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**STATE OF WASHINGTON
WHATCOM COUNTY SUPERIOR COURT**

THE STATE OF WASHINGTON,

PLAINTIFF,

v.

BELLINGHAM ANESTHESIA
ASSOCIATES, P.S.

DEFENDANT.

NO. **21 2 00882 37**
COMPLAINT FOR INJUNCTIVE
AND MONETARY RELIEF UNDER
THE CONSUMER PROTECTION
ACT

I. INTRODUCTION

1.1. The State of Washington, by and through its attorneys Robert W. Ferguson, Attorney General, and Rahul Rao and Travis Kennedy, Assistant Attorneys General, brings this action against Bellingham Anesthesia Associates, P.S. (BAA) for violating the Washington Consumer Protection Act (CPA).

II. PARTIES

2.1. Plaintiff is the State of Washington by and through its Attorney General. The State of Washington has a quasi-sovereign interest in maintaining the integrity of markets and protecting its citizens from anticompetitive and unlawful practices, and supporting the general welfare of its citizens and its economy. The State has authority to bring this action under the CPA, RCW 19.86.080.

2.2. Defendant Bellingham Anesthesia Associates, P.S., is a Washington for-profit, physician-owned medical practice specializing in the delivery of anesthesia services for medical

CIVIL COMPLAINT
BELLINGHAM ANESTHESIA
ASSOCIATES



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WHATCOM COUNTY SUPERIOR COURT**

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2.2. Defendant Bellingham Anesthesia Associates, P.S., is a Washington for-profit, physician-owned medical practice specializing in the delivery of anesthesia services for medical

1 procedures, with its principal place of business in Bellingham, Whatcom County, Washington.
2 BAA provides anesthesia services in Whatcom, Skagit, San Juan, and northern Snohomish
3 counties.

4 III. JURISDICTION

5 3.1. The State files this complaint under the Consumer Protection Act,
6 RCW 19.86.080.

7 3.2. This Court has personal jurisdiction because Defendant is a Washington
8 professional service corporation that does business in the State of Washington, and whose
9 activities were intended to, and did have, a substantial and foreseeable effect on Washington
10 State trade and commerce.

11 IV. VENUE

12 4.1. Whatcom County Superior Court is the appropriate venue because BAA's
13 principal place of business is in Bellingham in Whatcom County, and the acts giving rise to this
14 action occurred in Whatcom County.

15 V. NATURE OF THE CASE

16 5.1. This action challenges BAA's practice of using both (1) exclusive agreements
17 with certain health care facilities to provide anesthesia services that limits would-be competitors'
18 access to certain medical facilities, and; (2) non-competes with shareholder- and employed-
19 physicians that unreasonably exclude ex-BAA doctors from the Whatcom County and Skagit
20 County markets.

21 5.2. The combination of these two agreements has foreclosed the Whatcom and Skagit
22 County markets to competitors who seek to provide anesthesia services, giving BAA an illegal
23 monopoly in these geographic and product markets.

24 A. Background Information on Monopoly and Single-Firm Conduct

25 5.3. The antitrust laws prohibit conduct by a single firm with significant and durable
26 market power that unreasonably restrains competition by creating or maintaining monopoly

1 power. Typically, a single firm with 50% or more market dominance is considered to have
2 significant and durable market power. Conduct that is procompetitive or completely neutral, may
3 be improper and illegal when done by a monopolist if it forecloses the market to new
4 competition.

5 5.4. Non-compete agreements are clauses of employment, partner, or shareholder
6 contracts that prohibit that employee, partner, or shareholder from leaving a firm and competing
7 against it. In the case of physicians, who compete in local geographic markets, non-competes
8 prohibit practicing medicine within a specified geographic area and fixed period of time.
9 Physicians bound by a non-compete who leave their firm must either completely exit the
10 geographic market to work in a community where they may have no ties or relationships, wait
11 until the non-compete has expired, or take a job outside of their practice area or outside medicine
12 entirely.

13 5.5. In general, physician practices use non-competes primarily to deter doctors who
14 exit the group from opening up a competing firm that may be more attractive to the old practice's
15 patients, clients, or other revenue-generating relationships. In a medical practice that provides
16 ancillary services—such as anesthesia—the ancillary service provider views its relationships
17 with primary service providers—such as hospitals, surgical facilities, or surgeons—as its assets.
18 Non-competes seek to secure these relationships by denying departing physicians the
19 opportunity to provide a competing, and possibly better or cheaper, option to those primary
20 service providers.

21 5.6. Non-competes are nearly as common in states that enforce them as in states that
22 do not, demonstrating their prevalence as an anticompetitive tool even when they are illegal or
23 unenforceable.

24 5.7. In the labor market as a whole, non-competes are not correlated with additional
25 benefit to end consumers.
26

1 5.8. The antitrust laws protect competition in upstream labor markets as well as
2 downstream markets for goods and services.

3 5.9. Non-compete agreements suppress labor market competition, thereby artificially
4 limiting turnover. As to medical practices, physicians bound by non-competes are less capable
5 of opening up a smaller medical practice that could provide competing services at lower cost.
6 Similarly, physician non-competes make it harder for competing firms to enter new markets
7 because they artificially restrict the supply of local talent that the potential market entrants can
8 hire.

9 5.10. As noted above, anticompetitive agreements can occur not just in an upstream
10 market like that for labor, but can also occur in a downstream market between a service provider
11 and a facility where the service is performed.

12 5.11. One provision in contracts between healthcare service providers and medical
13 facilities may be for exclusivity. In a healthcare industry context, an exclusive services
14 agreement is one where the medical service provider negotiates for the right to be the exclusive
15 provider of that service at a medical facility in exchange for the group agreeing to provide and
16 manage all aspects of that service within the facility.

17 5.12. These exclusive contracts generally result in that medical services department—
18 say, the anesthesiology department—and associated equipment being closed off to physicians or
19 other providers who are not part of the contracting group.

20 5.13. In a competitive market, certain exclusive contracts may benefit competition in
21 the market in ways that improve competition among different brands of different manufacturers
22 or service providers.

23 5.14. However, when the firm using exclusive contracts is a monopolist, as with BAA,
24 the focus shifts to whether those contracts impede new firms from gaining market share or
25 smaller existing firms from expanding their presence. The monopolist might try to impede the
26 entry or expansion of new competitors because that competition would erode its market position.

1 The antitrust laws prohibit anticompetitive acts by a monopolist that forecloses competition or
2 prevents new products or service providers from reaching consumers.

3 **B. Relevant Markets**

4 5.15. In most instances, assessing whether conduct is anticompetitive first requires
5 defining a relevant antitrust market, consisting of both a product market and a geographic
6 market.

7 5.16. Here, the administration of anesthesia in non-dental medical procedures in
8 Whatcom County and Skagit County is the relevant antitrust market.

9 **1. Product Market**

10 5.17. A product market consists of all the goods and services buyers view as close
11 substitutes.

12 5.18. Anesthesia is a necessary component of many medical procedures, including
13 almost every form of surgery as well as many non-surgical procedures where patient pain
14 management is needed.

15 5.19. In Washington State, anesthesia can be administered by either an anesthesiologist
16 or a certified registered nurse anesthetist (CRNA). Anesthesiologists are medical doctors who
17 specialize in the administration of anesthesia. CRNAs are nurses that work independently to
18 administer anesthesia, or may collaborate with and assist doctors, surgeons, and other medical
19 professionals in anesthesia administration. Because Washington State allows both
20 anesthesiologist and CRNAs to administer anesthesia, both forms of service providers are
21 substitutes for the other.

22 5.20. Although anesthesia is often needed in both medical and dental procedures, and
23 may be performed by the same person, medicine and dentistry are two separate markets. To
24 begin, medical procedures and dental procedures are generally paid for by two different sets of
25 payers—health insurance companies for one, dental insurance companies for the other. More,
26 defendant BAA does not provide anesthesia services to dental facilities or dental patients, instead

1 focusing only on providing anesthesia services for medical procedures. For these reasons, dental
2 anesthesia is excluded from any relevant antitrust market definition in this lawsuit.

3 5.21. Thus, the relevant product market is the administration of anesthesia in non-
4 dental medical procedures by either an anesthesiologist or a CRNA.

5 **2. Geographic Market**

6 5.22. In an antitrust action, an appropriate geographic market is the area of effective
7 competition where buyers can turn for alternate sources of supply.

8 5.23. Whatcom County and Skagit County is the relevant geographic market. BAA is
9 based out of Bellingham, and has a footprint throughout the northwestern part of Washington.
10 In Whatcom and Skagit counties, BAA is the dominant anesthesia service provider.

11 5.24. Payer data and claims submitted by insurance providers that contain patients'
12 residence zip codes establish that patients in Whatcom and Skagit counties strongly prefer to
13 receive medical services requiring anesthesia close to their homes.

14 5.25. Healthcare is inherently localized, and with very few exceptions, patients in need
15 of medical procedures tend to seek local physicians or healthcare facilities. Consistent with that,
16 qualitative evidence indicates that Whatcom County and Skagit County patients prefer to receive
17 care near their homes, rather than driving a longer distance. For example, a patient in Bellingham
18 seeking outpatient knee surgery is not likely to have that procedure done in Bellevue. Similarly,
19 a patient involved in a car accident in Bellingham is most likely not being rushed to an
20 emergency room in Seattle.

21 **C. Defendant Bellingham Anesthesia Associates**

22 5.26. BAA is a physician-only anesthesia practice located in Bellingham with about 48
23 doctors and a practice footprint in Whatcom, Skagit, San Juan, and northern Snohomish counties.
24 In Whatcom and Skagit counties, BAA is the dominant anesthesia provider.

1 5.27. BAA provides anesthesia-services to non-dental medical patients in acute care
2 and non-acute care settings. This includes anesthesia for inpatient surgeries at hospitals,
3 emergency room services, and outpatient procedures.

4 5.28. As a physician-only practice, BAA does not employ or otherwise use non-
5 physician anesthesia providers such as certified registered nurse anesthetists (CRNAs).

6 5.29. Excluding anesthesia provided for dental procedures, in Whatcom and Skagit
7 counties, BAA commands about 90% market share for all physician-administered anesthesia.
8 Along the dense I-5 corridor in Whatcom and Skagit counties, that market share reaches almost
9 100%. The State is aware of only five non-BAA anesthesiologists in Whatcom County. All five
10 are ex-BAA shareholders, who are no longer restricted by a non-compete agreement. During the
11 period of time when the five ex-BAA physicians were subject to restrictions in the non-compete
12 agreement, they could only perform dental or pediatric dental anesthesia in Whatcom or Skagit
13 counties. For those ex-BAA shareholders who were married to surgeons, BAA granted a limited
14 waiver of their non-competes to allow the former shareholders to perform anesthesia on the
15 patients of their respective spouses' practices. For four of the five non-BAA anesthesiologists
16 practicing in Whatcom and Skagit counties, the bulk of their practice continues to be providing
17 anesthesia services to dental or pediatric-dental patients—services BAA does not perform.
18 Opting not to pursue dental anesthesia work, the fifth ex-BAA anesthesiologist, while subject to
19 the non-compete, traveled over 120 miles roundtrip to Everett in Snohomish County to perform
20 anesthesia and also performed limited anesthesia for her husband's surgical patients. This fifth
21 doctor only recently became free of BAA's non-compete restrictions.

22 5.30. That the only non-BAA anesthesiologists in Whatcom County are ex-BAA
23 physicians who now primarily perform dental anesthesia, illustrates the difficulty new
24 competition has in finding opportunities in or avenues to enter the non-dental anesthesia market.

25 5.31. BAA exercises monopoly power in Whatcom and Skagit counties in the provision
26 of physician-administered anesthesia. Even including non-physician CRNAs, BAA continues to

1 have a significant and durable market share well in excess of 50% in both counties. Whatcom
2 County, specifically, has very limited CRNA coverage due to BAA's dominance.

3 **D. BAA's Anti-Competitive Agreements**

4 5.32. As part of its normal business practice, BAA has entered into two different types
5 of agreements that combined have had the effect of foreclosing the market to new competitors.
6 First, BAA requires all of its physicians to sign restrictive non-compete agreements that lock
7 them out of the geographic market for an unreasonably long period of time. And second, BAA
8 has entered into agreements with both acute care and non-acute care facilities to be the exclusive
9 provider of anesthesia services (Facility Contracts).

10 **1. Non-Compete Agreements**

11 5.33. Before the enactment of Washington's new law curbing the use of non-compete
12 agreements, RCW 49.62, BAA required all of its doctors—whether employed or shareholder—
13 to sign three-year non-compete agreements.

14 5.34. After the new law, BAA reduced the restriction to 18 months for employed
15 doctors, the maximum period allowed under the new law. BAA did not, however, change the
16 non-compete's time period for shareholders, leaving it at three years. Most—all but a handful—
17 of BAA's 48 doctors are shareholders.

18 5.35. BAA has enforced the non-compete provision against former physicians,
19 including by reminding them upon exit of the scope of the non-compete and enforcing the non-
20 compete restrictions in arbitration.

21 5.36. BAA has no legitimate business interest justifying the restrictive time frame of
22 the non-compete agreements in question.

23 5.37. Many, if not all, of the doctors who sign BAA's non-compete agreements do not
24 know any trade secrets or other BAA intellectual property, nor are they likely to gain such
25 information in the course of their employment. Even if a BAA doctor did have access to
26 legitimately proprietary information, those secrets could be protected by a less restrictive means.

1 5.38. The temporal restriction in the non-compete agreement of three years for
2 shareholders and 18 months for employed physicians is not reasonable and is designed to
3 preserve BAA's monopoly.

4 **2. Facility Contracts**

5 5.39. BAA is the exclusive provider of anesthesia to the only hospital in Whatcom
6 County, two of the three hospitals in Skagit County, the only hospital in San Juan County, and a
7 hospital in northern Snohomish County.

8 5.40. On top of these hospitals, BAA is also the exclusive provider at a multi-specialty
9 ambulatory surgical center (ASC) and a single-specialty ASC in Bellingham. BAA also provides
10 services to a single-specialty ASC in Skagit County.

11 5.41. While BAA is not the exclusive anesthesia services provider to Bellingham's
12 largest ASC—Pacific Rim Outpatient Surgery Center (PROSC)—it still services over 90% to
13 95% of the anesthesia needs for PROSC's roughly 5,000 annual procedures. At PROSC, by
14 default, surgeries are assigned to BAA, and only by affirmative surgeon request will PROSC
15 assign a non-BAA anesthesiologist or CRNA. An assignment to a non-BAA anesthesia provider
16 happens only 5% to 10% of the time.

17 5.42. Of note, in late 2019, the PeaceHealth healthcare system reached an agreement
18 to purchase PROSC. PeaceHealth-St. Joseph's hospital is an acute care facility in Bellingham,
19 and is the largest hospital in Whatcom County; BAA is the exclusive provider of anesthesia
20 services to this hospital. Ultimately, PeaceHealth and PROSC abandoned that transaction. If,
21 however, that transaction had been consummated, it is possible that BAA's pre-existing
22 exclusive arrangement with St. Joe's Hospital would have given BAA a right or opportunity for
23 an exclusive arrangement with PROSC. Had this situation happened—or if a similar occurrence
24 happens in the future—BAA would be the exclusive provider to all of the dominant surgical
25 facilities in Whatcom County.

1 **E. Market Foreclosure Because of Combination of Non-Compete Agreements and**
2 **Facility Contracts**

3 5.43. BAA’s combined use of non-competes with excessively restrictive time frames
4 and exclusive Facility Contracts where none is needed has the effect of foreclosing the market
5 to new competition.

6 5.44. The primary effect of a three-year non-competes on shareholder physicians and
7 the original three-year and amended 18-month non-competes on employed physicians is to
8 preclude BAA physicians from either spinning off their own, smaller medical practice or to
9 prevent an external anesthesiology practice from entering the market and hiring from the only
10 local pool of qualified anesthesiologists.

11 5.45. Of the five former BAA physicians who stayed in the Bellingham area, four now
12 mainly or exclusively perform dental or pediatric dental anesthesia, a service BAA does not
13 perform and does not consider competition. This continues to be their primary practice even
14 though they are all outside of the non-competes.

15 5.46. To the extent any of the five ex-BAA doctors today perform the type of medical
16 or surgical anesthesia that BAA services, they do so at near *de minimus* levels and mostly for the
17 patients of their respective spouses or a surgeon with whom they have a close personal
18 relationship.

19 5.47. Four of the five ex-BAA physicians were held to the full three years of their non-
20 compete, and were removed from the market—a market for a service where, to ensure patient
21 safety, highly specialized skills must be maintained so as to not atrophy—so long that the barrier
22 to re-entry is almost insurmountably high.

23 5.48. Similarly, BAA’s use of exclusive Facility Contracts where none is needed has
24 foreclosed the market by cutting off potential competitors’ access to medical facilities—i.e.,
25 revenue streams—where anesthesia services are performed.
26

1 5.49. Outside of hospitals and ASCs, the volume of non-dental anesthesia is too low
2 for many firms to profitably compete for market share.

3 5.50. For acute care hospitals with 24/7 emergency needs, there may be reasons for the
4 hospital to secure round-the-clock anesthesia coverage through an exclusivity clause in the
5 Facility Contract.

6 5.51. No comparable justification exists for non-acute care facilities like ASCs or
7 clinics. For these non-acute care facilities, exclusivity simply forecloses a competing firm's
8 access. Indeed, BAA already provides anesthesia services to certain ASCs—such as PROSC,
9 and other smaller single-specialty clinics—without exclusivity. That BAA can profitably service
10 these other non-acute care facilities on a non-exclusive basis shows that BAA does not need
11 exclusivity to provide anesthesia to ASC or clinic patients in Whatcom and Skagit counties.

12 5.52. While exclusive agreements such as those described above exist and may be used
13 to enhance competition in robust markets where multiple firms are all fairly competing, when
14 used by a monopolist like BAA, they do not favor competition. Instead, arrangements like this
15 simply forecloses the market to new competitors.

16 5.53. In a competitive market—whether that competition comes from a spin-off group
17 or an outside practice expanding to Bellingham—firms like BAA would have to compete by
18 providing enhanced services, greater quality of care or patient service, reducing prices, or
19 through other means that would benefit and attract facilities or patients. A competitive market
20 also has the simple effect of giving medical facilities, surgeons, and patients choices on whom
21 they want to perform critical medical services.

22 5.54. By foreclosing the market, BAA has denied medical facilities, surgeons, and
23 patients the choices they would otherwise have in an open, competitive market.

24 **VI. CAUSE OF ACTION – VIOLATION OF RCW 19.86.040**

25 6.1. The State repeats and realleges each and every allegation of Paragraphs 1.1 –
26 5.54, as if fully set forth here.

1 6.2. BAA has unlawfully monopolized the market for anesthesia services in the
2 Whatcom and Skagit County markets in violation of RCW 19.86.040.

3 **VII. PRAYER FOR RELIEF**

4 The State requests that the Court:

5 7.1. Enter judgment in favor of the Plaintiff and against the Defendant;

6 7.2. Adjudicate and decree that the Defendant engaged in the conduct alleged in this
7 complaint;

8 7.3. Find that Defendant's combined use of unreasonably long non-compete
9 agreements and exclusive Facility Contracts with ASCs was done to monopolize and maintain a
10 monopoly for the provision of anesthesia services in Whatcom and Skagit counties in violation
11 of RCW 19.86.040;

12 7.4. Declare that section 2(c), or any other provision explicitly or implicitly
13 suggesting exclusivity, in Defendant's Facility Contract with Bellingham Ambulatory Surgery
14 Center is unenforceable and rescinded;

15 7.5. Declare that section 1, or any other provision explicitly or implicitly suggesting
16 exclusivity, in Defendant's Facility Contract with Cascade Outpatient Spine Center is
17 unenforceable and rescinded;

18 7.6. Enjoin Defendant from including or agreeing to any provision or clause in a
19 Facility Contract with a non-acute care facility located in either Whatcom or Skagit counties that
20 would make or have the effect of making Defendant the exclusive provider of anesthesia services
21 at that non-acute care facility. This injunction would apply to ASCs or other non-acute care
22 facilities associated with or owned by an acute care facility;

23 7.7. Enjoin Defendant from requiring any employed physician to sign a non-compete
24 agreement with a time restriction longer than 9 months, and require Defendant to modify all
25 existing and in-effect non-compete agreements with current or former employed physicians to a
26 term no longer than nine months;

1 7.8. Enjoin Defendant from requiring any shareholder physician to sign a non-
2 compete agreement with a time restriction longer than 12 months, and require Defendant to
3 modify all existing and in-effect non-compete agreements with current or former shareholder
4 physicians to a term no longer than 12 months;

5 7.9. Award an appropriate amount of costs and attorneys' fees; and

6 7.10. Such other relief as this Court finds just and equitable.

7
8 DATED: August 25, 2021.

9 ROBERT W. FERGUSON
10 Attorney General

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12 

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3 the date below as follows:

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11 DATED: August 25, 2021, at Seattle, Washington.

12 

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