UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BASEL MUSHARBASH, Plaintiff, VS. U.S. ANESTHESIA PARTNERS, INC., *et al.*, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 4:25-CV-00116

ORDER

Before the Court are (1) 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's (collectively, "Welsh Carson") Motion to Dismiss (Doc. #35), Plaintiff Basel Musharbash's ("Plaintiff") Response (Doc. #39), and Welsh Carson's Reply (Doc. #46); and (2) Defendant U.S. Anesthesia Partners, Inc.'s ("USAP") Motion to Dismiss for Lack of Subject-Matter Jurisdiction[1] (Doc. #48; Doc. #49), Plaintiff's Response (Doc. #50), and USAP's Reply (Doc. #59). The Court held a hearing on the motions on May 28, 2025, wherein the parties presented oral arguments. Having considered the parties' arguments, the submissions, and the applicable legal authority, the

[1] USAP has filed a Motion to File Under Seal, which asks the Court to permit it to file a sealed version of the Motion to Dismiss for Lack of Subject-Matter Jurisdiction. Doc. #47. Plaintiff has not filed a response to the Motion to File Under Seal, which the Court takes "as a representation of no opposition." See S.D. Tex. Local R. 7.4. Thus, the Court will grant the Motion to File Under Seal. Doc. #47. Moreover, the Court notes that USAP has already filed a sealed (Doc. #48) and public (Doc. #49) version of the Motion to Dismiss for Lack of Subject-Matter Jurisdiction. In this Order, the Court cites to the sealed, unredacted version of the motion (Doc. #49).

Court grants Welsh Carson's Motion to Dismiss and denies USAP's Motion to Dismiss.

I. Background

a. Factual Background

This class action lawsuit arises out of an alleged multi-year anticompetitive scheme perpetrated by Welsh Carson and USAP to monopolize hospital anesthesia services in Texas. Doc. #1 ¶ 1. Welsh Carson, a private equity firm, helped create USAP, a physician services organization that offers anesthesia services. *Id.* ¶¶ 2–3. Plaintiff is a Texas resident that paid USAP for anesthesia services provided at a Dallas hospital. *Id.* ¶ 14. According to Plaintiff, he—and the proposed class—have been harmed by Welsh Carson and USAP's alleged misconduct by paying artificially inflated prices for hospital anesthesia services. *Id.* ¶ 206.

1. The Hospital Anesthesia Market

First, some background on the hospital anesthesia market is in order. While medical providers can provide anesthesia services in several healthcare settings, this case concerns "hospital-only anesthesia services" sold to commercially insured and uninsured patients. *Id.* ¶ 71. Hospital-only anesthesia services include inpatient and outpatient anesthesia services that must be provided in a hospital because the patient may require certain medical services only available at a hospital. *Id.* ¶ 73. To provide hospital-only anesthesia services, hospitals can employ their own anesthesiologists or, as relevant here, partner with anesthesia groups like USAP. *See id.* ¶ 77.

The price that commercially insured patients must pay to a medical provider for anesthesia services under a healthcare plan is determined by (1) the price the patient's insurer negotiates with the provider and (2) application of the specific features of the patient's insurance plan, including the deductible, copay, coinsurance, and other factors. *Id.* ¶¶ 79, 88. In negotiating rates with anesthesia providers, the insurers' "main leverage . . . is the threat of network exclusion." *Fed.*

Trade Comm'n v. U.S. Anesthesia Partners, Inc., No. 4:23-CV-03560, 2024 WL 2137649, at *1 (S.D. Tex. May 13, 2024); *see* Doc. #1 ¶ 145. However, insurers also have an incentive to maintain a network of providers in a broad geographic area. Doc. #1 ¶ 145. Thus, the larger the geographic scope that a provider group operates in, the more difficult it is for an insurer to exclude that group from its network. *Id.* In other words, "[i]f a group grows so large that it becomes indispensable, the threat of network removal loses its bite." *Fed. Trade Comm'n*, 2024 WL 2137649, at *1. Uninsured patients are likewise not able to negotiate the prices of hospital-only anesthesiology services, as they are simply charged the full price of the services rendered. Doc. #1 ¶ 80.

2. The Formation of USAP

In early 2012, John Rizzo ("Rizzo"), a former executive at a large national anesthesia group, contacted Welsh Carson partner D. Scott Mackesy ("Mackesy") seeking investors for a new anesthesia practice called New Day Anesthesia ("New Day"), which ultimately became USAP. *Id.* ¶ 24. Rizzo began working with Welsh Carson partner Brian Regan ("Regan") to get Welsh Carson investors on board. *Id.* ¶ 25. Rizzo and Regan explained to Welsh Carson partnership that New Day's goal was to pursue an "anesthesiology consolidation strategy" and build a nationwide presence by consolidating the hospital anesthesia market in certain key areas, including Texas. *Id.* After Rizzo and Regan pitched this concept, Welsh Carson agreed to provide start-up capital, help "develop a market roadmap," and conduct due diligence on "acquisition candidates." *Id.* ¶ 26. Welsh Carson then recruited another healthcare executive, Kristen Bratberg ("Bratberg"), to help found and launch New Day. *Id.* ¶ 27. Bratberg would ultimately become USAP's CEO and sit on USAP's board from its founding in 2012 until December 2021. *Id.* ¶¶ 27, 29.

Welsh Carson, Bratberg, and Rizzo then began pursuing what would ultimately become USAP's first acquisition: Greater Houston Anesthesiology ("GHA")—an anesthesiology provider

group in Houston that was "20 times the size of the second largest local competitor." *Id.* ¶¶ 28–30. On August 13, 2012, New Day was officially incorporated, with Regan, Bratberg, Rizzo, and Mackesy sitting on its Board of Directors. *Id.* ¶ 31. On August 31, 2012, New Day, Welsh Carson, and GHA "agreed to a three-month exclusivity period to negotiate" the potential acquisition. *Id.* During that three-month period, Welsh Carson worked with consultants to determine whether the acquisition of GHA would be prudent and to obtain financing for the deal. *Id.* ¶¶ 32–33. Ultimately, several banks agreed to provide debt financing to New Day. *Id.* Moreover, Defendant Welsh, Carson, Anderson & Stowe XI, L.P. ("Fund XI")—an investment fund—agreed to provide the investment capital to form New Day, at which time it acquired a 50.2% interest in the company and maintained the authority to fill the majority of the Board of Directors (the "Board"). *Id.* ¶¶ 18, 34. After securing this funding, New Day's formation was officially announced on November 19, 2012, under a new name: USAP. *Id.* ¶ 35. On December 12, 2012, USAP acquired GHA. *Id.*

3. USAP's Post-Formation Conduct

After acquiring GHA, USAP sought out other anesthesia practices that already held exclusive contracts with major hospitals. *Id.* ¶¶ 36–38. Thereafter, USAP went on to acquire fifteen other anesthesia practices in Texas. *Id.* ¶¶ 36–70. Each time, USAP increased the providers' reimbursement rates to match GHA's pre-acquisition reimbursement rates—which were "some of the highest in Texas." *Id.* Most of these acquisitions occurred between 2012 and 2018. *Id.* ¶¶ 43–66, 69. However, acquisitions continued and in September 2019, USAP acquired Star Anesthesia ("Star"), and in January 2020, USAP acquired Guardian Anesthesia Services ("Guardian"). *Id.* ¶¶ 68, 70. USAP's acquisitions steadily increased its Texas market share. In 2021, by revenue, USAP held nearly 70% market share in Houston, 68% in Dallas-Fort Worth, and greater than 50% in Austin. *Id.* ¶ 6.

Plaintiff also alleges that, when USAP was unable to acquire competitors, it sought out price-fixing agreements. *Id.* ¶ 169. Under these agreements, independent anesthesia groups gave USAP authority to bill and receive reimbursements for hospital-only anesthesia services. *Id.* USAP would use that billing authority to charge its higher, GHA-level reimbursement rates. *Id.* Plaintiff alleges USAP held three such agreements, two of which were inherited by USAP upon acquiring GHA in 2012 and Pinnacle Anesthesia Consultants in 2014, and one of which was entered by USAP on its own accord in 2014. *Id.* ¶¶ 172–186.

In the several years after USAP's formation in 2012, Fund XI's majority interest in the company declined as equity was issued to new USAP physician partners. *Id.* ¶¶ 18–19. By 2017, Fund XI owned 44.8% of USAP. *Id.* In 2017, Fund XI sold its equity, and Defendant Welsh, Carson, Anderson & Stowe XII, L.P. ("Fund XII") bought a 23% interest in USAP.[2] *Id.* After selling off a large share of its interest, Welsh Carson retained authority to appoint two Board members. *Id.* ¶ 19–21. In 2019 and 2020, those two Board members—Regan and Mackesy—voted to approve the acquisitions of Star and Guardian. *Id.* ¶ 138.

b. Related Pending Lawsuits

1. The FTC Action

On September 21, 2023, the Federal Trade Commission ("FTC") filed suit against Welsh Carson and USAP in this District, and the case is currently pending before the Honorable Kenneth M. Hoyt (the "FTC Action"). *Id.* ¶ 189. The FTC seeks a permanent injunction and other equitable

[2] The Court notes that the Complaint does not plead with clarity the distinction between the various Welsh Carson Defendants, and instead mostly refers to them all collectively. However, as noted by Welsh Carson at the May 28 hearing, there appears to be no dispute that Fund XI was the entity held the initial 50.2% interest in USAP and sold its interest in 2017. Fund XII then separately purchased a 23% interest in USAP in 2017, when Fund XI divested. These facts were also highlighted in the parallel FTC proceeding. *See Fed. Trade Comm'n*, 2024 WL 2137649, at *3.

relief based on "substantially the same misconduct" as Plaintiff alleges in this case. *Id.*

Welsh Carson and USAP sought dismissal of the FTC's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). *Fed. Trade Comm'n*, 2024 WL 2137649, at *3. Relevant to this case, Welsh Carson argued that the FTC could not bring its suit under Section 13(b) of the FTC Act ("Section 13(b)") "because Welsh Carson is not violating antitrust laws, nor is it about to." *Id.* Judge Hoyt agreed, determining that the FTC did not adequately allege that Welsh Carson "is violating" or "is about to violate" antitrust law under Section 13(b) given that "the FTC [did] not allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation.". *Id.* at *3–6. Judge Hoyt explained that "[t]he only sense in which the scheme still exists is that USAP still exists, and that USAP still consolidates the market and reduces competition. But that goes to USAP's violations, not Welsh Carson's." *Id.* As such, Judge Hoyt granted Welsh Carson's motion to dismiss. *Id.* Judge Hoyt denied USAP's motion to dismiss, finding that the FTC had sufficiently alleged its claims. *Id.* at *6–9.

2. The *EMT* Action

On November 20, 2023, a group of employee benefit plans filed a class action complaint against Welsh Carson and USAP, alleging they paid USAP artificially inflated prices for hospital anesthesia services. Doc. #1 ¶ 190. That case is pending before the undersigned and captioned *Electrical Medical Trust et al v. U.S. Anesthesia Partners, Inc.*, Case No. 4:23-cv-4398 (hereinafter, "*EMT*"). Like this case, the allegations in *EMT* are substantially the same as those in the FTC Action.

In *EMT*, both Welsh Carson and USAP sought dismissal under Rule 12(b)(6). *See Elec. Med. Tr. v. U.S. Anesthesia Partners, Inc.*, No. 4:23-CV-04398, 2024 WL 5274650 (S.D. Tex. Sept. 27, 2024). Specifically, Welsh Carson argued that the plaintiffs' claims should be dismissed

under the applicable statute of limitations. *Id.* at *3. In response, the plaintiffs argued their claims were not time-barred because they had alleged a continuing antitrust violation for which Welsh Carson could be held liable because it either (1) was part of a continuing conspiracy with USAP, or (2) formed a "single enterprise" with USAP. *Id.* at *4. This Court rejected both arguments, finding that Welsh Carson and USAP were incapable of conspiring under *Copperweld Corporation v. Independence Tube Corporation*, 467 U.S. 752 (1984) and that the complaint failed to allege Welsh Carson's independent participation in the alleged scheme within the limitations period. *Id.* *4–6. As such, the Court dismissed the plaintiffs' claims against Welsh Carson as time-barred. *Id.* With respect to USAP, the Court found the plaintiffs failed to sufficiently allege a conspiracy to monopolize claim, but denied USAP's motion to dismiss in all other respects. *Id.*

c. Procedural History

On January 9, 2025, Plaintiff filed his Class Action Complaint (the "Complaint") against Welsh Carson and USAP, alleging claims for (1) monopolization under Section 2 of the Sherman Act ("Section 2"), (2) unlawful acquisition under Section 7 of the Clayton Act ("Section 7"), (3) conspiracy to monopolize under Section 2, (4) attempted monopolization under Section 2, (5) horizontal agreement to fix prices under Section 1 of the Sherman Act ("Section 1"), and (6) horizontal agreement to divide market under Section 1. Doc. #1 ¶¶ 210–255. On February 14, 2025, Welsh Carson filed its Motion to Dismiss under Rule 12(b)(6). Doc. #35. On March 17, 2025, USAP filed its Motion to Dismiss for Lack of Subject-Matter Jurisdiction Under Rule 12(b)(1). Doc. #48; Doc. #49. The Court heard oral arguments on the motions on May 28, 2025.

II. Welsh Carson's Motion to Dismiss

a. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state

a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In a Rule 12(b)(6) motion, courts must liberally construe the complaint in favor of the plaintiff and take all well-pleaded facts as true. *Id.* at 662. In addition, all reasonable inferences must be drawn in the plaintiff's favor. *Severance v. Patterson*, 566 F. 3d. 490, 501 (5th Cir. 2009). A well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556. "The court's review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

b. Analysis

In its Motion to Dismiss, Welsh Carson's primary argument is that, as in *EMT*, Plaintiff's claims are time-barred under the applicable statute of limitations. Doc. #35 at 5–14. "The statute of limitations for antitrust claims is four years." *Chandler v. Phoenix Servs., L.L.C.*, 45 F.4th 807, 815 (5th Cir. 2022); *see also* 15 U.S.C. § 15b. Generally, in federal antitrust cases, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures [the plaintiff]." *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). However, the continuing violation exception "permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust violation." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982).

Here, Plaintiff and Welsh Carson agree that the limitations period begins on September 21, 2019—four years before the FTC initiated the FTC Action. Doc. #35 at 6; Doc. #1 ¶ 128; 15 U.S.C. § 16(i). Nearly all of the wrongful conduct alleged in the Complaint occurred prior to September 2019. The only alleged conduct that arguably occurred within the limitations period are USAP's acquisition of Star in September 2019 and its acquisition of Guardian in 2020. But Plaintiff argues that his claims against Welsh Carson are nonetheless timely because (1) Welsh Carson is capable of and did conspire with Rizzo, Bratberg, and GHA to commit antitrust violations through USAP *prior* to the actual formation of USAP; (2) Welsh Carson committed overt acts in furtherance of the conspiracy during the limitations period; (3) Welsh Carson did not withdraw from the conspiracy; and (4) Welsh Carson fraudulently concealed its monopolization scheme, thereby tolling the statute of limitations. *See* Doc. #39 5–14.

1. Conspiracy

Plaintiff alleges that, in 2012, Welsh Carson conspired with Rizzo, Bratberg, and GHA to commit antitrust violations through USAP, after which Welsh Carson took numerous overt acts in furtherance of the conspiracy. *Id.* at 6–10. Welsh Carson, on the other hand, argues that under *Copperweld*, the Complaint fails to allege a conspiracy by "separate economic actors pursuing separate economic interests." Doc. #35 at 10–11 (quoting *Copperweld*, 467 U.S. at 769).

In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [Section] 1 of the Sherman Act," meaning that "a parent and its wholly owned subsidiary "are incapable of conspiring with each other." 467 U.S. 752, 771 (1984); *see also Chandler v. Phoenix Servs.*, No. 7:19-CV-00014-O, 2020 WL 1848047, at *13 (N.D. Tex. Apr. 13, 2020), *aff'd*, 45 F.4th 807 (5th Cir. 2022) (noting that *Copperweld*'s single enterprise theory also applies to Section 2). "Although

Copperweld addressed the specific relationship between a parent company and its wholly owned subsidiary, '[l]ower courts have since applied *Copperweld*'s reasoning (sometimes referred to as the 'single-entity' rule) to a broader variety of economic relationships.'" *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1233 (10th Cir. 2017) (quoting *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005)).

In *American Needle, Inc. v. National Football League*, the Supreme Court expanded on *Copperweld*, holding that "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power." 560 U.S. 183, 194 (2010) (citing *Copperweld*, 467 U.S. at 769). Thus, in determining whether two entities are capable of conspiring with each other, the Supreme Court explained:

> The key is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a contract, combination, or conspiracy *amongst separate economic actors pursuing separate economic interests*, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition.
>
> *Id.* (cleaned up) (emphasis added).

In response to Plaintiff's argument that his claims are not time-barred because Welsh Carson participated in a conspiracy, Welsh Carson primarily relies on this Court's holding in *EMT* that Welsh Carson and USAP were incapable of conspiring under *Copperweld*. 2024 WL 5274650, at *5. But Plaintiff argues that the conspiracy alleged in this case is distinct from the conspiracy alleged by the plaintiffs in *EMT*—which focused on a conspiracy between Welsh Carson and *USAP*, and not a conspiracy between Welsh Carson, Rizzo, Bratberg, and GHA. Doc. #39 at 6–10. Thus, as framed by Plaintiff, the question in this case is how *Copperweld* applies, if

at all, to a supposed conspiracy between Welsh Carson, Rizzo, Bratberg, and GHA.

As an initial matter, the Court notes that the plaintiffs in *EMT* not only relied on substantially the same factual allegations as the instant Complaint, but those plaintiffs also raised the very same theory of an "original" conspiracy that pre-dated the formation of USAP in order to overcome Welsh Carson's *Copperweld* argument. The only arguably meaningful difference is that the Plaintiff in this case has explicitly argued that the conspiracy was not actually between Welsh Carson and USAP, but between Welsh Carson and the individuals and entities that helped form USAP. But even if the Court assumes that this distinction is meaningful, such that *Copperweld* does not apply, Plaintiff's claims against Welsh Carson are still untimely. This is because, as discussed in further detail below, Plaintiff has still failed to allege any overt acts in furtherance of the conspiracy by Welsh Carson that occurred within the limitations period.[3]

2. Continuing Violation

Even assuming *Copperweld* does not apply such that Welsh Carson is capable of forming a conspiracy with Rizzo, Bratberg, and GHA, the next issue is whether Plaintiff has adequately alleged the continuing violation exception, which "permits a cause of action to accrue whenever

[3] The Court notes that Plaintiff's Response to Welsh Carson's Motion to Dismiss makes one cursory argument that Welsh Carson is liable for the acts of USAP as a co-conspirator. Doc. #39 at 8; *see Powers v. Nassau Dev. Corp.*, 753 F.2d 457, 461 (5th Cir. 1985) (noting antirust "conspirators are bound by the acts of any one of them"). Plaintiff's argument in this regard is circular. To overcome this Court's decision in *EMT* that Welsh Carson and USAP *cannot* conspire with each other under *Copperweld*, Plaintiff has argued at length that he is not relying on a conspiracy between Welsh Carson and USAP to support his claims. To the extent Plaintiff *is* asserting such a conspiracy, the Court again finds Welsh Carson and USAP are not capable of conspiring with each other under *Copperweld* because the Complaint does not allege that they are "separate economic actors pursuing separate economic interests." *Copperweld*, 467 U.S. at 769; *Am, Needle*, 560 U.S. at 197; *Top Rank, Inc. v. Haymon*, No. CV154961JFWMRWX, 2015 WL 9948936, at *16 (C.D. Cal. Oct. 16, 2015) (dismissing antitrust claims against an investment firm where it committed "funding, business expertise, and operational supervision" to a company because they were not capable of conspiring under *Copperweld*). Thus, as in *EMT*, Welsh Carson cannot be held liable for USAP's post-limitations conduct based on an alleged conspiracy.

the defendant commits an overt act in furtherance of an antitrust conspiracy." *Kaiser*, 677 F.2d at 1051. In this regard, Plaintiff argues that Welsh Carson committed "overt acts" within the limitations period when Regan and Mackesy voted to approve the Star and Guardian acquisitions in 2019 and 2020. Doc. #39 at 9–10.

As the Court noted in *EMT*, "by the time the Star and Guardian acquisitions occurred, Welsh Carson's involvement with USAP had dwindled considerably." 2024 WL 5274650, at *6. Specifically, Fund XI divested in 2017, at which time Fund XII purchased a 23% interest in the company and retained the ability to appoint two of fourteen Board members. The only distinction between *EMT* and this case is that the Complaint here alleges those two USAP Board members then voted to approve the Star and Guardian acquisitions. But those Board members are presumed to have been acting on behalf of USAP, not on behalf of Welsh Carson. *See United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (noting "an officer or director of both corporations can change hats and represent the two corporations separately"); *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (noting "courts generally presume that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary"). At bottom, the allegations in the present Complaint are admittedly premised on the same set of facts as those in the FTC Action and *EMT*. And in both cases, the Court determined that the plaintiffs failed to "allege any conduct by Welsh Carson in the past six years that is a plausible antitrust violation." *Fed. Trade Comm'n*, 2024 WL 2137649, at *5; *EMT*, 2024 WL 5274650, at *6. The same is true here. Because the Complaint does not allege any conduct by *Welsh Carson* within the limitations period, Plaintiff cannot rely on the continuing violation exception.

3. Fraudulent Concealment

Plaintiff also argues that his claims against Welsh Carson are not time-barred because the

Complaint plausibly alleges that the statute of limitations has been tolled by Welsh Carson's fraudulent concealment of its antitrust violations. Doc. #39 at 11–14. "[T]he fraudulent-concealment doctrine, when applicable, suspends limitations to prevent a defendant from 'concealing a fraud, or . . . committing a fraud in a manner that is concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it.'" *Abecassis v. Wyatt*, 902 F. Supp. 2d 881, 897 (S.D. Tex. 2012) (quoting *Bailey v. Glover*, 88 U.S. 342, 349 (1874)). Fraudulent concealment requires a plaintiff to prove two elements: "first, that the 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." *Rx.com v. Medco Health Sols., Inc.*, 322 F. App'x 394, 397 (5th Cir. 2009) (quoting *Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1528 (5th Cir. 1988)). "To satisfy the first element, the defendants must have engaged in 'affirmative acts of concealment.'" *Id.* (quoting *Allan Constr. Co.*, 851 F.2d at 1531). In addition, "[a]llegations of fraudulent concealment must satisfy" the heightened pleading standards under Rule 9(b). *S.E.C. v. Jackson*, 908 F. Supp. 2d 834, 868 (S.D. Tex. 2012).

Welsh Carson argues that Plaintiff has not plausibly pleaded any "affirmative acts of concealment" by Welsh Carson. Doc. #35 at 12. In his Response, Plaintiff points to press releases issued by USAP in 2014 and 2015, which concerned certain USAP acquisitions and how those acquisitions could benefit consumers. Doc. #39 at 12–13; Doc. #1 ¶ 125. Plaintiff further argues that these press releases can toll the limitations period as to Welsh Carson because tolling as to one co-conspirator (USAP) triggers tolling as to all co-conspirators (Welsh Carson). Doc. #39 at 14. But the Court has already determined that USAP and Welsh Carson are not capable of conspiring under *Copperweld*. *Supra* p. 11 & n.3; *see also EMT*, 2024 WL 5274650, at *4–5. Thus, Plaintiff cannot rely on concealment by USAP to show concealment by Welsh Carson. And

because the Complaint alleges no "affirmative acts of concealment" by Welsh Carson, Plaintiff has failed to plead the applicability of the fraudulent concealment doctrine. As a result, Plaintiff's claims against Welsh Carson are time-barred and the Motion to Dismiss under Rule 12(b)(6) is granted.

III. USAP's Motion to Dismiss for Lack of Subject-Matter Jurisdiction

a. Legal Standard

"A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction tests the court's statutory or constitutional power to adjudicate the case." *Wesolek v. Layton*, 871 F. Supp. 2d 620, 627 (S.D. Tex. 2012) (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)). "The burden of proof for a [Rule] 12(b)(1) motion to dismiss is on the party asserting jurisdiction, and, at the pleading stage, the plaintiff's burden is to allege a plausible set of facts establishing jurisdiction." *Haverkamp v. Linthicum*, 6 F.4th 662, 668 (5th Cir. 2021) (cleaned up). Moreover, "all well-pleaded facts are taken as true and all reasonable inferences must be made in the plaintiff's favor." *Id.* at 668–69. District courts may dismiss a case for lack of subject matter jurisdiction 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." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

b. Analysis

USAP moves to dismiss Plaintiff's claims for lack of subject-matter jurisdiction under Rule 12(b)(1), arguing that Plaintiff has failed to establish Article III standing. Doc. #49. To demonstrate Article III standing, a plaintiff must show: "(1) that he has an injury in fact; (2) that there is a causal connection between his injury and the conduct complained of; and (3) that his

injury will be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The Fifth Circuit recognizes that a motion under Rule 12(b)(1) can present two different types of challenges to standing—one facial, the other factual." *Satanic Temple Inc. v. Young*, 681 F. Supp. 3d 685, 691 (S.D. Tex. 2023). A facial attack on standing concerns whether the factual allegations in the complaint, accepted as true, are sufficient to support jurisdiction, whereas a factual attack gives the district court "discretion to consider any evidence submitted by the parties, such as affidavits, testimony, and documents." *Id.* However, "there are limits to a district court's ability to resolve fact disputes on a Rule 12(b)(1) motion." *Pickett v. Texas Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1029 (5th Cir. 2022). Specifically, "where issues of fact are central both to subject matter jurisdiction and the claim on the merits, . . . 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).

USAP lodges a factual attack on Plaintiff's standing, arguing that Plaintiff's injury is not fairly traceable to any purported anticompetitive conduct by USAP. In support, USAP primarily relies on the Declaration of Frank Burns, USAP's Chief Administrative Officer (the "Burns Declaration"). Doc. #48, Ex. 1. Plaintiff's injury in this case is premised on a single $637.10 payment to USAP for anesthesiology services he received at a Dallas hospital. Doc. #1 ¶ 14. According to the Burns Declaration, this treatment occurred on March 22, 2024, at which time Plaintiff was insured through an "exchange" plan offered by UnitedHealthcare Insurance Company ("UnitedHealthcare") on the Affordable Care Act Marketplace. Doc. #48, Ex. 1 ¶ 5. UnitedHealthcare treats these exchange plans as out-of-network. *Id.* After Plaintiff received treatment, USAP billed UnitedHealthcare $2,871. *Id.* ¶ 5. UnitedHealthcare processed the claim as out-of-network, and thus determined how much it would pay for the claim using "federal and/or

state balance billing regulations." *Id.* ¶¶ 6–7. Ultimately, the amount UnitedHealthcare "allowed" for the claim totaled $772.49, $135.39 of which was paid by UnitedHealthcare and $637.10 of which was paid by Plaintiff. *Id.* ¶ 6. Because the clam was out-of-network, the allowed amount was not based on any contracted rate between USAP and UnitedHealthcare. *Id.* ¶ 7. As a result, USAP argues Plaintiff's injury—the amount he paid to USAP—is not fairly traceable to any anticompetitive conduct by USAP, because the central theory of the Complaint is that USAP artificially inflated the rates for anesthesiology services by acquiring competitors and leveraging its market size to negotiate higher reimbursement rates with insurers. Doc. #48 at 6–7.

In response, Plaintiff argues that USAP improperly attacks the merits of his claims, which is not permitted on a Rule 12(b)(1) motion. Doc. #50 at 7–11. In this regard, the gravamen of USAP's motion is that, according to the Burns Declaration, the price Plaintiff ultimately paid USAP had nothing to do with the anticompetitive conduct alleged in the Complaint. This opinion is not only conclusory, it goes to the heart of the dispute: whether the price Plaintiff paid for anesthesiology services was higher due to USAP's anticompetitive conduct. Indeed, in its Reply brief, USAP seemingly concedes that the standing issue overlaps with the merits. *See* Doc. #59 at 2. The Court finds that, at the Rule 12(b)(1) stage, it is not appropriate resolve the jurisdictional issue presented in USAP's factual attack given that it is intertwined with the merits of this case. *See Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (finding that "a jurisdictional attack intertwined with the merits of an FTCA claim should be treated like any other intertwined attack, thereby making resolution of the jurisdictional issue on a 12(b)(1) motion improper").[4]

[4] This does not foreclose USAP from re-urging its factual attack on Plaintiff's standing at a later stage of the case. *See Texas v. Mayorkas*, No. 6:23-CV-00001, 2023 WL 5616184, at *2 (S.D. Tex. Aug. 29, 2023) ("After careful review, the Court is of the opinion that the question of whether Texas has standing to bring this suit is better resolved at the summary judgment stage where the Court can consider extra-record discovery evidence for standing.").

Thus, the Court looks to the allegations in the Complaint, which must be accepted as true and viewed in a light favorable to Plaintiff. *See Pickett v. Texas Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1031 (5th Cir. 2022). In this regard, Plaintiff alleges that USAP "exploited its leverage" in the market—which was amassed by a monopolization scheme and other anticompetitive conduct—in order to raise prices, causing Plaintiff to pay an artificially inflated price for hospital-only anesthesiology services. Doc. #1 ¶¶ 7–8, 10. These allegations amount to an injury-in-fact traceable to USAP's alleged anticompetitive conduct. Therefore, at this stage in the proceedings, Plaintiff has sufficiently established standing. USAP's Motion to Dismiss for Lack of Subject-Matter Jurisdiction is denied.

IV. Conclusion

In conclusion, the Court finds that Plaintiff's claims against Welsh Carson are time-barred under the applicable statute of limitations. Thus, Welsh Carson's Motion to Dismiss (Doc. #35) is hereby GRANTED and Plaintiff's claims against Welsh Carson are DISMISSED WITH PREJUDICE. USAP's Motion to File Under Seal (Doc. #47) is GRANTED. USAP's Motion to Dismiss for Lack of Subject-Matter Jurisdiction (Doc. #48; Doc. #49) is DENIED.

It is so ORDERED.

AUG 25 2025
Date

The Honorable Alfred H. Bennett
United States District Judge