

## ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

*In the Matter of Welsh Carson, Anderson, and Stowe, File No. 201 0031*

### **I. Introduction**

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Welsh, Carson, Anderson, and Stowe and its affiliates (collectively “Welsh Carson” or “Respondents”). The Consent Agreement settles charges that Welsh Carson violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, by conspiring to monopolize or controlling, directing, or encouraging the illegal consolidation of hospital-only anesthesia services in Texas.

Welsh Carson is a private equity firm that invests in and manages a portfolio of companies in the healthcare and technology sectors. It runs this business using various corporate entities that share personnel and resources, including WCAS Management Corporation, WCAS Management, LLC, WCAS Management LP, WCAS XII Associates, LLC, and funds such as WCAS XI. All these various corporate entities act together as a single company, and are referred to as “Welsh Carson” or “the Firm.”

In 2012, Welsh Carson created U.S. Anesthesia Partners, Inc. (“USAP”) to consolidate anesthesia practice groups in Texas. Working together with Welsh Carson, USAP acquired at least 15 competitors in Houston, Dallas, Austin, and across Texas, significantly raising the prices each charged for anesthesia services. Through 2017, Welsh Carson maintained control of USAP through its majority ownership stake or because it held the voting rights of almost all of the other shareholders. Today, Welsh Carson remains USAP’s single-largest shareholder and the most influential member of its board of directors.

The purpose of the Consent Agreement is to protect the public from Welsh Carson’s potential future anticompetitive conduct and deter others from engaging in similar anticompetitive conduct. Under the terms of the proposed Decision and Order (“Order”), Welsh Carson will limit its involvement with USAP and must notify—or in certain circumstances obtain approval from—the Commission prior to making acquisitions or investments in anesthesia and other hospital-based physician practices.

The Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or finalize the proposed Order. The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the

Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms.

## **II. The Complaint**

According to the complaint, Welsh Carson devised a scheme in 2012 to consolidate the market for hospital-based anesthesia services. It planned to create a company, buy up a critical mass of anesthesia practices in key markets, and then leverage the resulting market power to raise prices to those that pay for health care, including patients, employers, insurance companies, and others. Welsh Carson created USAP to be the vehicle for its anesthesia consolidation scheme, identified acquisition targets, conducted due diligence, provided or secured financing, and helped to develop the strategy to execute price increases with insurers. Under Welsh Carson's control, direction, and encouragement, USAP acquired 15 competitors in Texas.

With Welsh Carson's support, USAP controlled between 60-70 percent of the Houston and Dallas hospital-only anesthesia markets by 2020 and increased its rates with each of the major commercial insurers in Texas. Over time, these increases have cost Texas employers and insurers tens of millions of dollars. In addition to Texas, USAP maintains a presence in at least ten other states, including Florida, Colorado, Washington, Arizona, Indiana, Tennessee, Nevada, Maryland, Kansas, and Oklahoma.

Welsh Carson has also invested in other hospital-based physician specialties, including emergency medicine, neonatology, and radiology. For example, U.S. Radiology Specialists was founded jointly by Welsh Carson and one of the nation's largest radiology groups, and today covers over 80 hospitals in more than a dozen states. Pediatrix, a neonatology practice, was a Welsh Carson portfolio company that acquired over 100 neonatology practice groups. The complaint alleges that Welsh Carson's history of investing in hospital-based practices supports a reasonable likelihood that Welsh Carson will engage in similar or related conduct in the future.

The Complaint alleges monopolization and conspiracy to monopolize claims under Section 5 of the FTC Act, as well as violations of Section 7 of the Clayton Act.

## **III. The Proposed Order**

The proposed Order seeks to limit Respondents' ongoing involvement in USAP and to prevent recurrence of the conduct alleged in the Complaint, including in other geographic areas and in other hospital-based physician practices with competitive dynamics similar to hospital-only anesthesia services. To accomplish these goals, the proposed Order incorporates Respondents' unique structure into the proposed Order's definitions and operative provisions and as a result, the proposed Order consolidates ownership interests, voting rights, and board appointments across the various Respondents. For example, the definition of each non-fund Respondent aggregates control across WCAS Parties (excluding entities held by a fund) to

determine whether any entity is part of the Respondent, and control over future investments (see Sections III and IV of the proposed Order) will be determined across all WCAS Parties.

Section II of the proposed Order limits Respondents' ongoing ownership rights and entanglements with USAP. Paragraphs II.A and II.B freeze Respondents' current investment in USAP and reduce their board representation to a single seat—who cannot serve as chairman—thereby preventing Welsh Carson from retaking control over USAP and reducing Respondents' ability to benefit from USAP's monopoly position in Texas. To remove any unnecessary connections between Respondents and USAP, Paragraph II.C further requires Respondents, upon a written request from USAP, to terminate (without penalty) contracts under which Respondents provide services to USAP.

To prevent recurrence of Respondents' alleged conduct in anesthesia markets, Section III of the proposed Order requires Respondents to obtain prior approval or provide the Commission notice before completing certain transactions. Such provisions alert the Commission about transactions before they occur, so that the Commission can attempt to stop future anticompetitive serial acquisitions in their incipiency. Prior approval and notice provisions can be particularly important for acquisitions that fall below HSR reporting thresholds, like many of those anticompetitive transactions alleged in the Complaint. Because Respondents have historically invested in anesthesia practices in multiple states, Section III extends nationwide. Paragraph III.A requires prior approval for specified transactions in which Respondents plan to acquire an ownership interest in an anesthesia practice, either through a Respondent itself or through an anesthesia business in which Respondents already have a controlling interest. Paragraph III.B applies when an anesthesia business in which Respondents have a non-controlling ownership interest (other than passive interest of less than ten percent) makes certain acquisitions, and requires Respondents to provide notice to the Commission.

Given Welsh Carson's consolidation of other hospital-based practices, the proposed Order extends beyond anesthesia investments. Specifically, Section IV of the proposed Order requires Respondents to give the Commission advance notice and pause closing for 30 days for certain investments in other hospital-based physician groups. Section IV applies when Respondents invest directly in a relevant practice or through an entity in which Respondents have more than 50% of ownership, voting rights, or board appointments.

For transactions covered by Sections III and IV, the proposed Order applies whether Respondents make the investment through an existing investment fund or an investment fund created in the future. Section V gives the Commission notice if any such future fund will be operated by a manager other than one of the Respondents.

Section VI gives the Commission certain discovery rights with respect to its ongoing litigation against USAP in federal court in Texas.

Finally, Sections VII, VIII, and IX of the proposed Order include provisions designed to ensure the effectiveness of the relief, including: obtaining information from Respondents that they are complying with the Order; requiring Respondents to submit compliance reports; and requiring Respondents to maintain specific written communications.