**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| BASEL MUSHARBASH, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. 4:25-cv-116<br><br>**FILED UNDER SEAL** |

**PLAINTIFF BASEL MUSHARBASH'S OPPOSITION TO U.S. ANESTHESIA PARTNERS, INC.'S MOTION TO DISMISS**

Plaintiff Basel Musharbash alleges that Defendant U.S. Anesthesia Partners, Inc. ("USAP") monopolized hospital-only anesthesia markets, enabling it to raise prices for anesthesia services, and that Plaintiff, a patient, paid a portion of those inflated prices. USAP's motion to dismiss disregards those allegations and improperly attacks the merits of Plaintiff's claim using a Rule 12(b)(1) motion, without competent evidence, asserting that Plaintiff's payment was unaffected by USAP's monopolization and elevation of prices. USAP's motion ignores the nature of Plaintiff's claims, disregards the Fifth Circuit standard for merits-overlapping jurisdictional challenges, and fails to rebut Plaintiff's allegations. USAP's motion is properly considered a merits challenge under Rule 12(b)(6) or (at most) a facial challenge under Rule 12(b)(1), both of which require the

Court to presume Plaintiff's allegations are true. Such a challenge fails, as Plaintiff plausibly alleges supracompetitive patient prices caused by USAP's monopolization. Finally, other evidence, submitted herewith, refutes USAP's core assertion that it played no role in determining the price charged to and paid by Mr. Musharbash, thus defeating any purported factual challenge as well.

**BACKGROUND**

Plaintiff Basel Musharbash alleges that he directly paid USAP $637.10 for anesthesia services provided to him at Medical City Dallas Hospital. Compl. ¶ 14. Plaintiff's allegations are based on personal knowledge and uncontroverted documentary evidence. *See* Declaration of Plaintiff Basel Musharbash ("Musharbash Decl.") ¶¶ 1–6. In April 2024, Mr. Musharbash received an Explanation of Benefits Statement from his insurer, [redacted], documenting how his payment obligation was calculated. The total amount USAP billed for his anesthesia service rendered on [redacted], was $[redacted]; the insurance plan discounts were $[redacted]; the amount allowed was $[redacted] his insurance plan paid $[redacted]; and the amount that he owed to USAP was $637.10. Musharbash Decl. ¶¶ 3–4, Ex. A ([redacted] Explanation of Benefits Statement, [redacted]) at 1–2. Then, USAP billed Mr. Musharbash on May 12, 2024. Musharbash Decl. ¶ 5, Ex. B (USAP Bill, May 12, 2024). Mr. Musharbash paid USAP in full on September 18, 2024. Musharbash Decl. ¶ 6, Ex. C (Musharbash's Payment to USAP, Sept. 18, 2024) at 1.

Plaintiff alleges that USAP's consolidation scheme and agreements with competitors caused him to pay artificially inflated prices for hospital-only anesthesia services. Compl. ¶¶ 10, 206, 215–16, 222, 227–28, 236–37, 242, 246, 251, 255. He seeks to represent himself and a class of similarly situated plaintiffs, to recover damages and obtain injunctive and declaratory relief. *Id.* ¶¶ 10, 192–93, 208, 215–16, 222, 227–28, 236–37, 242, 246, 251, 255.

## LEGAL STANDARD

A plaintiff has standing if he establishes that (1) he suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical;" (2) that injury is "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;" and (3) it is likely "that the injury will be redressed by a favorable decision." *Parada v. Sandhill Shores Prop. Owners Ass'n*, 604 F. Supp. 3d 567, 576 (S.D. Tex. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

A defendant can lodge either a facial or a factual attack to a court's subject matter jurisdiction. A facial attack challenges "whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction," and the allegations in the complaint are presumed to be true. *Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981). "A factual attack on the subject matter jurisdiction of the court, however, challenges the facts on which jurisdiction depends." *Id.* A plaintiff rebuts a factual attack by providing preponderant evidence that the court has subject matter jurisdiction. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

## ARGUMENT

Plaintiff has alleged an injury caused by USAP and thus has standing. USAP's monopolization of hospital-only anesthesia services has eliminated meaningful competition in the alleged markets, enabling it to charge supracompetitive prices. USAP argues that Plaintiff's claim depends solely on USAP's ability to negotiate increased reimbursement rates from insurers—but Plaintiff's claim is not so limited. The Complaint alleges that USAP's monopolization increased prices in general, including the price from which the amount of Mr. Musharbash's ultimate

payment was derived. The Complaint is replete with allegations that USAP's consolidation scheme has resulted in increased prices to patients overall. USAP's efforts to rewrite the Complaint fail.

## I. Plaintiff Alleges that USAP's Conduct Unlawfully Raised the Prices for Hospital-Only Anesthesia Services.

Defendant USAP misconstrues Plaintiff's well-pled claims to argue that Plaintiff's insurance somehow insulates him from any antitrust harm. Defendant's factual argument, which should be rejected at the pleading stage for the reasons set forth herein, ignores the unassailable fact that Plaintiff alleges he paid artificially inflated prices for hospital-only anesthesia services, regardless of his insurance coverage, and that USAP's conduct inflated prices overall, including the "list price" from which Plaintiff's out-of-pocket payment was derived. USAP's "strawman" argument, therefore, fails.

USAP's motion contests Mr. Musharbash's allegations that he suffered an injury-in-fact that is traceable to USAP's anticompetitive conduct and does not challenge redressability. *See* Mot. at 6. "[E]conomic injury is a quintessential injury upon which to base standing." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (citing *Barlow v. Collins*, 397 U.S. 159 (1970)). "[A]ntitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset." *Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 27 (1st Cir. 2015) (citing *Adams v. Mills*, 286 U.S. 397, 407 (1932)). Insured patients who directly purchase services from healthcare providers are injured by the inflated costs of those services. *See Rozema v. Marshfield Clinic*, 1997 WL 416292, at *9 (W.D. Wis. Mar. 10, 1997) (Patient plaintiffs established antitrust standing by alleging "that they are all purchasers of physician services from defendants[']" clinic and "were injured because the prices of physician services were raised, fixed, pegged or stabilized.").

While "Article III requires a causal connection between the plaintiff's injury and the defendant's challenged conduct, it doesn't require a showing of proximate cause or that the defendant's actions are the very last step in the chain of causation." *Roake v. Brumley*, --- F. Supp. 3d ---, 2024 WL 4746342, at *24 (M.D. La. Nov. 12, 2024) (quoting *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019)). Instead, "an indirect causal relationship will suffice, so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." *Campaign v. Miss. Dep't of Hum. Servs.*, 175 F. Supp. 3d 691, 707 (S.D. Miss. 2016) (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009)). Allegations that a defendant's conduct contributed to a plaintiff's injury are sufficient. *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010).

Plaintiff alleges that the price Mr. Musharbash paid was "artificially inflated" due to "USAP's consolidation scheme and agreements with competitors." Compl. ¶ 10. The Complaint further asserts that USAP's consolidation scheme raised prices overall, which affected the price directly paid by Plaintiff and members of the Class. *See, e.g.*, *id.* ¶ 1 ("For over a decade, Defendants U.S. Anesthesia Partners, Inc. . . . and Welsh Carson engaged in a scheme to monopolize hospital anesthesia services in Texas, drive up prices, and increase their profits."); *id.* ¶ 41 ("[E]ach acquisition would increase USAP's market power and ability to raise prices."); *id.* ¶ 159 ("Despite regular price increases, USAP's market share only increased because it was unthreatened by competition."); *id.* ¶¶ 215, 222, 227, 236, 242, 251 (identifying "higher prices for hospital-only anesthesia services than they otherwise would have" paid as the antitrust injury suffered by Plaintiff and others similarly situated).[1] That USAP's conduct also affected patient

[1] *See also id.* ¶ 5 ("USAP's strategy has diminished the quality of anesthesiology services, while also increasing prices."); *id.* ¶¶ 99, 106 (alleging "USAP's ability to raise prices after each acquisition without sustaining a corresponding loss in patient volume demonstrates that a

prices derived from in-network reimbursement rates, in addition to overall prices and other aspects of the price calculation that ultimately caused Plaintiff to pay an inflated price, is not a basis to dismiss Plaintiff's claim.[2]

Courts consistently hold that anticompetitive conduct that inflates an initial price, even if that price is later reduced, supports a finding of injury-in-fact. *See, e.g.*, *In re Indus. Diamonds Antitrust Litig.,* 167 F.R.D. 374, 383 (S.D.N.Y. 1996) ("[I]f a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser that negotiated an individual price suffered some injury.") (collecting cases).[3] "The theory that underlies these decisions is, of course, that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market." *Id.*; *see also In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 252 (S.D. Tex. 1978) (quoting expert stating that subsequent variations in price "are not inconsistent with the

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hypothetical monopolist" in each of the MSAs "could profitably impose small but significant non-transitory price increases."); *id.* ¶¶ 98, 111, 119, 142 (similar); *id.* ¶ 164 ("USAP exhibited a singular focus on amassing market share that degraded the quality of hospital-only anesthesia services.").

[2] No doubt USAP's monopolization scheme has also inflated the reimbursement rates negotiated with insurers. *See, e.g.*, *id.* ¶ 4 ("USAP aimed to consolidate dominant market share by acquiring competitors. It would then use its negotiating leverage to raise the price of anesthesia services."); *id.* ¶ 8 ("Upon each acquisition, USAP raised prices to its higher reimbursement rate and continued to increase prices. These price increases were not accompanied by quality improvements."); *id.* ¶ 32 (alleging USAP selected Greater Houston Anesthesiology as its initial acquisition because it "had the 'best rates'" and USAP "would be able to spread higher reimbursement rates to other practices it acquired."); *id.* ¶¶ 39, 96 (similar); *id.* ¶¶ 44, 52, 55, 57, 59–62, 65, 67–70, 105, 111 (similar).

[3] *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 696 n.19 (D. Minn. 1995); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 689 (N.D. Ga. 1991); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 578 (E.D. Pa. 1984); *In Re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 306–07 (E.D. Pa. 1980); *Hedges Enters., Inc. v. Cont'l Grp., Inc.*, 81 F.R.D. 461, 475 (E.D. Pa. 1979); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1040–41; *In Re Screws Antitrust Litig.*, 91 F.R.D. 52, 55 (D. Mass. 1981).

establishment or maintenance of an artificially inflated general price level, *since the artificially inflated general price level is the point from which all such price variations start*") (emphasis in original). And where a defendant's anticompetitive conduct affected the price determination process and resulted in a price higher than the plaintiff would have paid, courts have found injury supporting standing. *See Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 59 (S.D.N.Y. 2016) (holding injury established where an inflated "benchmark rate . . . [was] used as a component of [the] price" paid by the plaintiff) (collecting cases).

Mr. Musharbash's allegation that USAP's anticompetitive conduct "artificially inflated prices for hospital-only anesthesia services" and that he paid a higher price as a result is sufficient to establish his Article III standing. His allegations encompass increases in both the initial prices levied against commercially insured and uninsured patients, before any further reductions, and the extent to which USAP's consolidation of the relevant markets affected the amount these patients ultimately paid under the reimbursement calculation, including for out-of-network charges. Even if Mr. Musharbash's insurance plan limited the amount he had to pay, based on applicable billing regulations or otherwise, that does not erase the fact that those amounts could have been lower had USAP not inflated prices overall through its unlawful conduct.

## II. USAP Improperly Raises an Indirect Attack on the Merits of Plaintiff's Claim.

USAP styles its motion as a challenge to Plaintiff's "Article III standing," but that is a façade. USAP's real argument is that Plaintiff cannot prove elements of his claim—that he paid an inflated price resulting from USAP's misconduct. *See* Mot. at 2 ("USAP has investigated Mr. Musharbash's narrow standing allegations . . . and determined that the amount Mr. Musharbash paid to USAP did not have anything to do with USAP's purportedly supracompetitive contract rates."). This argument concerns causation and damages, elements that Plaintiff must prove to the jury at trial. *See, e.g.*, *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 852 (5th Cir. 1981) (Antitrust

plaintiffs "must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage."). Thus, USAP's motion challenges the merits of Plaintiff's claims. Courts in the Fifth Circuit reserve the resolution of such challenges until after discovery.

USAP ignores Fifth Circuit precedent on how to treat jurisdictional challenges that overlap with the elements of a plaintiff's claim. "[W]here issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits." *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004). In addition to promoting judicial economy,

> This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides . . . a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) (for failure to state a claim upon which relief can be granted) or Rule 56 (summary judgment)—both of which place greater restrictions on the district court's discretion.

*Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981)). "Accordingly, dismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery, should be granted sparingly." *Chatham Condo. Ass'ns v. Century Vill., Inc.*, 597 F.2d 1002, 1012 (5th Cir. 1979); *see also, e.g.*, *Gulf Marine Fabricators, LP v. ATP Innovator*, 2018 WL 1536638, at *3 (S.D. Tex. Jan. 17, 2018) ("In other words, where the question of jurisdiction is intertwined with the merits of the case, the proper course of action is to reserve both the jurisdictional question and the merits until the parties have a chance to conduct discovery.").

A district court may make its own factual determinations only when the jurisdictional facts involve matters separate from the plaintiff's claims themselves, as was the case in this Court's *Flaming v. Alvin Community College* case. 2018 WL 4600644, at *3 (S.D. Tex. Sept. 24, 2018)

(dismissing pro se § 1983 case because prisoner-student's claims regarding school policies were mooted by his graduation). "In contrast, if a factual attack on subject matter jurisdiction also implicates an element of the cause of action, the action should not be dismissed unless the alleged claim is immaterial or is wholly insubstantial and frivolous." *Union Pac. R.R. Co. v. Harris Cnty., Tex.*, 790 F. Supp. 2d 568, 573 (S.D. Tex. 2011) (internal marks omitted).

USAP's attack—challenging whether Mr. Musharbash was in fact damaged by Defendants' antitrust violations—is a paradigmatic attack on the merits of a claim. USAP contends that Mr. Musharbash "is not entitled to actual damages," and, therefore, "confuses two separate inquiries: (1) the merits, whether [Mr. Musharbash] sufficiently stated a claim; and (2) jurisdiction, whether the court has power to reach the merits of [Mr. Musharbash]'s claim." *See Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 608 (5th Cir. 2014). Put simply, to "render a decision on whether [Mr. Musharbash] is entitled to a particular type of relief—in this case actual damages—is to decide the merits of the case," so a "Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction is not the proper mechanism [for this] challenge." *Id.* Otherwise, not just USAP's challenge, but "any Rule 12(b)(6) motion" could be "restyled as a Rule 12(b)(1) standing motion" by contending that the plaintiff lacks standing because he or she cannot prove entitlement to recover. *Griffin v. HSBC Mortg. Servs., Inc.*, 2015 WL 4041657, at *3 (N.D. Miss. July 1, 2015) (quoting *Curtis v. Cenlar FSB*, 2013 WL 5995582, at *2 (S.D.N.Y. Nov. 12, 2013)).

Unsurprisingly, USAP cites no cases where a court allowed a "factual attack" on an antitrust plaintiff's allegations of harm and causation. To the contrary, it is "the well-established principle in this Circuit that premature dismissals of antitrust claims for lack of subject matter jurisdiction are not favored 'where the factual and jurisdictional issues are completely intermeshed[.]'" *Chatham Condo. Assocs.*, 597 F.2d at 1011 (quoting *McBeath v. Inter-Am.*

*Citizens for Decency Comm.*, 374 F.2d 359, 363 (5th Cir. 1967)). USAP's supposedly "instructive" case, *Demartini v. Microsoft Corp.*, was not a factual attack at all. 662 F. Supp. 3d 1055, 1061 (N.D. Cal. 2023). Instead, the court dismissed the relevant claim because the complaint itself contained no allegation that the plaintiffs would be harmed in the labor market. *See id.* ("Plaintiffs do not contend the alleged anticompetitive effects in the labor market will damage them; thus, they do not have standing to pursue such claim."). Here, the opposite is true: Plaintiff specifically and plausibly alleges that USAP's anticompetitive conduct has lessened competition in the relevant market and that he has already been harmed by overcharges in that same market. Compl. ¶¶ 14, 215, 227, 236, 242, 251.

USAP's motion is plainly an "indirect attack" on the merits of Plaintiff's claims, and as such it should be subject to the standards for a motion to dismiss under Rule 12(b)(6)—i.e., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). USAP knows it cannot meet those standards—both because this Court already applied that standard in the *Electrical Medical Trust* ("*EMT*") case against USAP and because Mr. Musharbash's allegations here readily meet the low pleading-stage threshold for Article III injury and damages. *See Elec. Med. Tr. v. U.S. Anesthesia Partners, Inc.*, 2024 WL 5274650, at *7 (S.D. Tex. Sept. 27, 2024) ("At this stage of the case, where the Court accepts Plaintiffs' allegations as true, the Court finds that Plaintiffs have sufficiently alleged that they are direct purchasers with standing to pursue their antitrust claims."). Indeed, USAP does not even attempt to challenge the adequacy of Mr. Musharbash's allegations under Rule 12(b)(6), which is the only standard that should apply.

USAP's attempt to repackage its failed standing challenge as a "factual attack" via an (inadmissible) declaration should be rejected. "Because the jurisdictional question and the merits of Plaintiffs claim are 'intertwined,' that question can be addressed, if necessary, at a later

procedural stage." *Kipp Flores Architects, LLC v. Mid-Continent Cas. Co.*, 2015 WL 10557922, at *8 (S.D. Tex. Mar. 13, 2015), *report and recommendation adopted*, 2015 WL 12778803 (S.D. Tex. June 5, 2015).

**III. USAP Fails to Properly Raise a Factual Attack on the Court's Jurisdiction.**

USAP's rule 12(b)(1) motion is deficient for another reason. USAP's motion, based solely on the declaration of a USAP employee, fails to support its arguments with competent evidence showing that Mr. Musharbash's payment could not have been lower absent USAP's monopolization.

Unable to challenge the threshold elements of Plaintiff's standing, USAP attempts to muddy the water through a declaration from its Chief Administrative Officer, Frank Burns. According to USAP's CAO, [redacted] determined the amount Plaintiff paid and, therefore, he could not be harmed by USAP's conduct. Burns Decl. ¶ 10. This is the only evidence USAP offers that purports to controvert Plaintiff's allegations that USAP's monopoly power played a role in inflating the price he paid. Because this affidavit is not based on personal knowledge, it is not competent evidence and is insufficient to support a factual challenge. Accordingly, USAP fails to raise a factual challenge to this Court's jurisdiction.[4]

"Merely attaching affidavits and the like does not create a factual attack unless those affidavits contradict or challenge a fact necessary for jurisdiction." *Quinan v. Jet Lending, LLC*, 2022 WL 716668, at *3 n.3 (S.D. Tex. Mar. 10, 2022) (quoting *Compass Bank v. Veytia*, 2011 WL 6046530, at *4 (W.D. Tex. Dec. 5, 2011)); *see also Lifesize, Inc. v. Chimene*, 2017 WL 1532609,

[4] The other documents USAP attaches are inapposite to this contention and instead list various "[redacted]" Ex. A, identify the amount billed, the amount allowed, and the division of responsibility for that payment between [redacted] and Mr. Musharbash, and indicate that the [redacted] *See* Exs. B, C, D. Put differently, the attachments show at most that the service was processed out of network.

at *6 (W.D. Tex. Apr. 26, 2017) (treating defendant's jurisdictional attack as "facial" after finding the evidence defendant attached to its motion was "lacking"); *IBEW-NECA Sw. Health & Benefit Fund v. Winstel*, 2006 WL 954010, at *1 (N.D. Tex. Apr. 12, 2006) (treating defendant's motion as a facial attack because "his affidavits do not in any respect challenge as a factual matter that the Fund is an ERISA plan").

A valid affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify to the matters stated. *See* Fed. R. Evid. 602; *see also* Fed. R. Civ. P. 56(c)(4). As the Fifth Circuit has repeatedly held, an affidavit cannot meet this requirement simply by stating that its conclusions are based on personal knowledge. *See, e.g.*, *Meadaa v. K.A.P. Enters., L.L.C.*, 756 F.3d 875, 881 (5th Cir. 2014). "Rather, the affiant must provide the district court with sufficient information to allow the latter to conclude that the affiant's assertions are indeed based on such knowledge." *Id.* Because a "defendant making a factual attack on a complaint," purportedly under Rule 12(b)(1), may support that attack only with competent "affidavits, testimony or other *admissible* evidence," *Teamer v. Napolitano*, 2012 WL 1551309, at *4 (S.D. Tex. May 1, 2012) (emphasis added), an affidavit from an affiant without personal knowledge is ineffectual. An affidavit that includes a "single, conclusory statement denying Plaintiffs' allegations" is likewise "hardly sufficient to lodge a factual attack on jurisdiction." *Daily Wire, LLC v. U.S. Dep't of State*, 733 F. Supp. 3d 566, 581 (E.D. Tex. 2024).

USAP's Burns declaration is not based on personal knowledge. The declaration lacks any basis to support the notion that Mr. Burns has personal knowledge regarding [redacted] billing and insurance decisions, much less the specific assertions he makes about Mr. Musharbash's bill. Mr. Burns is the Chief Administrative Officer for *USAP* with "thirty years of healthcare management

experience," but there is no indication that he previously worked for [redacted] or even any other insurance company. Burns Decl. ¶ 1. Yet the bulk of his offered testimony is about actions and decisions undertaken by [redacted]:

- "[redacted] treats these exchange plans as out-of-network and, therefore, outside of the terms of [redacted] contract with USAP-Texas." *Id.* ¶ 4.
- "[redacted] initially processed the claim as out-of-network, allowing [redacted] for the claim." *Id.* ¶ 6.
- "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." *Id.* ¶ 10.

Mr. Burns is not a representative of [redacted]; he cannot testify on [redacted] behalf. More importantly, his declaration provides no facts showing he has personal knowledge of the process by which [redacted] determined how much of USAP's monopolistic charge would be paid directly by Mr. Musharbash. Instead, as his declaration makes clear, Mr. Burns reviewed a handful of billing records that someone obtained on the internet regarding Mr. Musharbash's bill, and then sponsored various assertions about what those records purportedly mean and show.

That is inappropriate and inadmissible testimony. The party best positioned to speak to [redacted] role in determining the amount paid by Mr. Musharbash is [redacted].[5] Those facts will need to be obtained via discovery and then weighed by the Court at summary judgment, precisely as outlined above. Mr. Burns's unfounded declaration is an invalid attempt to short circuit that process.

[5] Even if Mr. Burns averred that he learned of [redacted] practices from a representative of [redacted] (which, tellingly, he does not), his declaration would still be inadmissible, as "Rule 602 prevents a witness from testifying about a hearsay statement upon which he has no personal knowledge." *United States v. El-Mezain*, 664 F.3d 467, 495 (5th Cir. 2011); *see also id.* ("It is axiomatic that a witness may not merely repeat the subject matter of a hearsay statement, nor may he rely on inadmissible hearsay as a substitute for his own knowledge.").

Mr. Burns' personal-knowledge problem is compounded by his speculative conclusions on specialized matters of insurance billing regulations. Specifically, he purports to offer testimony regarding "federal and/or state balance billing regulations" and the role they played with respect to Mr. Musharbash's bill. *Id.* ¶ 7. This is the true crux of his opinion: that Mr. Musharbash's share of the bill was determined by regulations rather than by USAP, thus depriving him of standing. But Mr. Burns provides no basis for the Court to conclude that he is qualified or knowledgeable to testify about those regulations, either in general or as specifically applied here.[6]

Worse, his opinion leaves entirely unexplained how the "federal and/or state balance billing regulations" supposedly drove that determination. *Id.* Tellingly, Mr. Burns's "and/or" equivocation fails to even identify which regulations he thinks were involved. Mr. Burns provides no basis—beyond unqualified *ipse dixit*—for his conclusion that the amount balance-billed to Mr. Musharbash was "not based on any contracted rate between USAP-Texas and [redacted]." *Id*. Even if Mr. Burns were qualified to address this subject based on his knowledge and experience, his wholly conclusory and unexplained assertion is still not admissible testimony, much less the sort of testimony that the Court should rely upon in dismissing a case under either Rule 12(b)(1) or 12(b)(6). *See Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987) ("Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.").

The Court should, therefore, disregard Mr. Burns's declaration, which leaves USAP's motion without any valid evidentiary support. A party that files a 12(b)(1) challenge without evidentiary support is deemed to have made a facial, rather than factual, attack on the plaintiff's

[6] Mr. Musharbash's Estimation of Benefits demonstrates only that USAP cannot bill him "for any amount above the copayment, coinsurance and/or deductible." Musharbash Decl. Ex. A, at 2. Mr. Musharbash plausibly alleges that had USAP not been charging anticompetitive prices, he would have had to pay less out of his deductible amount after [redacted] negotiated discounts.

jurisdiction. *See Teamer*, 2012 WL 1551309, at *4 ("A facial attack happens when a defendant files a Rule 12(b)(1) motion without accompanying evidence.") (citing *Paterson*, 644 F.2d at 523). And in a facial attack, allegations in the complaint are taken as true. *Id.* That, in turn, compels the denial of USAP's motion because the Complaint properly alleges that Mr. Musharbash's damages were indeed caused by USAP's anticompetitive behavior. *See* Compl. ¶¶ 14, 215, 227, 236, 242, 251.

## IV. USAP's Facial Challenge to Plaintiff's Standing Fails.

Even if the Court disagrees with the above arguments, USAP's motion should still be treated (and rejected) as a facial challenge. A defendant can raise a factual attack only by controverting a fact necessary for jurisdiction with evidence. *See, e.g.*, *Quinan*, 2022 U.S. Dist. LEXIS 42958, at *7 & n.3. USAP submits no evidence challenging the amount it initially billed for its services, nor its role in setting that amount, nor Mr. Musharbash's allegation that this amount, and consequently the amount he ultimately paid, is supracompetitive. Accordingly, USAP fails to challenge or contradict Mr. Musharbash's allegations that USAP's anticompetitive conduct raised the top-line price for hospital-only anesthesia services. USAP also fails to support its assertion that it played no role in determining the reduction to the amount USAP initially billed for its services.

"When a court evaluates a facial attack to jurisdiction, it must 'look to the sufficiency of the allegations in the complaint because they are presumed to be true. If those jurisdictional allegations are sufficient the complaint stands.'" *Lifesize*, 2017 WL 1532609, at *6 (quoting *Paterson*, 644 F.2d at 523).

USAP's facial challenge fails. USAP's motion repackages its argument, already rejected by this Court, that commercial insurers' role in the transactions at issue defeats Plaintiff's standing. In *EMT*, this Court rejected USAP's argument that "commercial insurers are a middleman, which

precludes Plaintiffs from being direct purchasers." 2024 WL 5274650, at *6. The Court rejected USAP's argument because it misread the *EMT* Plaintiffs' complaint. Those plaintiffs allege not that "commercial insurers purchase services from USAP and then re-sell those services to Plaintiffs" but instead "that they directly reimburse USAP for the healthcare services it provides." *Id.* (internal quotes omitted). Accordingly, "[a]t this stage of the case, where the Court accepts Plaintiffs' allegations as true, the Court finds that Plaintiffs have sufficiently alleged that they are direct purchasers with standing to pursue their antitrust claims." *Id.* at 7.

USAP attempts to revive this failed strategy by focusing on the role commercial insurers play in setting prices. Here, USAP argues Plaintiff's complaint concerns the inflation of only in-network prices. As it did in *EMT*, USAP misreads Plaintiff's complaint. Mr. Musharbash alleges that USAP exerts its monopoly power to inflate both in-network and out-of-network prices. Because USAP does not lodge a factual attack, this Court should accept Plaintiff's allegations as true. Under that standard, Mr. Musharbash specifically and plausibly alleges standing. Regarding injury-in-fact, he alleges that he paid USAP inflated prices for hospital-only anesthesia services. *See* Compl. ¶¶ 215, 222, 227, 236, 242, 151. Regarding traceability, he alleges that USAP set the initial price from which the amount he ultimately paid was derived, and that USAP exerted its monopoly power to inflate these prices. *See* Compl. ¶¶ 1, 41, 159. Put differently, absent USAP's anticompetitive conduct, the price he paid for anesthesia services would have been lower.

## V. Plaintiff's Evidence Also Defeats Any Factual Attack.

Even if USAP properly raises a factual attack—it does not—Plaintiff's attached evidence rebuts Mr. Burns's declaration. The Claims Summary document Mr. Musharbash received from his insurer says that allowed amounts under his plan are arrived at after the "plan negotiates discounts with providers" like USAP. Musharbash Decl., Ex. 1 (Claims Summary). Such

negotiations would depend on USAP's leverage to negotiate with insurers—leverage derived from USAP's monopoly share of the relevant markets. *See, e.g.*, *Industrial Diamonds*, 167 F.R.D. at 383 (collecting cases recognizing that "negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market").[7] Likewise, the Claims Summary document makes clear that, *contra* Mr. Burns, the balance billing regulations here merely provided a *cap* on Mr. Musharbash's ultimate direct payment to USAP after the other pricing-determination steps had played out—all of which were affected by USAP's monopoly power. In other words, the Claims Summary refutes USAP's position that Mr. Musharbash's direct payment obligation was wholly determined by factors beyond USAP's influence or control. Given that USAP has not offered facts proving that the price paid by Mr. Musharbash was unaffected by USAP's monopolization, its motion must fail.[8]

**CONCLUSION**

Because USAP's motion challenges the merits of Plaintiff's claim and is unsupported by competent evidence, it is properly considered under Rule 12(b)(6) or, at most, as a Rule 12(b)(1) facial challenge to jurisdiction. Under both standards, Plaintiff adequately alleges that USAP used its monopoly power to inflate the price he paid for hospital-only anesthesia services. Plaintiff also attaches evidence that refutes USAP's asserted facts. USAP's motion should be denied for all of these reasons.

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[7] USAP also states that it successfully disputed and as a result increased the amount it received from [redacted] for Mr. Musharbash's claim. Burns Decl. ¶¶ 8–9. This further undermines its basis for claiming that [redacted] "unilaterally" set the price paid by Mr. Musharbash and prevents Mr. Burns's affidavit from supporting its factual challenge.

[8] USAP's position is also contrary to its earlier statement to the Court, in the *EMT* case, that the amount of out-of-network payments are resolved through federal and state laws requiring negotiation between insurers and providers and, if unsuccessful, arbitration. USAP Mot. to Dismiss at 4–5, Case No. 4:23-cv-04398, ECF No. 50.

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Respectfully submitted,

*/s/ Barrett H. Reasoner*

Barrett H. Reasoner (Attorney in Charge)
Federal ID No. 14922
State Bar No. 16641980
Brice Wilkinson
Federal ID No. 1277347
State Bar No. 24075281
**GIBBS & BRUNS LLP**
1100 Louisiana, Suite 5300
Houston, TX 77002
Phone: (713) 751-5244
breasoner@gibbsbruns.com
bwilkinson@gibbsbruns.com

Kellie Lerner (Pro Hac Vice)
Harrison McAvoy (Pro Hac Vice)
**SHINDER CANTOR LERNER LLP**
14 Penn Plaza, Fl. 19
New York, NY 10122
Phone: (646) 960-8608
kellie@scl-llp.com
harrison@scl-llp.com

Kimberly A. Justice (Pro Hac Vice)
**FREED KANNER LONDON & MILLEN LLC**
923 Fayette Street
Conshohocken, PA 19428
Phone: (224) 632-4500
kjustice@fklmlaw.com

Justin S. Nematzadeh (Pro Hac Vice)
**NEMATZADEH PLLC**
101 Avenue of the Americas, Suite 909
New York, NY 10013
Phone: (646) 799-6729
jsn@nematlawyers.com

Keagan H. Potts (Pro Hac Vice)
**SHINDER CANTOR LERNER LLP**
600 14th St. NW, 5th Fl.
Washington, DC 20005
Tel.: (646) 960-8601
Fax: (646) 960-8625
kpotts@scl-llp.com

Robert J. Wozniak (Pro Hac Vice)
**FREED KANNER LONDON & MILLEN LLC**
100 Tri-State International Drive, Suite 128
Lincolnshire, IL 60069
Phone: (224) 632-4500
rwozniak@fklmlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2025, the foregoing document was filed with the Court and served on all counsel of record through the Court's electronic filing system.

/s/ *Brice Wilkinson*
Brice Wilkinson

# DECLARATION OF PLAINTIFF BASEL MUSHARBASH IN SUPPORT OF OPPOSITION TO U.S. ANESTHESIA PARTNERS, INC.'S MOTION TO DISMISS

(Filed Under Seal)

# Exhibit A
# (Filed Under Seal)

# Exhibit B
# (Filed Under Seal)

# Exhibit C
# (Filed Under Seal)