Texas.

5. USAP billed [redacted]. A true and correct copy of USAP's billing record for the claim is attached to this declaration as Exhibit A.

6. [redacted] initially processed the claim as out-of-network [redacted]. A true and correct copy of the Explanation of Benefits for Mr. Musharbash's claim dated April 12, 2024 is attached to this declaration as Exhibit B.

7. The allowed amount as well as the amount assigned to Mr. Musharbash were based on federal and/or state balance billing regulations, according to the Explanation of Benefits. These amounts were not based on any contracted rate between USAP-Texas and [redacted].

8. USAP disputed the amount it received from [redacted] for Mr. Musharbash's claim. In 2024, USAP initiated Texas Independent Dispute Resolution against [redacted] to recover the outstanding amount on Mr. Musharbash's claim.

9. On June 6, 2024, USAP and [redacted] agreed to resolve the dispute. As part of the resolution, [redacted]. This reimbursement occurred by [redacted]. Attached to this declaration as Exhibit C are true and correct images of the Texas Department of Insurance's online portal showing the resolved claim. Mr. Musharbash's contribution remained the same. A true and correct copy of his revised Explanation of Benefits dated June 25, 2024 is attached to this declaration as Exhibit D.

10. The amount that Mr. Musharbash paid for the services he received was determined by the amount [redacted] unilaterally chose to initially allow for his claim in conjunction with his co-pay and deductible obligations as determined by [redacted]; it has no connection with the rate that USAP or USAP-Texas receives from [redacted] under their contract.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 17, 2025

Frank Burns

Frank Burns

Signature: Frank Burns
Frank Burns (Mar 17, 2025 15:28 CDT)

Email: frank.burns@usap.com

Exhibit A

FILED UNDER SEAL

Exhibit B

FILED UNDER SEAL

Exhibit C

FILED UNDER SEAL

Exhibit D

FILED UNDER SEAL