No. 20-1007

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GERARD KENNEY, ALEXA JOSHUA, GLEN DELA CRUZ MANALO, and KATHERINE MURRAY-LEISURE
Plaintiffs-Appellants,

v.

AMERICAN BOARD OF INTERNAL MEDICINE
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania No. 18-cv-5260
(The Honorable Robert F. Kelly and The Honorable Wendy Beetlestone)

BRIEF OF DEFENDANT-APPELLEE AMERICAN BOARD OF INTERNAL MEDICINE

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The American Board of Internal Medicine ("ABIM") sets standards for certifying physicians in internal medicine. ABIM certification is considered the gold standard for physician certification in internal medicine. For the last 30 years, ABIM has offered only time-limited certification, which includes ongoing requirements for physicians to maintain the certification. Plaintiffs concede that they do not challenge ABIM's right to determine its own certification standards, yet they seek an entitlement to lifetime certification without meeting the ongoing maintenance requirements.

1. Did the district court properly dismiss plaintiffs' Sherman Act Section 1 tying claim when plaintiffs did not plausibly allege that initial certification and maintenance of certification are separate products capable of being tied rather than components of ABIM's singular certification program?

2. Did the district court properly dismiss plaintiffs' Sherman Act Section 2 claim for monopolization of the alleged market for maintenance of certification when there is no distinct market for maintenance of certification and plaintiffs failed to allege ABIM competed on anything other than the merits of its certification?

3. Did the district court properly dismiss plaintiffs' RICO claim when plaintiffs failed to allege they were directly injured by any party's reliance on

ABIM's supposed misrepresentations about the quality and benefits of its certification program?

4. Did the district court properly conclude that plaintiffs could not state an unjust enrichment claim when plaintiffs chose to maintain their certifications and received the benefits of maintaining the certifications for which they paid?

II. COUNTERSTATEMENT OF THE CASE

A. ABIM's Certification Program

ABIM is a non-profit evaluation organization that since 1936 has established uniform standards for physicians specializing in internal medicine and offered internists the opportunity to earn board certification. Am. Compl. ¶¶ 17, 21-22. ABIM states that its certification is a marker that a physician has the knowledge, skills, and judgment to be board certified. *Id.* ¶¶ 21, 160. An internist can earn ABIM certification by completing educational and training requirements and demonstrating that she meets rigorous standards by passing a certification exam. *Id.* ¶¶ 18-22. Certified internists are called diplomates. Plaintiffs concede that ABIM is entitled to set its own standards and is not required to accept any other products as substitutes for its certifications. Appellants' Br. 10.

ABIM has expanded its certification program over the years to include twenty subspecialties – such as cardiology and gastroenterology – in which internists can become certified in addition to their primary certification in internal

medicine. *Id.* ¶ 3. ABIM is one of twenty-four member boards that make up the American Board of Medical Specialties ("ABMS"). *Id.* ¶ 158. Each member board offers certification in its medical specialty. *Id.* ¶¶ 158, 160.

Board certification is voluntary and is not a requirement of licensure to practice internal medicine in any state. *Id.* ¶¶ 23, 41. Many practicing internists nonetheless choose to pursue ABIM certification, though some cannot meet the requirements. *Id.* ¶ 21. Many, but not all, healthcare institutions, other employers, and insurers have made the independent decision to require board certification to be eligible for admitting privileges or in-network coverage. *Id.* ¶¶ 37-39.

Although ABIM initially issued certifications for life, since 1990 ABIM has issued only time-limited certifications that expire unless the diplomate successfully participates in maintenance of certification ("MOC"), including passing periodic examinations in accordance with standards set by ABIM. *Id.* ¶ 26. All internists who obtained certification from 1990 onward were aware of this continuing requirement at the time they first became certified. *Id.* Internists certified before 1990 were issued certificates without expiration dates and accordingly have been "grandfathered," meaning they are not required to participate in MOC to remain certified. *Id.* ¶ 27.

ABIM requires diplomates, other than those grandfathered, to participate in the MOC program to maintain certification. *Id.* The MOC program requires

educational and self-assessment activities and the successful completion of periodic knowledge assessment examinations, with the option of taking a Knowledge Check-In test every two years or a more substantial examination every ten years. *Id.* ¶¶ 31-34. Diplomates fulfill their on-going educational requirements by completing ABIM-approved Continuing Medical Education ("CME") programs, offered by a variety of independent providers.[1] *Id.* ¶ 54. ABIM has made public statements about the value of its diplomates demonstrating that they are staying current in the field of internal medicine through participation in the MOC program. *Id.* ¶ 135.

The National Board of Physicians and Surgeons ("NBPAS"), an organization with no relationship with ABMS, also offers a maintenance of certification program to internists. *Id.* ¶ 56. NBPAS, however, does not offer initial certification; rather, it requires that physicians obtain initial certification from an ABMS member board. *Id.* ¶ 57. The NBPAS maintenance of certification program requires that physicians complete at least fifty hours of CME every two years. *Id.* Unlike ABIM's MOC program, NBPAS does not require that physicians pass an exam. *Id.* ABIM does not, and plaintiffs concede that ABIM should not "be required to[,] accept any other CPD [continuous professional

[1] Physicians can also use these CME programs to fulfill their licensure requirements.

development] product as a substitute for certifications or MOC." Appellants' Br. 21.

B. Plaintiff Internists

Plaintiffs are three internists who obtained time-limited initial certifications from ABIM, and one who received a time-limited certification in a subspecialty. Plaintiff Gerard Kenney obtained board certifications in internal medicine in 1993 and in gastroenterology in 1995. Am. Compl. ¶ 75. Dr. Kenney alleges he chose to forgo taking the periodic examinations required to maintain his certifications and, as a result, had to forgo an employment offer because the employer required him to maintain ABIM subspecialty certification. *Id.* ¶¶ 75-79.

Plaintiff Alexa Joshua obtained board certification in internal medicine in 2003. *Id.* ¶ 83. Dr. Joshua failed to maintain ABIM certification because, despite participating in MOC, she did not pass an MOC examination. *Id.* ¶ 85. Dr. Joshua contends that, as result of her failure to pass that examination and maintain certification, a hospital revoked her admitting privileges. *Id.* ¶¶ 84-88.

Plaintiff Glen Dela Cruz Manalo obtained board certifications in internal medicine in 1997 and in gastroenterology in 2000. *Id.* ¶ 91. Dr. Manalo chose not to participate in MOC and his internal medicine certification therefore expired in 2007. *Id.* ¶ 93. Dr. Manalo alleges his employer terminated his employment because he did not maintain ABIM certification. *Id.* ¶ 96.

Plaintiff Katherine Murray-Leisure obtained a lifetime board certification in 1984 and a time-limited board certification in infectious disease in 1990. *Id.* ¶ 104. She does not complain of her lifetime board certification, but only of her subspecialty certification. Dr. Murray alleges that she lost one year's income because she did not pass the required MOC examination in 2009 and her hospital required her to maintain her subspecialty certification. *Id.* ¶¶ 107-112. After she passed the examination in 2012, the hospital restored her privileges. *Id.* ¶ 111.

C. Plaintiffs' Claims

In December 2018, plaintiffs brought this suit against ABIM on behalf of themselves and a purported class of all internists required by ABIM to participate in MOC to maintain their certifications. Compl. ¶ 113. Plaintiffs asserted two antitrust claims: tying in violation of Section 1 of the Sherman Act and monopolization in violation of Section 2 of the Sherman Act. *Id.* ¶¶ 121-128. Plaintiffs alleged that the "product markets relevant to this action are the market for initial board certification of internists and the market for maintenance of certification of internists." *Id.* ¶ 46. Plaintiffs claimed ABIM was tying its "initial board certification service" and its "MOC program." *Id.* ¶ 121. Plaintiffs also alleged ABIM had created and maintained "monopoly power in the market for maintenance of certification." *Id.* ¶¶ 126-127. In January 2019, plaintiffs amended their complaint, asserting the same antitrust claims and two additional claims:

violation of Section 1962(c) of the RICO Act and unjust enrichment. Am. Compl. ¶¶ 167-176.

D. Procedural History

1. The District Court's Opinion

On September 26, 2019, Judge Kelly granted ABIM's motion to dismiss. The court dismissed plaintiffs' Section 1 tying and unjust enrichment claims with prejudice and plaintiffs' Section 2 monopolization and RICO claims without prejudice. JA-41. Rather than amend their Section 2 monopolization and RICO claims as the court granted them leave to do, plaintiffs chose to stand on their Amended Complaint. By stipulation, a final judgment was entered on December 6, 2019. JA-4-6.

2. Related Proceedings

After plaintiffs filed this action, the plaintiffs in one of four similar suits filed against ABMS member boards moved to transfer all of the cases pursuant to 28 U.S.C. § 1407 for coordinated pretrial proceedings. The United States Judicial Panel on Multi District Litigation denied the motion. *In re Am. Bd. of Med. Specialties Maintenance of Certification Antitrust Litig.*, Order Denying Transfer, MDL No. 2888 (June 5, 2019). In one of those cases, the district court dismissed the Section 1 tying and Section 2 monopolization claims. *Siva v. Am. Bd. of Radiology*, 418 F. Supp. 3d 264, 279 (N.D. Ill. 2019).

III. SUMMARY OF THE ARGUMENT

ABIM certification is a voluntary program in which plaintiffs chose to participate to demonstrate their qualifications in the field of internal medicine. Board certification is not required to practice medicine. When plaintiffs chose to pursue board certification from ABIM, they knew that participation in MOC would be a continuing requirement for them to remain certified.

Since 1990, ABIM has only offered time-limited certifications that required participation in MOC to maintain certification. This means that ABIM diplomates must demonstrate over time – through the completion of educational activities and passing periodic knowledge assessments – that they are keeping up to date with medical developments. This standard reflects ABIM's judgment that requiring physicians to participate in MOC to maintain their certifications – rather than granting lifetime certifications with no such maintenance requirements – enables ABIM to "to ensure that those it has certified are still able to meet its 'rigorous standards' and stay up-to-date on the general practice of internal medicine." JA-30. While plaintiffs suggest that they do not "contend ABIM should be prevented from determining its own standards, or be required to accept any other CPD product as a substitute for certification or MOC," Appellants' Br. 21, that is exactly what plaintiffs seek. In fact, plaintiffs are attempting to substitute their own standards for ABIM's by demanding that "ABIM not revoke certifications of

internists who do not buy MOC." *Id.* Plaintiffs asked the court to force ABIM to grant them lifetime certifications – something ABIM has not done for 30 years. The district court properly declined to do so.

The district court properly dismissed plaintiffs' Section 1 tying claim because plaintiffs failed to plead factual allegations plausibly demonstrating that MOC and initial board certification are separate products capable of being tied. The district court considered each of plaintiffs' factual allegations and, drawing upon the case law and common sense, rejected plaintiffs' argument that MOC and initial board certification should be considered separate products. Instead, the court concluded that plaintiffs' allegations make clear that there is no demand for MOC separate and apart from the demand for board certification. ABIM offers a single certification program for internists to demonstrate their excellence. That program includes initial certification and MOC. As plaintiffs acknowledge, ABIM is entitled to set its own standards in determining who qualifies for its recognition.

The district court also properly dismissed plaintiffs' Section 2 claim for monopolization of the market for MOC after concluding that plaintiffs' allegations showed there was no separate market for MOC to monopolize. Plaintiffs' Section 2 claim also failed because they did not allege that ABIM engaged in anticompetitive conduct rather than competing on the merits of its certification. When a professional certification group such as ABIM gives a seal of approval, but

its conduct in no way constrains others to follow its recommendations, there is no restraint on competition.

Plaintiffs' other claims were properly dismissed as well. The district court dismissed plaintiffs' fraud-based RICO claim for lack of standing because their claims were too attenuated. Indeed, this Court's recent holding in *Devon Drive Lionville, LP v. Parke Bancorp, Inc.*, confirms that proximate causation under RICO requires reliance, which plaintiffs failed to allege. 791 F. App'x 301, 307 (3d Cir. 2019).

Finally, plaintiffs failed to state an unjust enrichment claim based on their payment of fees to ABIM. They chose to participate in ABIM's program, knowing of its continuing requirements, and they received the benefits of maintaining the certification for which they paid. It is equitable for ABIM to require plaintiffs to meet its standards if they wish to remain certified by ABIM.

For all these reasons, the decision below should be affirmed.

IV. ARGUMENT

A. Standard of Review

This Court's "review of a district court's dismissal of a complaint for failure to state a claim is plenary." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible

on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). Determining whether a complaint states a plausible claim for relief requires that the court "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *see also Kedra v. Schroeter*, 876 F.3d 424, 446 (3d Cir. 2017) (recognizing a court should consider "as a matter of common sense" whether a complaint states a plausible claim) (citing *Iqbal*). While courts "accept the allegations as true," they "are not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007). Further, the court should disregard subjective characterizations and legal conclusions. *See Schuylkill Energy Res Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997) (disregarding assertions that were "belied by both the remaining factual allegations and the law").

Where, as here, plaintiffs do not contend that the district court erred by failing to afford them leave to amend their claims, this Court need only consider whether the district court was correct in holding plaintiffs have failed to state a claim and should not grant relief in the form of leave to amend. *See Klatch-Maynard v. Ent Surgical Assocs. Hazleton Health & Wellness Ctr.*, 404 F. App'x 581, 584 (3d Cir. 2010) ("Klatch's continued insistence on the sufficiency of her amended complaint, and her failure on appeal to even mention amending her

complaint a second time, convince us that affirmance of the District Court's judgment is the proper course.").

B. The District Court Properly Dismissed Plaintiffs' Tying Claim.

Plaintiffs asserted a Sherman Act Section 1 claim, contending that ABIM unlawfully ties "MOC" to "initial board certification." Am. Compl. ¶ 122. That is what they argued throughout the proceedings below. On appeal, plaintiffs argue that ABIM ties MOC, which they now claim is one of many "CPD" products, to "certifications." Appellants' Br. 17. That argument cannot be presented here for the first time, and thus has been waived. But no matter how plaintiffs attempt to defend their tying claim, it fails.

To plead their tying claim, plaintiffs must present factual allegations establishing: (1) there is more than one product – that is, initial board certification and MOC are separate products; (2) the purchase of initial board certification is conditioned on participation in MOC; (3) ABIM has sufficient economic power in the market for initial certification to enable it to restrain trade in a separate market for MOC; and (4) a substantial amount of commerce in the alleged market for MOC is affected. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 18 (1984). The district court held that plaintiffs failed to plausibly allege that MOC and initial certification are separate products. JA-33. The district court's dismissal is consistent with long-standing precedent on tying and should be affirmed.

1. Plaintiffs Have Impermissibly Altered Their Tying Allegations on Appeal.

This Court "has consistently held that it will not consider issues that are raised for the first time on appeal." *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 443 (3d Cir. 1997) (quoting *Harris v. City of Phila.*, 35 F.3d 840, 845 (3d Cir. 1994)). Here, plaintiffs not only present new arguments to support their tying claim on appeal, but also attempt to rewrite key allegations contained in their Amended Complaint: the definitions of the tying and tied products and their markets.

Plaintiffs' attempt to re-write their allegations is improper. Plaintiffs do not argue in their brief that the district court erred by failing to give them leave to amend their tying (or unjust enrichment) claims. Rather than arguing they should have been permitted to amend (or amending the claims that the district court gave them leave to amend), plaintiffs have chosen to stand on their claims as pled. They have thus waived such argument, and the Court need not consider the issue. *See Cuff v. Camden City Sch. Dist.*, 790 F. App'x 413, 419 (3d Cir. 2019) (holding the court "need not reach the issue" where appellant "forfeited [the] issue on appeal" by failing to set it forth in his opening brief).

Despite standing on their allegations, plaintiffs nonetheless change the tying product from "initial board certification" to "certifications" in their briefing. *Compare* Am. Compl. ¶ 3 ("The tying product is ABIM's initial board

certification"), *with* Appellants' Br. 3 ("Certifications are the tying product"). No matter how they attempt to phrase it on appeal, plaintiffs made clear in their Amended Complaint that "[t]his case is about … the market for initial board certification." Am. Compl. ¶ 1. To the extent plaintiffs are trying to obscure that they received time-limited board certification and undercut the district court's conclusion that "[i]nternists are not buying 'initial certification' or 'maintenance of certification,' but rather ABIM certification" by using "certifications" to refer to the tying product, this change is improper on appeal. JA-30.

Plaintiffs likewise attempt to change the tied product market from the market for "maintenance of certification"– which by its very language connotes connection to ABIM's certification–to the market for "CPD," *i.e.*, continuous professional development programs. *Compare* Am. Compl. ¶ 1 ("This case is about … the market for maintenance of certification of internists."), *with* Appellants' Br. 36-37 (arguing that "market structure and practices" show that "[o]ther vendors sell CPD products without selling certifications"). Indeed, on appeal, plaintiffs frame ABIM's MOC as one of many CPD products on the

market.[2] While on appeal plaintiffs use "CPD" over thirty times, they did not use it at all in the briefing below.[3]

This Court's decision in *Queen City* is on point. The district court dismissed the plaintiffs' antitrust claims for failure to allege a relevant market, which the plaintiffs had pled was the "market" for Domino's-approved ingredients and supplies used by franchisees. *Queen City*, 124 F.3d. at 435. On appeal, the plaintiffs asserted a different market, comprised of pizza franchise opportunities. *Id.* at 443. This Court found no reference to a market comprised of pizza franchise opportunities in the pleadings and declined to address plaintiffs' new theory because, "where important and complex issues of law are presented, a far more detailed exposition of argument" before the district court is "required to preserve an issue." *Id.* at 444 (quoting *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 100 (3d Cir. 1990)).

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[2] The Amended Complaint specifically alleges a market limited to MOC products and identifies only one competitor in that space. Am. Compl. ¶ 68. Plaintiffs' argument on appeal that the market should be expanded to all so-called CPD products is directly contradicted by their allegations.

[3] The Amended Complaint uses the term "CPD" in one paragraph – as the official acronym for ABIM's long-defunct Continuous Professional Development Program, which was offered from 1975 to 1980. Am. Compl. ¶ 25.

As in *Queen City*, this Court should disregard plaintiffs' attempts to redefine the relevant products and markets on appeal. The new definitions were neither pled nor presented to the district court and thus plaintiffs failed to provide the "detailed exposition of argument required to preserve [the] issue." *Id.* ("[P]laintiffs have a duty to make the district court aware that they intend to rely on a particular relevant market theory.").

Thus, the Court should consider the sufficiency of the claims in which the tied product purportedly is maintenance of certification and the tying product purportedly is initial board certification, as plaintiffs pled in the Amended Complaint and the district court considered in dismissing plaintiffs' claims.

2. The District Court Properly Concluded That Initial Certification and MOC Were a Single Certification Product, Not Separate Products.

ABIM offers a single product – board certification. The district court agreed, concluding that "[i]nternists are not buying 'initial certification' or 'maintenance of certification,' but rather ABIM certification." JA-30. As the district court reasoned, many hospitals and other employers require ABIM certification. *Id.*; Am. Compl. ¶ 37 (alleging that hospitals and other employers require internists "to be ABIM certified"). Accordingly, plaintiffs did not and could not plausibly allege that there is demand for MOC separate and apart from demand for ABIM certification. Yet plaintiffs now argue that it was "clear error"

for the district court to conclude that ABIM's initial certification and MOC are part of a single certification product because the court "erroneously adopted ABIM's unsubstantiated thesis, contradicted by Plaintiffs' factual allegations[.]" Appellants' Br. 22. The district court's conclusions were based on the allegations and common sense, and thus were proper under *Iqbal* and supported by the relevant case law. *Iqbal*, 556 U.S. at 679; *see also Kedra*, 876 F.3d at 441.

a. There is No Demand for MOC Separate and Apart from the Demand for Board Certification.

Courts routinely reject tying claims when, as here, products are purchased as components of a single product. *See, e.g., Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 704-06 (7th Cir. 1984) (finding a prefabricated building and its name to be "inseparable" components of a single product, and thus, not capable of being tied); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1290 (9th Cir. 1983) (rejecting tying claim in the health insurance context, finding "no separation between the pharmacy benefit and the restrictions on the sources from which drugs can be purchased"). The district court reasoned that, "[b]ecause ABIM offers the certification, it has the right ensure those standards are met. Through offering its own MOC program, ABIM has full control over the standards required to achieve certification." JA-31. The court further noted that "[i]t would entirely alter the nature of the certification if outside vendors could re-certify internists and potentially disrupt the trust hospitals, patients and

insurance companies place on the ABIM certification." *Id.* Rather than argue otherwise, plaintiffs concede these points. Appellants' Br. 21 ("Nor do Plaintiffs contend ABIM should be prevented from determining its own standards, or be required to accept any other CPD product as a substitute for certifications or MOC."). Instead, plaintiffs attempt to create an artificial distinction between the components of ABIM certification, which should be rejected. *See Jack Walters*, 737 F.2d at 703 ("Almost every product can be viewed as a package of component products. . . . But to hold therefore that every composite product is a tie-in … would place industry under a vast antitrust cloud, and has been rejected.").

Since ABIM stopped offering lifetime certification in 1990, it has granted only time-limited certifications that require internists not only to earn initial certification, but also to maintain their ABIM certifications by fulfilling a continuing component of the certification process. The term Maintenance *of Certification* reflects this simple reality. *Siva*, 418 F. Supp. 3d at 275 (holding ABR certification and its MOC program to be "two components of a product sold over time") (internal quotation marks omitted).

The district court appropriately held that MOC is a component of ABIM certification, rather than a separate product, because there is no demand for MOC apart from the demand for ABIM certification. The determination whether separate products exist depends "on the character of the demand for the two

items." *Jefferson Parish*, 466 U.S. at 19. As such, "no tying arrangement can exist unless there is a sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]." *Id*. at 21-22; *Serv. & Training v. Data Gen. Corp.*, 963 F.2d 680, 684 (4th Cir. 1992) ("The purpose of the inquiry into consumer demand is to determine whether there are customers who would, absent an illegal agreement, purchase the tied product without the tying product, and the tying product without the tied product."); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 463 (1992) (finding separate demand for copying machine servicing and parts because "[a]t least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self-service for example, would purchase parts without service"). Plaintiffs must therefore allege that there is demand among internists to purchase MOC without ABIM certification. They cannot. There is no demand for MOC by physicians who were not board certified in the first instance.

Courts routinely dismiss tying claims where, as here, consumer demand for the allegedly tied product is inextricably connected to that of the tying product. In *Kaufman v. Time Warner*, for example, the Second Circuit affirmed dismissal of a tying claim where the plaintiffs alleged that a cable company unlawfully required

purchasers of their cable services also to lease their cable boxes necessary to transmit their cable programming. 836 F.3d 137, 140 (2d Cir. 2016). Despite the plaintiffs' contention in *Kaufman* that there would be a "thriving market" for cable boxes but for the cable company's alleged tying arrangement, the court found that the plaintiffs failed to allege the existence of demand for cable boxes separate and apart from the demand for the cable services. *Id.* at 144-45. Rather, the demand for the two products was intertwined, because "to be useful to a consumer, a cable box must be cable-provider specific, like the keys to a padlock." *Id.* at 142,144 ("[I]f there is no separate market for the allegedly tied product, there can be no fear of leveraging a monopoly in one market to harm competition in a second market. The second market simply does not exist."). Similarly, ABIM's MOC is only useful to internists certified by ABIM. Put another way, physicians who were not board certified would not seek to take the tests that are a required element of MOC.

There is no separate demand for the tied product where consumers make one decision to purchase the product of which it is a component. Thus, in *Kaufman*, in the eyes of a consumer, the market for the cable boxes was identical to that of the cable services. Consumers made the choice to purchase cable services from Time Warner, which entailed purchase of Time Warner cable boxes, and no separate products existed. In *Klamath-Lake*, the Ninth Circuit affirmed that a tying claim failed where there was "no separation" between pharmacy benefits an insured

chose to purchase and the restrictions on the sources from which drugs could be purchased according to those benefits. 701 F.2d at 1290. The court found that consumers "certainly did not consider these as two separate products" because "[i]n deciding whether to buy the pharmacy benefit, they made just one decision[.]" *Id.* And in *Collins v. Associated Pathologists*, the Seventh Circuit found "pathology services [we]re not a separate and distinct product from hospitals services" because "no separate demand exist[ed] for pathological services[.]" 844 F.2d 473, 477 (7th Cir. 1988). Here, internists made just one decision to pursue ABIM certification. That certification, as they have always known, includes initial certification and MOC.

Similarly, in *Casey v. Diet Center, Inc.*, the court rejected a tying claim where the market for the allegedly tied product existed only because of the tying product. 590 F. Supp. 1561, 1563-66 (N.D. Cal. 1984). In *Casey*, franchisees brought a tying claim against a franchise weight loss program, alleging that it unlawfully tied the purchase of proprietary diet tablets to the purchase of a franchise. *Id.* at 1562. The court found the tablets and franchise to be a single product because "the [consumer] demand for the [tablets] is not separate from that for the franchise: it is generated wholly by the franchisee's operation of the franchise … Indeed, the [tablets] may be purchased only by [] franchisees." *Id.* at 1564; *see also SubSolutions, Inc. v. Doctor's Assocs.*, 436 F. Supp. 2d 348, 353-55

(D. Conn. 2006) (rejecting a franchisee's tying claim where there was no demand for a custom point-of-sale ("POS") system separate and apart from the purchase of the franchise itself).

These holdings apply with equal force here. As in *Kaufman* and *Klamath-Lake*, no distinct demand exists for the allegedly tied product. As in *Casey*, demand for MOC exists only because of ABIM certification. This reality is further highlighted by the fact that NBPAS, who plaintiffs allege offers a competing product to MOC, only offers its product to internists who already have ABIM initial certification.

Plaintiffs' attempts to reframe the products and markets cannot change the simple fact that there is no market to "maintain" ABIM certification separate and apart from the market for ABIM certification itself. Plaintiffs try to distract from this glaring deficiency by arguing that demand should be assessed before MOC was introduced. Appellants' Br. 23 (citing *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 469 (7th Cir. 2020)). Their reliance on *Viamedia* for this point is misguided. In *Viamedia*, the products were not inextricably connected. 951 F.3d at 437-38. The alleged tying product was interconnect services (which enabled cable providers to sell advertising targeted to different regional audiences) and the tied product was advertising representation services (which was related to spot advertising). *Id.* at 436-37. Plaintiff alleged that defendant continued to sell the

products independently in some markets; plaintiffs do not make this crucial allegation here. *Id.* at 469-70. As part of its analysis, the court looked at demand for the tying product prior to the challenged contract. *Id.* at 469. Here, however, there is no demand to examine prior to the inception of MOC because the product was, and is, board certification.

Nor do the other cases cited by plaintiffs provide any basis for reversal. None of those cases involves similar substantive allegations and the district court in each either applied the wrong legal test or pleading standard. *See Flora v. Cty. of Luzerne*, 776 F.3d 169, 179 (3d Cir. 2015) (reversing dismissal where "the District Court's decision rest[ed] on an errant reading" of Supreme Court precedent); *Kedra*, 876 F.3d at 446 (reversing because the district court misunderstood the level of culpability required for a finding of deliberate indifference and thereby "imposed a novel and heightened culpability standard on a plaintiff pleading deliberate indifference"); *see also Sweda v. Univ. of Pa.*, 923 F.3d 320, 326 (3d Cir. 2019) (declining "to extend *Twombly*'s antitrust pleading rule to [ERISA] claims" as the district court had done below in error); *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 87 (3d Cir. 1999) ("[T]he District Court should have considered the exhaustion and timeliness defenses presented in this case under Rule 12(b)(6), rather than under Rule 12(b)(1)."). The district court here applied the proper legal test by considering whether plaintiffs plausibly alleged there was

"sufficient demand for the purchase of the tied, or unwanted, product separate from the tying, or wanted product." JA-27 (citing *Jefferson Parish*, 466 U.S. at 21-22).

Because the district court found plaintiffs failed to allege two separate products, it properly dismissed plaintiffs' tying claim. *See Rick-Mik Enters. v. Equilon Enters., LLC*, 532 F.3d 963, 975 (9th Cir. 2008) (affirming dismissal of tying claim after finding "separate products are not at issue"); *see also Queen City*, 124 F.3d at 433 (affirming dismissal of tying claims against a franchisor at the motion to dismiss stage).

b. Decisions in the Franchise Context Make Clear that Products Integral to the Overall Quality of the Brand Are Not Capable of Being Tied.

The district court correctly found that decisions in the franchise context are "very instructive." JA-30 n.2. Courts have consistently reasoned that products that are integral components of the franchise itself cannot be considered separate products to support tying claims. *See, e.g., Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1353-54 (9th Cir. 1982); *SubSolutions*, 436 F. Supp. 2d at 353-55 (rejecting franchisees' tying claim because a customized POS system was not a separate product). Those cases "highlight the importance of allowing the company controlling the product to control the quality of the product." JA-30 n.2. ABIM too should be permitted to control the quality of its certification.

In *Krehl*, the Ninth Circuit rejected franchisees' claim that Baskin-Robbins allegedly tied the purchase of their ice cream to the purchase of the franchise itself. 664 F.2d at 1353-54. The court reasoned that, as Baskin-Robbins' reputation is "utterly dependent" upon the quality of the ice cream sold at its franchises, Baskin-Robbins name and its ice cream were a single product. *Id.* at 1354.

Similarly, the Fourth Circuit in *Principe v. McDonald's Corporation* rejected the franchisees' tying claim, reasoning that a building lease, security deposit note, and a license were not separate products but component parts of the overall franchise package, inseparable from the franchise. 631 F.2d 303, 309-11 (4th Cir. 1980). In so deciding, the court noted that each was a component of the overall "formula" sold to franchisees. *Id.* at 311. And, in *Rick-Mik*, the Ninth Circuit affirmed the dismissal of a tying claim, finding credit-card processing services were not a separate product from franchise gasoline stations. 532 F.3d at 974. The court held "franchises are not a separate and distinct product from … credit-card processing services" where including credit card processing in the franchise "gives Equilon some ability to ensure the quality and reliability of credit card processing[.]" *Id.*

The district court aptly concluded that "[l]ikewise, ABIM has an interest in ensuring that all ABIM-certified internists can meet and maintain the same standards and requirements." JA-30 n.2. MOC is a continuing component of

board certification. Just like the franchisors in *Krehl* and *Principe*, ABIM sells a single formula – its certification of internists – upon which it stakes its reputation.[4] This certification has components – initial certification and MOC – that are inseparable from ABIM certification as a whole. *See Siva*, 418 F. Supp. 3d at 274 ("[W]hat ABR sells to its certified physicians–and, indirectly, to the other industry participants who rely on ABR's credentialing of physicians–is essentially an endorsement based on a formula, including all that it entails, for assessing physicians' knowledge, skill, and understanding.") (internal quotation marks omitted). Similar to the franchisee-franchisor relationship, ABIM shares a relationship with ABIM-certified internists, who hold themselves out to their employers, potential employers, patients, and the public as meeting the standards set by ABIM. Plaintiffs concede, as they must, that the antitrust laws cannot not be used so that ABIM is "prevented from determining its own standards[.]" Appellants' Br. 21. "Otherwise," as the district court noted, "hospitals, insurance companies, and patients would lose faith in the ABIM certification process." JA-

[4] Plaintiffs' argument that the district court "adopt[ed] ABIM's affirmative defenses" by referencing the franchise analogy in a footnote is meritless. Appellants' Br. 45-47. The district court found these cases relevant in deciding whether plaintiffs plausibly alleged that there were two products capable of being tied. JA-30 n.2. In the cases cited by plaintiffs, conversely, the courts had already held, as a matter of law, that the plaintiffs alleged *per se* tying claims. Appellants' Br. 46.

30 n.2. MOC is not a separate product. It is the way in which ABIM ensures its own standards for certification are met. Plaintiffs cannot use the antitrust laws to change those standards.

c. Plaintiffs Fail To Plausibly Allege that MOC and ABIM Certification Are Separate Products.

Plaintiffs failed to allege facts showing a demand for MOC separate from the demand for ABIM board certification. The district court did not, as they allege, "arrogate[] to itself determination of the ultimate factual issue, and simply [take] as true ABIM's arguments rather than Plaintiffs' factual allegations to the contrary." Appellants' Br. 23. The district court considered each of plaintiffs' factual allegations in light of the *Jefferson Parish* "character of demand" test and appropriately concluded that plaintiffs had not pled facts plausibly showing "that ABIM's initial certification and MOC programs are distinct products."[5] JA-33.

[5] Plaintiffs also argue that the district court improperly used a functional analysis to determine that ABIM certification and MOC are components of a single product. Appellants' Br. 40-41. They cite to *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 683-85 (4th Cir. 1992), in which the Fourth Circuit reversed a grant of summary judgment for the defendant because it found, among other things, that the district court ignored evidence that the defendant continued to sell its software (the alleged tying product) to certain customers without support services (the allegedly tied product), and misapplied the *Jefferson Parish* demand test. As explained below, the district court here neither conducted a functional analysis nor ignored plaintiffs' allegations.

i. ABIM Has Always Sold MOC Together with Initial Certification.

Plaintiffs contend that ABIM sold, and continues to sell, MOC separately from initial certification. Appellants' Br. 27-29. This is plainly inaccurate. Since ABIM added a continuing component to its certification program, whether that was voluntary CPD in 1975 or MOC in 1990, it has ***never*** sold that product to internists without ABIM certification.[6] Plaintiffs do not allege otherwise.

The only case plaintiffs cite as support is *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Publications*, 63 F.3d 1540 (10th Cir. 1995). That reliance is misplaced. In that case, the defendants allegedly forced consumers of full-service bar review courses in Colorado also to purchase supplemental Multistate Bar Exam ("MBE") workshops. *Id.* at 1545-48.

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[6] Plaintiffs argue that the district court "got its math wrong" when it found that ABIM certification has included some continuing component since 1974 or 1975. Appellants' Br. 29 n.11. They contend that ABIM announced it would begin requiring MOC in 1990 and only began offering MOC in 2000. *Id.* 28-29. Plaintiffs' characterization of ABIM's certification program is fundamentally flawed, and the district court was not required to accept it. In the 1970s, ABIM added a continuing component, which was then voluntary, to its singular certification program, and then made it mandatory in 1990. JA-30-31; *Siva*, 418 F. Supp. 3d at 272 ("[P]laintiff is not quite correct to the extent that he suggests that initial certification and MOC have been sold separately in the past. In fact, there never was a time when they were sold separately. . . . ABR sold certification without any MOC component, and now ABR sells certification with an MOC component. But ultimately ABR sells only one product . . . .").

Reversing a grant of summary judgment for the defendants on the separate products issue, the Tenth Circuit found there were sufficient factual allegations that the defendants, among other things: (1) continued to offer the MBE workshop without the full-service bar review course; (2) continued to offer the full-service bar review course without the supplemental MBE workshops in some other states; and (3) stipulated that the allegedly tied products occupied separate product markets. *Id.* at 1547-48; *see also Viamedia*, 951 F.3d at 469-70 (finding two products where defendant continued to offer the allegedly tied products separately in some geographic markets). This decision is similar to *AngioDynamics, Inc. v. C.R. Bard, Inc.*, No. 1:17-cv-00598, 2018 U.S. Dist. LEXIS 131206, *1, *20-23 (N.D.N.Y. Aug. 6, 2018), a case cited by plaintiffs elsewhere in their brief, in which the court denied a motion to dismiss tying claims where the plaintiff alleged that the defendant sold the tying product to a particular customer without the tied product.

Here, unlike the defendants in *Multistate Legal Studies* and *AngioDynamics*, ABIM does not sell, and has never sold, MOC without initial certification in any market. That would be nonsensical because MOC exists only for those internists who are ABIM-certified in the first place.

Moreover, when ABIM modified its certification program to require MOC, it ceased offering lifetime certification. All ABIM initial certifications offered

since 1990 have required participation in MOC. The suggestion that ABIM's grandfathering of internists certified before 1990 somehow demonstrates the existence of separate products is therefore baseless. Appellants' Br. 30-33. In 1990, ABIM changed the certification requirements for all internists going forward. Am. Compl. ¶¶ 26, 27, 49. ABIM did not retroactively impose the MOC component on those internists certified before 1990 because they, unlike plaintiffs, had been offered and granted lifetime certifications. ABIM's decision to change its certification product over thirty years ago to adapt to the continually evolving field of medicine was not an antitrust violation. *See* JA-33 ("We see no problem that at some point ABIM realized there was a need to have its certified internists undergo an MOC program, whether because the internists could not keep up with the advances in their particular field, saw their skills diminish, or any other reason."); *see also Cal. Comput. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) (rejecting plaintiff's theory that defendant's product design change was anticompetitive "technological manipulation," and finding instead that defendant had "the right to redesign" its product).

Plaintiffs alternatively argue that their allegations that ABIM treats MOC as a distinct product from its certification are sufficient. They ask this Court to make this inference from ABIM's statement on an IRS form that MOC "means something different" than initial certification, and erroneously argue that the

district court "gave no heed to this allegation." Appellants' Br. 30. But ABIM's statement is fully consistent with the requirement of MOC as a continuing component of its certification product. When internists initially obtain ABIM certification, they demonstrate that they have completed the requisite internal medicine training and passed the initial examination. Am Compl. ¶ 21. By completing MOC, including passing periodic examinations, and remaining ABIM-certified, an internist demonstrates that they are keeping current with their medical knowledge. *Id.* at ¶ 53. ABIM's acknowledgment that initial certification and MOC – both components of its certification process – demonstrate "something different" does not support the conclusion that certification and MOC are separate products.

Finally, plaintiffs allege that ABIM charges for and accounts for MOC separately, and that such allegations suffice to show that MOC is a separate product. *Id.* ¶¶ 34, 64, 144-48; Appellants' Br. 34-35. However, separate payments do not necessarily indicate two products. For example, the court in *Klamath-Lake* rejected an alleged tie between a pharmacy benefit and drug purchase restrictions despite the separate payments for the initial plan and the copayments with each drug purchase. 701 F.2d at 1290. The court stated that a "[c]opayment's purpose, whatever it might be, does not split the drug purchase terms of the pharmacy benefit from the pharmacy benefit itself. It functions no

differently than would a provision in the offer to perform garden maintenance that required the owner of the garden to supply the fertilizer." *Id.* This logic applies with equal force here. Just like the recurring copayments incurred from drug purchases, separate and recurring MOC fees do not illustrate that MOC is a distinct product from ABIM certification. Rather, it is entirely consistent with MOC as a continuing requirement of ABIM certification over time.

Plaintiffs' argument that the district court failed to accept their factual allegations as true is simply incorrect. The district court properly concluded that the argument that ABIM sells MOC separately from its certification rested on a mischaracterization of the alleged facts concerning ABIM certification, and that plaintiffs did not plausibly allege the existence of separate products. *See* JA-30 (finding plaintiffs' theory regarding separate sales to be "misleading"); *see also Iqbal*, 556 U.S. at 663-64 ("[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.").

ii. Only ABIM's MOC Program Maintains ABIM Certification.

Equally flawed is plaintiffs' contention that there are separate markets for MOC and initial certification because competitors sell "other CPD products" without certification. Specifically, plaintiffs alleged that NBPAS sells a "competing maintenance of certification product" without initial certification. Am.

Compl. ¶¶ 56-58; *see also* Appellants' Br. 12, 18, 36-38 (arguing that "other vendors sell CPD products like MOC"). But the fact that other vendors sell CPD products such as CME is totally irrelevant; they do not offer MOC.[7] NBPAS's product does not compete with ABIM's MOC program because only ABIM provides a program to maintain its own certification. *See Siva*, 418 F. Supp. 3d at 276 ("[T]here can be no foreclosure of competitive access to any market for certification from ABR, whether at the initial or MOC stage, because no one *can* provide certification in ABR's name but ABR.") (internal quotation marks and citation omitted; emphasis in original).

Indeed, plaintiffs admit that the products offered by NBPAS, or any other organization for that matter, are not substitutes for MOC. Appellants' Br. 21 (stating that they do not "contend ABIM should … be required to accept any other CPD product as a substitute for certification or MOC"). This admission is consistent with the district court's conclusion that "ABIM's MOC and NBPAS maintenance of certification offering are clearly not the same product, as they are not 'maintaining' the same certification." JA-31. Nor does NBPAS's product require an exam, unlike MOC. *See* Am. Compl. ¶ 57 (alleging that NBPAS's

[7] Plaintiffs do not contend that diplomates must purchase CME from ABIM; rather diplomates may fulfill the educational requirements of MOC by taking CME courses from any number of approved providers.

product requires only that a physician, in addition to being licensed to practice medicine and board-certified, complete fifty hours of accredited CME within two years); *id.* ¶¶ 26-34 (noting that MOC requires internists to pass periodic MOC examinations). In any event, the fact that NBPAS offers a product of its own is not relevant to whether ABIM certification and MOC are separate products. *See SubSolutions*, 436 F. Supp. 2d at 355 (finding "the fact that a number of other vendors wanted to sell POS-systems to Subway franchisees … is ***irrelevant*** to the determination of whether a Subway franchise and a POS-system are separate products") (emphasis added).

In reality, plaintiffs desire to reap the benefits of ABIM certification without having to comply with ABIM's requirements, including periodic knowledge assessments. *See* Appellants' Br. 21 ("Plaintiffs ask only that ABIM not revoke certification of internists who do not buy MOC."). As the district court reasoned, it would be patently unfair to ABIM, and the thousands of internists that participate in ABIM's MOC program, to allow internists to remain ABIM-certified through "an outside, and possibly inferior, third-party process." JA-32. In its decision in *Jack Walters*, the Seventh Circuit put it succinctly: "maybe [plaintiff] is capable, as it alleges, of building from parts it gets elsewhere a farm building identical to [defendant's] building; but it does not follow that it can put [defendant's] name on it." 737 F.2d at 705 ("[I]f you happen to be in the business of selling faucets, a

dealer cannot force you to let him sell, under your name, faucets he gets elsewhere"). The antitrust laws do not require ABIM to allow plaintiffs to continue holding themselves out to employers and patients as board certified by using other products to maintain their ABIM certification.

3. Plaintiffs Failed To Allege Forcing.

Plaintiffs' tying claim also fails for the independent reason that they do not allege that they were forced to purchase MOC. Plaintiffs must allege that (i) ABIM conditioned initial certification on the sale of MOC, and (ii) that ABIM has appreciable power in the initial certification market to force internists to purchase MOC. *Eastman Kodak Co.*, 504 U.S. at 461-62. The district court correctly found that "[n]owhere in the Amended Complaint do [p]laintiffs allege that they were forced to buy MOC products in order to purchase initial certification." JA-29. If plaintiffs did not wish to maintain their certifications, they could have chosen not to purchase MOC. Moreover, plaintiffs knew they would be required to participate in MOC when they chose to pursue ABIM certification.

The Second Circuit's decision in *Smugglers Notch Homeowners' Ass'n v. Smugglers' Notch Mgmt. Co.*, 414 F. App'x 372 (2d Cir. 2011), is on point. In that decision, the court affirmed dismissal of a tying claim where the plaintiffs "were fully aware of [defendant's] policies," which they then claimed constituted unlawful tying, and had "voluntarily signed purchase and sale agreements that

expressly required purchasers to enter into [the allegedly tied] contracts." *Id.* at 377. Decisions in franchise cases are in accord. When buying into a franchise, a franchisee "knows the contractual limitations and duties before entering into the contract. A complaint about such contractual obligations ***is not an antitrust matter***." *Rick-Mik*, 532 F.3d at 975 (emphasis added); *see also Queen City*, 124 F.3d at 443 ("[W]here the defendant's 'power' to 'force' plaintiffs to purchase the alleged tying product stems … from plaintiffs' contractual agreement to purchase the tying product, no claim will lie.").

Plaintiffs cannot deny that certification is voluntary and not required to practice medicine in any state. Am. Compl. ¶¶ 23, 41. Each plaintiff knew that MOC would be a continuing requirement of ABIM certification when each plaintiff chose to pursue certification. *Id.* ¶¶ 75, 83, 91, 104. Although plaintiffs ask "only" for lifetime certification, Appellants' Br. 21, without the requirement to pass periodic examinations, this was not the certification they were granted. Their complaints about the requirements of a certification program they chose to pursue do not amount to an antitrust matter.

The reality is that plaintiffs have the choice whether to participate in MOC. Indeed, Dr. Manalo has never purchased MOC. Am. Compl. ¶ 93. Plaintiffs argue that internists are forced to buy MOC because it is an "economic reality" that "certifications are essential for an internist to practice medicine successfully."

Appellants' Br. 38. But plaintiffs allege only that it may be financially advantageous for them to be Board certified. If internists wish to maintain their certifications to take advantage of employment opportunities offered by third parties, they can do so by participating in MOC. ABIM does not force them to do so. If there is any "forcing," it is by such third parties based on their own assessments of the value of ABIM board certification. Similarly, if internists would rather keep current by buying "CPD products from others[,]" they are free to do so. *Id.* But in that case, they can no longer advertise themselves as meeting the standards set by ABIM. Plaintiffs concede, as they must, that they cannot "contend ABIM should be prevented from determining its own standards, or be required to accept any other CPD product as a substitute for certification or MOC." *Id.* at 21.

4. Plaintiffs Fail To State a Rule of Reason Tying Claim.

As plaintiffs have failed to state a *per se* tying claim, so too have they failed to state a tying claim under the rule of reason. The requirement to allege a tie between two separate products, and that sale of the tying product was conditioned on purchase of the tied product, applies to both *per se* and rule of reason claims. *Brokerage Concepts v. U.S. Healthcare*, 140 F.3d 494, 510-11 (3d Cir. 1998). As discussed above, plaintiffs' allegations establish neither.

Accordingly, the Court need not consider whether the rule of reason or the *per se* standard applies to plaintiffs' tying allegations, as plaintiffs apparently concede. Appellants' Br. 49. However, should the Court reach this issue, the rule of reason would be the appropriate standard. This Court has recognized that the rule of reason is appropriate when considering rules adopted by professional societies, "even when the behavior resembles conduct usually subject to a *per se* approach." *Mass. Sch. of Law at Andover v. ABA*, 107 F.3d 1026, 1033 (3d Cir. 1997) (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458 (1986)). Here, the use of the rule of reason is appropriate because "in the context of a profession, the nature and extent of [the] anticompetitive effect are too uncertain to be amenable to *per se* treatment.'" *Id.* (quoting *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983). When a court considers a tying claim under the rule of reason, "the plaintiff [] has the more difficult burden of showing that the arrangement … unreasonably restrained competition in the tied product market." *Brokerage Concepts*, 140 F.3d at 511. Plaintiffs fail to meet this additional burden.

Plaintiffs argue they have plausibly alleged ABIM unreasonably retrained competition in the tied product market by preventing internists from purchasing other CPD products, including "CME products that serve the same function as MOC." Appellants' Br. 49. Their Amended Complaint, however, undermines this argument. The alleged tied market is "the market for maintenance of certification

of internists," Am. Compl. ¶ 47, and other CPD products, such as CME, do not compete in that market because they do not maintain certification. Plaintiffs also allege that, due to ABIM's alleged tying, NBPAS has had "limited success" with its MOC product. *Id.* ¶ 59. But this bare allegation of harm to a single competitor fails to establish "competitive harm to the tied market as a whole" and thus cannot support a rule of reason tying claim. *Brokerage Concepts*, 140 F.3d at 519.

C. The District Court Properly Dismissed Plaintiffs' Claim for Monopolization of the Market for MOC.

Plaintiffs assert a Sherman Act Section 2 monopolization claim against ABIM for creation and maintenance of "monopoly power in the market for maintenance of certification." Am. Compl. ¶¶ 127-128. The district court properly dismissed this claim, rejecting the market definition. Having found no separate market for maintenance of certification, the district court correctly concluded ABIM could not monopolize a non-existent market. JA-34. Plaintiffs did not bring any claim against ABIM for monopolization of or abuse of monopoly power in the market for initial certification. Dismissal of the Section 2 claim also was appropriate because plaintiffs failed to allege facts showing that ABIM acted anticompetitively.

1. The District Court Properly Found There Is No Separate Maintenance of Certification Market To Monopolize.

To state a monopolization claim, plaintiffs must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power[.]" *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 433 (3d Cir. 2016) (internal quotations omitted). Plaintiffs cannot state a claim against ABIM for monopolization of a market that does not exist.

Plaintiffs alleged that ABIM created and maintained monopoly power in "the market for maintenance of certification." Am. Compl. ¶¶ 127-128. But that market is not cognizable. Having found that "ABIM's MOC product is not a separate market," the district court concluded, "ABIM cannot have a monopoly in a market that does not exist." JA-34; *see also Siva*, 418 F. Supp. 3d at 277 ("ABR cannot have or exploit a 'monopoly in a market that does not exist.'") (citing decision below). It is plaintiffs' burden to define the relevant market properly. *Queen City*, 124 F.3d at 442 (affirming dismissal of attempted monopolization claim where plaintiffs failed to allege a valid relevant market). Plaintiffs' failure to allege that ABIM monopolized a cognizable market dooms their claim.

2. Plaintiffs Fail To Allege Anticompetitive Conduct by ABIM.

In their monopolization claim, plaintiffs did not allege that ABIM has monopolized the certification market or abused its power in that market. Am.

Compl. ¶¶ 126-129. Plaintiffs declined the district court's invitation to amend their monopolization claim following the dismissal without prejudice below and cannot present new arguments on appeal as discussed in § IV.B.1, above.[8] Even if plaintiffs had asserted a claim for monopolization of the certification market, however, that claim would fail because plaintiffs do not sufficiently allege ABIM engaged in anti-competitive conduct. Rather, their allegations reveal that ABIM has properly competed on the merits of its certification.

Monopolization claims require that monopoly power "be accompanied by some anticompetitive conduct on the part of the possessor." *Broadcom*, 501 F.3d at 308. Anticompetitive conduct required for monopolization is distinguished from success "as a consequence of a superior product, business acumen, or historic accident." *Mylan Pharms.*, 838 F.3d at 433 (quoting *Broadcom*, 501 F.3d at 307); *see also W. Penn. Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 108 (3d Cir. 2010) (defining anticompetitive conduct in general as competition on "some basis other than the merits") (internal quotation omitted). Plaintiffs fail to allege that the

[8] Nor can plaintiffs present alternative unpled allegations that could support an amended monopolization claim. Having chosen to stand on the Amended Complaint rather than amend their monopolization claim, plaintiffs "cannot expect relief in the form of leave to amend." *Klatch-Maynard.*, 404 F. App'x at 584.

success of ABIM's certification is based on anything other than the merits or reputation of its program.

The allegations of purportedly anticompetitive conduct upon which plaintiffs rely to support their monopolization claim are insufficient. As discussed above, plaintiffs fail to make out a tying claim. JA-33. Plaintiffs argue that they can nevertheless make out a Section 2 claim based on conduct that does not amount to tying because ABIM is a monopolist. As an initial matter, plaintiffs' argument that bundling by a monopolist may be unlawful when none of their allegations even hints at a claim against ABIM for bundling should be rejected. Plaintiffs have waived any argument about bundling because they did not present such argument to the district court. Further, in each of the cases cited by plaintiffs, the parties agreed, or the court found, that the tied products were offered in separate markets. *See Viamedia*, 951 F.3d at 451 (parties did not dispute separate product markets); *Multistate Legal Studies*, 63 F.3d at 1547 (parties stipulated that the tied and tying products were offered in separate markets); *C.R. Bard, Inc. v. M3 Sys.*, 157 F.3d 1340, 1382 (Fed. Cir. 1998) ("the jury found that there was a relevant product market for [the tied product]"). Here, ABIM makes no such concession and the distinct court found just the opposite – there was no distinct market for the allegedly tied product.

Contrary to plaintiffs' assertions, the Seventh Circuit in *Viamedia* did not reject the lower court's effort to parse whether Comcast's conduct satisfied some platonic ideal of tying because Comcast was allegedly a monopolist. Appellants' Br. 54. Rather, the Seventh Circuit "too, walk[ed] through the tying factors at issue (separate product and forced purchase) and determine[d], taking the record as a whole, that Viamedia ha[d] provided sufficient evidence to create a question of fact as to each factor." 951 F.3d at 469. Here, plaintiffs' allegations related to tying conduct fail, not because they do not satisfy "some platonic ideal of tying," as implied by plaintiffs, but because there is no separate market for MOC.

The majority of plaintiffs' remaining purported allegations of anticompetitive conduct are conclusory and unsupported by factual averments. *See, e.g.*, Am. Compl. ¶¶ 2, 5, 55, 60, 62, 68, and 71. Therefore, the Court need not accept them. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 822 F.3d 125, 133 (3d Cir. 2016) (courts need not "accept mere[] conclusory factual allegations or legal assertions[.]") (citing *Iqbal*, 556 U.S. at 678-79). For example, plaintiffs claim ABIM's anticompetitive conduct includes "exclusive dealing," but they fail to allege any facts that would establish a supposed exclusive dealing arrangement. Am. Compl. ¶ 2. Similarly, the district court found that "Plaintiffs' assertion concerning ABIM's unnamed board members[,]" *i.e.*, that "ABIM's board of directors includes active participants in the market for internists' services and

related markets with their own private anticompetitive motives to restrain competition[,]" was "a mere conclusory allegation that is insufficient to defeat a motion to dismiss." JA-34-35 (citing *W. Penn. Allegheny Health Sys.*, 627 F.3d at 103-04).

Moreover, plaintiffs' allegations regarding ABIM "waging a campaign of deception about the benefits of MOC" are implausible and insufficient to support a monopolization claim. Appellants' Br. 55. In the first instance, even a supposed monopolist is entitled to promote the benefits of its certification program. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979) (holding even "a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits"). Plaintiffs argue that the district court ignored their allegations "that ABIM's campaign of deception has been successful as hospitals, insurers and others believe its fraudulent statements about MOC[.]" Appellants' Br. 56 n.18. But their allegations that ABIM deceived a huge number of hospitals and health insurers into requiring certification are merely conclusory and utterly implausible. Plaintiffs provide no factual support for their claim that ABIM induced so many much larger and more powerful institutions to do anything.

In cases involving professional certification, courts have repeatedly recognized that when the certifying organization "gives a seal of approval[,]" "but

does not constrain others to follow its recommendations, it does not violate the antitrust laws." *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989); *see also Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. Of Podiatric Surgery, Inc.*, 323 F.3d 366, 372 (6th Cir. 2003) (rejecting monopolization claims based on defendant's promotion of accreditation services because "there is no evidence that [defendant] had the authority to exclude competition at … hospitals"). ABIM does not prevent internists from practicing without certification. Nor does it have the authority to exclude competition at hospitals or elsewhere. Thus, ABIM's promotion of its certification program cannot amount to an antitrust violation. ABIM is free to promote its certification on the merits, and plaintiffs have presented no well-pled factual allegations that ABIM constrained others to use its certification in any way. Therefore, this Court should affirm the dismissal of plaintiffs' Section 2 monopolization claim.

D. The Plaintiff Who Did Not Purchase MOC Cannot Establish Antitrust Injury.

To establish antitrust standing under Sections 1 and 2 of the Sherman Act, a plaintiff must allege that they have suffered "*antitrust* injury" – that is, "injury of the type the antitrust laws were intended to prevent[.]" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).[9] The plaintiff who did not purchase

[9] The other three plaintiffs have alleged harms they now concede are "additional damages," not antitrust injuries. Appellants' Br. 52. Harm resulting from

MOC or any maintenance of certification product did not suffer antitrust injuries at all and should be dismissed. Plaintiffs' own case law supports this conclusion. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 531 (3d Cir. 2004) ("***a purchaser*** in a market where competition has been wrongfully restrained has suffered an antitrust injury") (emphasis added); *see also Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1266 n.10 (10th Cir. 2006) ("As the Plaintiffs neither purchase nor provide [tied product], they lack standing to assert this claim."); *Marian Bank. v. Elec. Payment Servs., Inc.*, No. 95-614-SLR, 1997 U.S. Dist. LEXIS 11560, at *16 (D. Del. Feb. 5, 1997) ("'[A]s a precondition to a tying claim, the buyer must actually purchase or lease the unwanted product.'") (quoting *Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861, 881 (D. Del. 1987)). Dr. Manalo does not allege he has purchased MOC, *i.e.*, the tied product. Am. Compl. ¶¶ 90-102. Thus, he has suffered no antitrust injury, and his claim was properly dismissed.

E. The District Court Properly Dismissed Plaintiffs' RICO Claim.

Plaintiffs asserted a fraud-based RICO claim, alleging that ABIM engaged in an ambitious scheme to "convince hospitals, insurers, and others to require

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employment decisions, such as lost wages or job opportunities, are not antitrust injuries. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 439 (2d Cir. 2005) ("[T]he injury alleged by plaintiffs – their ability to earn higher pay – was not 'an antitrust injury.'")

internists to buy MOC[.]" Appellants' Br. 57. That claim was properly dismissed on the basis that plaintiffs lack standing to bring this claim, as they have not alleged, nor could they plausibly allege, that they suffered injuries as a direct result of ABIM's alleged misrepresentations. JA-40 ("ABIM's alleged fraudulent statements are too attenuated to substantiate a claim."). Recent precedent of this Court reinforces the propriety of the decision below.

To demonstrate RICO standing, a plaintiff must allege (1) that they have suffered an injury to their business or property; and (2) the injury was directly related to the conduct underlying defendant's alleged RICO violation. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 804 F.3d 633, 638 (3d Cir. 2015). In *Devon Drive Lionville, LP v. Parke Bancorp, Inc.*, this Court confirmed that the second element under RICO standing – proximate causation – requires a plaintiff to show reliance on the alleged misrepresentations. 791 F. App'x at 307 (holding that RICO proximate causation "requires reliance … usually, a plaintiff must show 'that someone relied on the defendant's misrepresentations'") (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 656 (2008)). Because plaintiffs fail to allege that any hospital, insurer, or medical employer relied on ABIM's alleged misrepresentations, they have not pled standing. To the contrary, as the district court reasoned, "there are numerous reasons why Plaintiffs' employers would require internists to hold an ABIM certification beyond ABIM's

marketing materials[.]" JA-40. The district court thus properly dismissed plaintiffs' claim.

1. Plaintiffs Fail To Allege Reliance by any Hospital, Insurer, or Other Medical Employer.

Because they have based their RICO claim in fraud, plaintiffs must show that their loss was "a foreseeable result of *someone's* reliance on the misrepresentation." *Bridge*, 553 U.S. at 656 (emphasis in original); *Devon Drive*, 791 F. App'x at 307 (citing *Bridge*, 553 U.S. at 656).

Plaintiffs fail to allege that anyone's reliance on ABIM's misrepresentations caused their supposed injuries. The district court correctly rejected plaintiffs' conclusory allegation that "believing [ABIM's alleged] misrepresentations to be true, hospitals and related entities, insurance companies, medical companies and other employers require internists to participate in MOC[.]" Am. Compl. ¶ 166. Plaintiffs failed to identify a single hospital, insurer, or employer that even supposedly knew of ABIM's alleged misrepresentations about MOC, let alone relied upon such alleged misrepresentations in deciding to require their internists to be board certified. For example, though plaintiff Dr. Joshua alleges that Detroit Medical Center required physicians to maintain board certification in their specialties, she does not allege that it was aware of or relied on any statement by ABIM in making that credentialing decision. *Id.* at ¶ 85. This is true for the allegations of each plaintiff. Absent allegations of reliance by the employers on

any misrepresentation, any connection between ABIM's conduct and plaintiffs' employers requiring certification is pure, unsupported conjecture.

This Court has repeatedly affirmed the propriety of dismissing RICO claims at the motion to dismiss stage for failure to allege proximate cause. *See, e.g.*, *Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc.* 87 F. App'x 227, 234 (3d Cir. 2003) (affirming dismissal of RICO claims when the plaintiffs did not "allege[] the direct injury required for standing under RICO"); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.2d 912, 933 (3d Cir. 1999) (affirming dismissal of RICO claims when the "causation chain [was] much too speculative and attenuated to support a RICO claim"). Proximate cause requires showing that a plaintiff's injuries were directly related to the conduct underlying defendant's alleged RICO violation. *Avandia*, 804 F.3d at 638. And this Court confirmed in *Devon Drive* that proximate cause requires a plaintiff to show reliance. The district court appropriately found that plaintiffs failed to show proximate cause as their allegations were "too attenuated to substantiate a claim." JA-40.

2. Plaintiffs' Alleged Injuries Did Not Directly Result from ABIM's Conduct Because Hospitals' and Other Employers' Decisions Break the Chain of Causation.

Plaintiffs' allegations also fail to establish that their alleged injuries resulted from ABIM's misrepresentations rather than from any number of intervening

causes. Plaintiffs argue that they have standing to pursue their RICO claim because they are the "targets" and "immediate victims" of ABIM's supposed scheme, Appellants' Br. 62-64, but their allegations do not support that argument.

In *Anza v. Ideal Steel Supply Corp.*, the Supreme Court held that "the central question" of proximate causation in a RICO case "is whether the alleged violation ***led directly*** to the plaintiff's injuries." 547 U.S. 451, 461 (2006) (emphasis added). In *Anza*, Ideal alleged that its competitors defrauded a tax authority and used the proceeds from their fraud to lower prices and attract more customers, harming Ideal by drawing its customers away. *Id.* at 458. In finding that Ideal had not established proximate cause, the Court recognized a "discontinuity between the RICO violation [defrauding the tax authority] and the asserted injury. Ideal's lost sales could have resulted from factors other than petitioners' alleged acts of fraud." *Id.* at 459. The realistic possibility that a RICO plaintiff's injuries may actually have been caused by intervening causes other than the defendants' alleged conduct is a consistent theme of *Anza* and the other cases cited by plaintiffs.

Courts recognize that proximate cause is not pled if the plaintiff's injuries could well have resulted from conduct other than the alleged RICO violation. As the district court correctly found, plaintiffs allege two broad types of injuries: loss of income or employment opportunities, and payments of fees to ABIM for MOC. JA-38. Proximate cause is lacking for both types of alleged injuries.

Plaintiffs' claimed losses of income or employment opportunities resulted not from ABIM's conduct, but from decisions made by hospitals and employers. Plaintiffs fail to connect any statement by ABIM to a decision made by a single hospital, insurer, or employer. *See* JA-36 (finding plaintiffs did not "claim that ABIM actually deceived or coerced any hospital into requiring its internists to be ABIM-certified"). The employers are independent decision makers that may have decided to require certification for any number of reasons. As the district court stated, "the Amended Complaint, itself, provides more reasonable and legitimate explanation as to why hospitals and medical service providers require ABIM certification, such as ABIM's long established history of certification and its creation of a national standard to compare internists from different states." *Id.* If a hospital independently chooses to require certification, then it is the hospital's conduct, not ABIM's, that caused the injury. *See Devon Drive*, 791 F. App'x at 307 (affirming dismissal of RICO claim for lack of standing where claims were premised on misrepresentations to "intervening actors who break the chain of causation").

Nor can plaintiffs allege that their payments for MOC fees directly resulted from ABIM's alleged misrepresentations. Plaintiffs have never alleged that they themselves were deceived into paying for MOC by ABIM's supposed misrepresentations about MOC. In sum, plaintiffs fail to allege that their injuries

resulted from ABIM's supposed misrepresentations about the quality of MOC rather than from any number of intervening causes.

The Third Circuit's decision finding proximate cause in *Avandia* is readily distinguished. In that case, the Third Circuit recognized that "GSK ***[did] not argue*** that a doctor's decision to prescribe Avandia or a patient's decision to take Avandia caused plaintiffs' injuries." 804 F.3d at 644 (emphasis added). The Court there observed that "[t]he conduct that allegedly caused plaintiffs' injuries is the same conduct forming the basis of the RICO scheme alleged in the complaint — the misrepresentation of the heart-related risks of taking Avandia that caused [plaintiffs themselves] to place Avandia in the formulary." *Id.* Whereas here, plaintiffs have never alleged ABIM's misrepresentations caused them to pay for MOC. And in *Brokerage Concepts*, the plaintiff healthcare consulting firm brought a RICO claim based on the defendant HMO's refusal to approve a pharmacy chain for membership in its network unless the pharmacy severed its contractual relationship with the plaintiff. 140 F.3d at 501. The Third Circuit found that the plaintiff's injury in losing the contract was proximately caused by the defendant's RICO violations because the plaintiff's harm was "the linchpin of the scheme's success" and was not "more appropriately attributable to an intervening cause that was not a predicate act under RICO." *Id.* at 521. The opposite is true here: plaintiffs' injuries result from myriad causes other than

ABIM's conduct, including plaintiffs' employers' credentialing decisions. *See* JA-39 (finding that plaintiffs' "loss of employment opportunities or job responsibilities were … a result of their employers' actions").

In any event, the RICO scheme alleged by plaintiffs is entirely implausible. Although their RICO claim sounds in fraud, plaintiffs fail to allege to whom ABIM even made the supposed misrepresentations. *See Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004) (requiring plaintiff asserting RICO claim sounding in fraud to allege "who made a misrepresentation ***to whom***") (emphasis added). Instead, plaintiffs allege that ABIM made misrepresentations "to the public, including but not limited to hospitals and related entities, insurance companies, medical corporations and other employers, and the media." Am. Compl. ¶ 135. Plaintiffs cannot identify a single person or entity to whom ABIM made such a misrepresentation. Nor can plaintiffs plausibly allege that ABIM can influence, let alone deceive, thousands of massive and geographically-diverse hospitals and insurance companies that dwarf ABIM in size, economic power, and reach.

The dismissal of plaintiffs' RICO claim should be affirmed.

F. The District Court Properly Dismissed Plaintiffs' Unjust Enrichment Claim.

The district court dismissed plaintiffs' claim for unjust enrichment, finding that "it is not inequitable for ABIM to keep the benefit [fees some plaintiffs paid to purchase MOC] since it did not 'force' Plaintiffs to purchase MOC." JA-41.

Plaintiffs cite no legal authority whatsoever for their argument that this dismissal should be reversed. This Court should affirm.

To state an unjust enrichment claim under Pennsylvania law, plaintiffs must allege: (1) a benefit conferred on the defendant by the plaintiffs; (2) appreciation of such benefit by the defendant; and (3) acceptance and retention of that benefit under circumstances that would make it inequitable. *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 273 (3d Cir. 2010). "The most significant element of the doctrine is whether the enrichment of the defendant is unjust." *Id.* (internal quotation omitted). Plaintiffs acknowledge that the district court found that they failed to show this third element. Appellants' Br. 66.

Plaintiffs' unjust enrichment claim fails because they cannot demonstrate ABIM's retention of MOC fees they paid to maintain their certifications is inequitable when they chose to pursue and maintain their certifications from ABIM. As discussed in § IV.B.3, above, plaintiffs chose whether or not to maintain their certifications – and indeed some have chosen not to do so. Am. Compl. ¶ 93. Plaintiffs argue that "[t]he economic reality is that internists whose certifications are revoked by ABIM because they do not buy MOC are no longer eligible for … requirements for the successful practice of medicine." Appellants' Br. 66. Not only did plaintiffs fail to plead this allegation, they admitted that board certification is not required to practice medicine. Am Compl. ¶¶ 23, 41. That

some plaintiffs desire to maintain their certifications in order to take advantage of opportunities with third parties does not mean ABIM forces it upon them.

Nor is it inequitable for ABIM to require internists to participate in MOC if they wish to continue to be certified by ABIM. Plaintiffs argue that ABIM's retention of MOC fees is inequitable because they "prefer to buy products from others to keep current rather than being forced to buy MOC from ABIM." Appellants' Br. 66-67. Yet this argument cannot be squared with their concession that they do not "contend ABIM should be prevented from determining its own standards, or be required to accept any other CPD product as a substitute for certifications or MOC." *Id.* 60. Plaintiffs cannot have it both ways. They are free to buy CPD products from others, but if they wish to continue to be certified by ABIM they must meet the requirements to maintain ABIM's certification. As the district court recognized, "it would be inequitable for Plaintiffs to demand ABIM continue to certify them without proving there are still able to meet ABIM standards and without paying ABIM for the MOC program." JA-41.

Moreover, under Pennsylvania law, a plaintiff cannot state an unjust enrichment claim if the plaintiff received the benefit of the product or service for which they paid. *See In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, No. 2007-MDL-1871, 2013 U.S. Dist. LEXIS 152726, *41-*42 (E.D. Pa. Oct. 22, 2013) (dismissing unjust enrichment claim on motion to dismiss where the

plaintiffs and their beneficiaries purchased, received, and used a drug which allegedly had concealed health risks).[10] Plaintiffs here allege that they conferred a benefit on ABIM by paying MOC-related fees but they cannot allege ABIM deprived them of any benefit for which they paid, for example, by failing to deliver the MOC programming or by revoking the certifications of plaintiffs who had paid MOC fees and met MOC requirements. Plaintiffs who purchased MOC "have received the benefit of their bargains."[11] *Id.* at *42.

[10] The *Avandia* plaintiffs did not appeal the dismissal of plaintiffs' unjust enrichment claim. 804 F.3d at 637 n.9.

[11] For example, Dr. Murray alleges she lost her infectious disease certification when she failed to pass her MOC examination and that as a result her hospital revoked her privileges. Am. Compl. ¶ 109. Once she was able to pass her MOC examination, her hospital restored her infectious disease privileges and she was able to earn increased income. *Id.* at ¶¶ 111, 112.

V. CONCLUSION

The decision of the court below was sound. Accordingly, ABIM respectfully requests that this Court affirm the dismissal of plaintiffs' Amended Complaint.

Dated: July 6, 2020

Respectfully submitted,

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CERTIFICATION

I, Leslie E. John, one of the counsel for Defendant-Appellee and a member of the bar of this Court, hereby certify as follows:

(1) Pursuant to Local Rule 28.3(d), at least one of the attorneys whose name appears on this Brief is a member of the bar of this Court.

(2) This Brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). This Brief was prepared in Times New Roman font on Microsoft Office Word 2016 and has 12,954 words according to the Microsoft Word count.

(3) Pursuant to Local Rule 31.1(c), the electronic version of the Brief and the hard copies to be filed with the Court are identical.

(4) Pursuant to Local Rule 31.1(c), a virus check was performed on this Brief using Windows Defender agent version 4.10.14393.1198 and no virus was detected.

Dated: July 6, 2020

/s/ Leslie E. John