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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Mr. Musharbash lacks Article III standing because his sole alleged injury is not "fairly traceable to" the conduct he alleges. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). In response, he claims that USAP's declarant lacks personal knowledge about whether USAP set the rates that he paid it (at 12-13); he is mistaken. He also suggests (at 7-11) that causation is necessarily a merits issue in an antitrust case, but that proposition conflicts with authority USAP cited (Mot. at 8), which he fails to distinguish. As for the claim that USAP's conduct led him to pay higher prices "regardless of his insurance coverage" (at 4), he points to no well-pleaded allegations making that strained theory plausible. The Court should dismiss the case.

ARGUMENT

I. USAP Has Properly Raised a Factual (Not Facial) Challenge to Mr. Musharbash's Standing Allegations (Not the Antitrust Merits)

A. Mr. Musharbash contends (at 11) that Mr. Burns's declaration is not based on personal knowledge because it discusses actions that [redacted] (rather than USAP) took. That is a *non sequitur*. The actions that [redacted] took vis-à-vis USAP, documented in USAP's records, fall

within Mr. Burns' "personal knowledge and experience" as a senior USAP executive (Burns Decl. ¶ 1). *See Rios v. Texas Christian Univ.*, 347 F.R.D. 486, 489 (N.D. Tex. 2024) (citation omitted); *see also Ecological Rts. Found. v. U.S. Env't Prot. Agency*, 541 F. Supp. 3d 34, 47 (D.D.C. 2021) (collecting cases). At a minimum, the fact that the amount Mr. Musharbash paid "has no connection with the rate that [USAP] receives from [redacted] under their contract" is within Mr. Burns' knowledge (Burns Decl. ¶ 10), and that fact suffices to undermine Mr. Musharbash's claim to standing.

Mr. Musharbash cites (at 11-12) cases rejecting "factual" challenges based on evidence that did not contradict the plaintiff's standing allegations. Those cases support USAP because, as he admits elsewhere in his brief (at 9), USAP's evidence does contradict his allegations.

B. Mr. Musharbash claims (at 7-10) that the Court cannot resolve traceability on this Motion because it overlaps with his merits burden to show antitrust injury. But that is contrary to *Demartini v. Microsoft Corp.*, 662 F. Supp. 3d 1055 (N.D. Cal. 2023) (Mot. at 8), which he fails to distinguish. It does not matter that *Demartini* concerned a facial attack (Opp. at 10). Like the plaintiffs in *Demartini*, Mr. Musharbash cannot fairly trace his asserted harm to the conduct he challenges. That is an Article III standing issue, not (just) a merits problem.

Mr. Musharbash relies on cases stating that (i) one who pays an overcharge suffers antitrust injury then and there (at 4), and (ii) if anticompetitive conduct is shown to have affected list pricing, then discounts or other variants on that pricing do not preclude a finding of antitrust injury (at 5-7). Those cases do not excuse antitrust plaintiffs from showing traceability. *See Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337, 346 (7th Cir. 2022) (affirming grant of motion to dismiss for failure to state a claim for failure to plead traceability). The second line is particularly inapt given USAP's evidence that the amount [redacted] chose to pay

(which determined the amount Mr. Musharbash paid) was set by [redacted] unilaterally, independent of USAP's list prices.

Mr. Musharbash argues (at 8) that the Court should not resolve genuine factual disputes on a Rule 12(b)(1) motion if standing and the merits overlap. But as USAP's cited authority shows (Mot. at 5-6), the Court may rely on *undisputed* facts established by materials outside the pleadings. To overcome USAP's factual challenge, Mr. Musharbash thus must meet USAP's evidence with conflicting evidence – not conclusory allegations and speculation. *See*, *e.g.*, *Bazile v. Finance Sys. of Green Bay, Inc.*, 983 F.3d 274, 278 (7th Cir. 2020) ("Once the allegations supporting standing are questioned as a factual matter – either by a party or by the court – the plaintiff must support each controverted element of standing with competent proof[.]" (cleaned up)).

II. Mr. Musharbash Lacks Article III Standing

A. Mr. Musharbash has raised no genuine factual dispute in response to USAP's evidence. His only attempt (at 16-17) depends on a form "Claims Summary" showing the "[redacted]" Opp. Ex. A at 1. He hinges his case on this boilerplate sentence: "[redacted]" *Id.* at 1, 7. That generalization is true, and it does not demonstrate what Mr. Musharbash must show – namely, that the rate he paid was actually negotiated by [redacted] and USAP. Further, the rest of the document (which he ignores) clarifies: "[redacted]" *Id.* at 2

Applicable law, in turn, provides that (absent agreement) insurers must pay out-of-network providers "at the usual and customary rate" – an indeterminate standard that insurers

alone apply. Tex. Ins. Code Sec. 1271.157(b). [redacted], not USAP, unilaterally determined what to pay under that standard (Burns Decl. ¶ 10) and Mr. Musharbash never alleges that USAP had any influence over that payment (USAP did not). Nor does he offer any other theory by which USAP affected the price set by his [redacted] plan (it did not).

B. Mr. Musharbash cannot dodge these many factors outside USAP's control and establish traceability by asserting (at 7) "that [the amount he had to pay] could have been lower had USAP not inflated prices overall." As an initial matter, that is not what he alleges in his Complaint (tellingly, there is no citation). He cannot rewrite his Complaint to allege some other theory of harm in his opposition brief. *Cf. In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504, 566 (S.D. Tex. 2011) ("[I]t is axiomatic that a complaint cannot be amended by briefs in opposition to a motion to dismiss.").

Even if Mr. Musharbash had pleaded a claim that USAP has "increased prices in general," he still would not have Article III standing. That is because an antitrust plaintiff cannot show traceability relying on vague allegations of price increases borne by others; the *plaintiff's* injury must (again) be traceable to the challenged conduct. *See Jones v. Micron Tech. Inc.*, 400 F. Supp. 3d 897, 907 (N.D. Cal. 2019) (granting motion to dismiss for lack of traceability because plaintiffs failed to show "*both* that the supracompetitively-priced [product] *and* its supracompetitive price wended their way into the [downstream products] Plaintiffs purchased" (first emphasis added)); *Los Gatos Mercantile, Inc v. E.I. DuPont De Nemours & Co.*, 2015 WL 4755335, at *13 (N.D. Cal. Aug. 11, 2015) (similar); *In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090, at *7 (D.N.J. Oct. 20, 2011) (similar).

Mr. Musharbash invokes (at 15-16) the Court's motion-to-dismiss opinion in *EMT*. But USAP did not dispute the *EMT* plaintiffs' Article III standing. The decision instead addressed

the distinct question whether plaintiffs had plausibly alleged that they are "direct purchasers" for purposes of the Clayton Act. *See Electrical Med. Tr. v. U.S. Anesthesia Partners, Inc.*, 2024 WL 5274650, at *6 & n.3 (S.D. Tex. Sept. 27, 2024); *see also*, *e.g.*, *Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 270 (3d Cir. 2016) ("[T]he direct purchaser rule represents a policy decision intended to aid the purposes of the antitrust statutes and does not speak to whether there is an Article III case or controversy."). Mr. Musharbash lacks standing to sue USAP, and this Court's *EMT* decision has nothing to say about that.

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At bottom, Mr. Musharbash contends (at 17) "USAP has not offered facts proving that the price paid by [him] was unaffected by USAP's monopolization[.]" It has; but in any event, it is his burden to show standing, not USAP's burden to refute it. He has not carried that burden.

CONCLUSION

The Court should dismiss the Complaint and the case.

Dated: April 14, 2025

Respectfully submitted,

/s/ *Geoffrey M. Klineberg*

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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*
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