No. 24-1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Emily Elizabeth Lazarou, and Aafaque Akhter, individually and on behalf of all others similarly situated

Plaintiffs-Appellants,

v.

American Board of Psychiatry and Neurology,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division,
Case No. 1:19-cv-01614
The Honorable Judge Jeremy C. Daniel

PETITION FOR REHEARING AND REHEARING *EN BANC* OF PLAINTIFFS-APPELLANTS

C. Philip Curley
Robert L. Margolis
ROBINSON CURLEY P.C.
600 West Van Buren Street, Suite 700
Chicago, IL 60607
Tel: 312.663.3100
pcurley@robinsoncurley.com
rmargolis@robinsoncurley.com

Attorneys for Plaintiffs-Appellants

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1994

Short Caption: Lazarou, et al., individually and on behalf of all others simiarly situated v. Am. Board of Psychiatry and Neurology

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The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Emily Elizabeth Lazarou, Aafique Akhter, individually and on behalf of all others similarly situated

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Robinson Curley, PC; Lite DePalma Greenberg, LLC; Carlson Lynch LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ C. Philip Curley Date: 6/24/24

Attorney's Printed Name: C. Philip Curley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Robinson Curley PC, 200 North LaSalle Street, Suite 1550, Chicago, IL 60601

Phone Number: (312) 546-5202 Fax Number: (312) 663-3100

E-Mail Address: pcurley@robinsoncurley.com

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Appellate Court No: 24-1994

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N/A

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Robert L. Margolis Date: 6/24/24

Attorney's Printed Name: Robert L. Margolis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Robinson Curley PC, 200 North LaSalle Street, Suite 1550, Chicago, IL 60601

Phone Number: (312) 546-5213 Fax Number: (312) 663-3100

E-Mail Address: rmargolis@robinsoncurley.com

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RULE 40 STATEMENT

The Majority Opinion (1) does not accept Plaintiffs' well-pleaded factual allegations as true, (2) fails to draw reasonable inferences in Plaintiffs' favor, and (3) improperly makes a factual determination. As such, it conflicts and cannot be reconciled with the pleading and Rule 12(b)(6) dismissal standards established in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), as well as many decisions of this Court, including V*asquez v. Indiana University Health, Inc.*, 40 F.4th 582, 583 (7th Cir. 2022), and *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 454 (7th Cir. 2020). This warrants *en banc* review.

The Majority also misapplies substantive antitrust law in three respects by: (1) failing to correctly analyze whether products are reasonably interchangeable, (2) requiring absolute interchangeability of products, and (3) disregarding that product market is a highly fact-intensive inquiry not suitable for resolution on a Rule 12(b)(6) motion.

PLAINTIFFS' TYING CLAIM

Plaintiffs Emily Elizabeth Lazarou ("Dr. Lazarou") and Aafaque Akhter ("Dr. Akhter") are psychiatrists. (¶ 1).[1] Defendant ABPN is a medical specialty board. (¶ 21). It sells a certification product in psychiatry and neurology nationwide to residency graduates who complete the ABPN certification examination. (¶ 2).

ABPN certification is the tying product. ABPN is the monopoly supplier of certifications for psychiatrists and neurologists (referred to herein as "doctor" or "doctors") and holds significant market power in the nationwide certification product market. (¶ 3). Drs. Akhter and Lazarou bought ABPN certifications in psychiatry in 2005 and 2007, respectively, after completing their residency. (¶¶ 18, 19, 158, 173).

There is also a separate nationwide product market for continuing medical education ("CME") products. (¶¶ 5, 77, 79, 188-191; *see Siva v. Am. Bd. of Radiology,* 38 F.4th 569, 578 (7th Cir. 2022)). CME products promote individual, self-directed lifelong learning after residency. (¶ 76). In addition to its certification product, ABPN sells a CME product it calls

[1] References to "¶ ___ " are to paragraphs of the Second Amended Class Action Complaint ("Complaint") included in the Separate Appendix of Plaintiffs-Appellants at SA-1-51 (Appeal Dkt. 13).

maintenance of certification ("MOC"). (¶¶ 90, 98-106, 114-115). ABPN describes MOC, like other CME products, as promoting "lifelong learning through continuing medical education and other educational programs." (¶ 7).

MOC is the tied product. ABPN forces doctors to buy MOC—its own CME product—by revoking certifications of doctors who do not buy MOC. (¶¶ 11, 96). Certifications are an economic necessity and doctors without certifications are at a major economic and career disadvantage. (¶¶ 4, 55-57, 64-70). The Accreditation Council for Continuing Medical Education ("ACCME") is working towards "the integration of CME and MOC." (¶¶ 30-31, 199(f)). ABPN requires doctors to pay a $175 annual MOC fee or forfeit their certifications. (¶ 99).

Because virtually all states require doctors to earn CME credits to be licensed (¶ 34), demand for CME products is "driven largely by state licensing requirements." *Siva*, 38 F.4th at 579. The American Medical Association ("AMA") recognizes two types of CME credits for state licensure, Category 1 credits (relevant here) and Category 2 credits. (¶ 80). MOC provides CME credit for state licensure in two separate ways: (1) direct credits through the AMA (¶¶ 82, 101, 120, 199(e)), and

(2) by states accepting MOC in place of CME licensure requirements (¶¶ 119, 121, 199(g)).

Doctors earn CME Category 1 direct credits from ABPN's MOC assessment products. (¶¶ 82, 101, 120, 199(e)). These direct credits can be applied by doctors toward state CME requirements nationwide. (¶¶ 82, 120, 177 (Dr. Akhter), 199(e)). In addition, many states accept participating in MOC or passing a MOC examination in full or partial satisfaction of CME requirements. (¶¶ 119, 121, 199(g)).[2] As stated by the New England Journal of Medicine, MOC is a "viable way" for doctors to "pick up bonus points" towards state CME license requirements. (¶ 118).

Because demand for CME products is "driven largely by state [CME] licensing requirements," *Siva*, 38 F.4th at 579, and MOC has the same purpose and goal as other CME products, doctors view MOC as

[2] Different states require different amounts of CME credits over different periods of time. Illinois (one state in which Dr. Lazarou is licensed) requires 150 CME credits *every three years* (50 per year on average), all of which can be Category 1 credits. (¶¶ 83, 157; 68 *Ill. Admin. Code* 1285.110(a)). Massachusetts (one state in which Dr. Akhter is licensed) requires 100 CME credits *every two years* (also 50 per year on average), all of which can be Category 1 credits. (¶¶ 172; 243 CMR 2.06(6)(a)).

reasonably interchangeable with other CME products, recognizing they serve the same purpose and are commercial substitutes. (¶¶ 122, 199(a)). As doctors are price sensitive, but for ABPN's tying of certifications and MOC, the cross-price elasticity of MOC and other CME products would be high. (¶ 201). The price of MOC is set by ABPN and is not determined by "normal competitive factors." (¶ 222).

Absent ABPN's tie and loss of their certifications, doctors would buy other CME products from different vendors in place of MOC. (¶¶ 117, 159 (Dr. Lazarou), 174 (Dr. Akhter), 202). According to the ACCME, since in or about 2005 when ABPN and other medical specialty boards began selling MOC, through November 2023, the number of accredited CME providers has declined almost 40 percent from 2,322 to 1,414. (¶ 217). According to its Forms 990, ABPN's MOC revenue increased exponentially from $761,650 in 2013 to $9,580,374 in 2022 (the only years ABPN has publicly disclosed MOC data), or approximately 1,257 percent. (¶ 146).

THE PANEL OPINION

A divided panel affirmed the District Court's dismissal of the Complaint. The Majority holds that because of MOC's "substantial cost in money, time, and effort" compared to other CME products, Plaintiffs "failed to plausibly allege that doctors see ABPN's MOC product as reasonably interchangeable with CME [products]." Op. 11, 15. The Dissent disagrees, believing that Plaintiffs have "complied with the pleading standards" by "plausibly alleging" that CME and MOC "are reasonably interchangeable." *Id*. 26 (Moldanado, J., dissenting).[3]

ARGUMENT

I. The Majority's Finding That The Complaint Does Not Plausibly Allege That MOC And Other CME Products Are Interchangeable Conflicts With The Pleading And Rule 12(b)(6) Dismissal Standards Established In *Twombly* and *Iqbal* And With Decisions Of This Court.

The Majority affirms dismissal based solely on its factual determination that MOC costs more "in money, time, and effort" than other CME products, and that as a result MOC is not "a true competitor" in the CME product market and doctors cannot, as a matter of law, view

[3] References to "Op. ___" are to pages of the Panel Opinion (Appeal Dkt. 32).

"MOC as reasonably interchangeable" with other CME products. Op. 10, 11.

Putting aside for the moment that as discussed in Argument IC below there is no basis for finding that MOC costs more, the Majority Opinion conflicts with the pleading and Rule 12(b)(6) dismissal standards in *Twombly* and *Iqbal*, and subsequent decisions of this Court, including V*asquez*, 40 F.4th at 583 (reversing dismissal of antitrust claims; "At this stage, we accept all well-pleaded facts as true and draw all reasonable inferences in Vasquez's favor."), *Viamedia*, 951 F.3d at 454 ("We review *de novo* a grant of a motion to dismiss, 'construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [its] favor.'"), and other decisions of this Court cited herein.

A. The Majority Fails To Accept Plaintiffs' Well-Pleaded Factual Allegations As True.

The Majority concedes that as clearly alleged, MOC provides "a benefit" to doctors "as [to] state licensure CME requirements" and that "on the surface" (that is, as the factual allegations demonstrate), MOC is "attractive" to doctors seeking alternative CME products. Op. 12. Yet it goes on to find it "implausible" that doctors would "pay for the MOC

product simply to avoid" purchasing other CME products. Op. 14. Contrary to *Twombly* and *Iqbal* and their progeny, the Majority by doing so fails to accept as true Plaintiffs' well-pleaded factual allegations and inappropriately goes beyond the pleadings to make the (baseless) factual determination that MOC costs more.

"[N]either *Twombly* nor *Iqbal* has changed the rule that judges must not make findings of fact at the pleading stage." *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012). Nor can a court "reject a complaint's plausible allegations by calling them 'unpersuasive.'" *Id.* Simply put, "the plausibility standard does not allow a court to question or otherwise disregard nonconclusory factual allegations simply because they seem unlikely." *Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan v. Buth*, 99 F.4th 928, 946 (7th Cir. 2024) (quoting *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015)). *See also Vasquez*, 40 F.4th 582 at 586-587 (quoting from *Twombly*: "probability of the plaintiff's recovery" not required). [4]

[4] The Supreme Court in *Twombly* was concerned about excessive discovery expense, not relevant here. *Twombly* alleged multiple nationwide conspiracies among America's largest telecommunications firms, and was dismissed because no facts were alleged supporting existence of the asserted conspiracies. 550 U.S. at 559. The Complaint

To be sure, the Majority sprinkles "implausible" throughout its Opinion. But buzzwords cannot hide the truth that despite the Complaint's well-pleaded factual allegations showing MOC to be interchangeable with other CME products, the Majority simply refuses to accept those allegations as true. For example, by qualifying MOC as just not a "*true competitor*" in the CME market (Op. 10 (emphasis added)), the Majority admits MOC is at least adequately alleged to be *a competitor*.

Whether MOC is a "true" competitor, whatever that means, goes beyond the pleadings, surely raises a fact issue, and inappropriately imposes the Majority's own economic theory of reasonableness in place of the well-pleaded factual allegations to the contrary in the Complaint. "Reasonable consumer behavior is not a matter of pure economic theory.

---

here concerns one discrete aspect of ABPN's operations (MOC) and a single antitrust claim (tying) against one defendant rather than a number of "unspecified" nationwide conspiracies; ABPN has far fewer employees, most of whom are not expected to have relevant information, than the "many thousands" of employees of the defendants seen as potential deponents in *Twombly*; and the "reams and gigabytes of business records" discoverable in *Twombly* do not exist here. *See id.* There is nothing suggesting discovery in this case will be any more burdensome than other federal commercial litigation matters. And ABPN certainly has not offered any data or evidence to suggest otherwise.

Rather, reasonable consumer behaviors are 'matters of fact, subject to proof that can be tested at trial, even if as judges we might be tempted to debate and speculate further about them.'" *Kahn v. Walmart Inc.*, 107 F.4th 585, 595 (7th Cir. 2024) (internal citation omitted).

Similarly, by acknowledging that "on the surface" MOC is "attractive" to doctors seeking alternative CME products, the Majority concedes the well-pleaded allegation that doctors *do view MOC* as reasonably interchangeable with other CME products. Op. 11. It then, however, improperly goes beneath the "surface" of Plaintiffs' allegations and finds it "difficult to imagine that doctors would see" MOC and other CME products as interchangeable. Op. 15. But no imagination is needed because as explicitly alleged, Dr. Akhter used MOC in precisely that fashion: "to meet State licensure requirements instead of buying different CME products from other CME vendors." ¶ 177. "Difficult to imagine" is simply a different way of the Majority stating its belief that Plaintiffs' allegations "seem unlikely" or are "unpersuasive."

B. The Majority Fails To Draw Reasonable Inferences In Plaintiffs' Favor.

In *Siva*, this Court instructed that MOC and other CME products "must be 'reasonabl[y] interchangeab[le]' in the minds of relevant consumers." 38 F.4th at 578 (citation omitted). Even assuming some merit to its outside-the-record determination that MOC costs more, the Majority still fails to observe the Rule 12(b)(6) dismissal standards of *Twombly* and *Iqbal* and their progeny.

This is because the Majority fails to credit the many well-pleaded facts *actually alleged* in the Complaint that when taken in the light most favorable to Plaintiffs, clearly support the inference that MOC is "reasonably interchangeable" with other CME products. The Complaint allegations describing and comparing the use and qualities of MOC and other CME products include:

> MOC and other CME products have the same purpose. (¶¶ 5, 7, 193).
>
> ABPN promotes MOC as a CME product. (¶¶ 92, 199(b)).
>
> ABPN substitutes MOC for CME products sold by others that are required by MOC. (¶ 105).
>
> Doctors view MOC as reasonably interchangeable with other CME products, recognizing they serve the same purpose and are commercial substitutes. (¶¶ 122, 177, 199(a)).

> MOC and other CME products have the same customer base. (¶ 194).
>
> Doctors use MOC for CME Category 1 direct credits toward state CME licensure requirements. ¶¶ 82, 101, 120, 199(e).
>
> Doctors use direct credits from MOC toward state CME product requirements nationwide. (¶¶ 82, 120, 199(e)).
>
> Dr. Akhter used CME direct credits from MOC "to meet State licensure requirements instead of buying different CME products from other CME vendors." (¶ 177).
>
> Doctors use their participation in MOC or passing a MOC examination to satisfy state CME product requirements. (¶¶ 119, 121).
>
> The ACCME is working towards "the integration of CME and MOC." (¶¶ 31, 199(f)).
>
> The New England Journal of Medicine describes MOC as a "viable way" for doctors to "pick up bonus points" towards CME license requirements. (¶ 118).

These well-pleaded facts, especially taken together, satisfy exactly what *Siva* requires: they "mak[e] it plausible that MOC is a substitute for other CPD products." *Siva*, 38 F.4th at 578. At minimum, they compel the reasonable inference that MOC is interchangeable with other CME products and that doctors view MOC as such. *See Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1329 n.5 (Fed. Cir. 2009) (reasonable inference "flows logically" from the facts alleged); *Poppell v. City of San*

Diego, 149 F.3d 951, 954 (9th Cir. 1998) (permissible inference exists when "there is a reasonable probability that the conclusion flows from the proven facts."). *See also* Black's Law Dictionary (10th ed. 2014) (inference defined as "[a] conclusion reached by considering other facts and deducing a logical consequence from them.").

Rule 12(b)(6) does not require (much less permit) dismissal even if the Majority's single outside-the-record "fact" could reasonably give rise to the adverse inference it prefers (it cannot, as discussed in Argument II below). This is because the many *actual factual allegations* set out in the Complaint supporting interchangeability outweigh the Majority's adverse inference from that single so-called "fact." The Majority wrongly restricted its Rule 12(b)(6) analysis to a "fact" not even in the record in order to claim an adverse inference.

Combing a complaint to find a single allegation taken out of context from which to draw an adverse inference (*see* Argument IC below), cannot prevail over the many other well-pleaded factual allegations supporting a favorable inference. Rule 12(b)(6) requires a court to "read the complaint as a whole, not to parse it piece by piece to determine whether each allegation, in isolation, is plausible." *Appvion,* 99 F.4th at 947

(internal quotation omitted). The Majority, contrary to *Twombly* and *Iqbal* and their progeny, fails to consider the entirety of Plaintiffs' allegations and the favorable inference that must be drawn from those allegations, that MOC and other CME products are interchangeable and are viewed that way by doctors.

C. There Is No Basis In The Record For The Majority's Factual Determination That MOC Costs More Than Other CME Products.

The Majority relies on a single snippet from the Complaint, taken wholly out of context, to support its factual finding that MOC costs more: Plaintiffs' allegation that doctors incur "a substantial cost in money, time, and effort" to buy MOC. Op. 11.

First, this allegation appears in the section of the Complaint titled "Antitrust Injury." ¶ 215. Thus, the adjective "substantial" addresses the fourth element of a tying claim requiring that "the tie affects a not-insubstantial amount of interstate commerce." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006). The allegation does not in any way address the comparative costs of MOC and other CME products. Nor can it fairly be so construed.

Second, the Complaint nowhere addresses the costs of other CME products or compare those costs with MOC. ABPN, of course, did not even assert this argument (likely because it knew it could not make a comparative cost argument in good faith); and needless to say, ABPN did not by Affidavit or otherwise offer any evidence below of the cost of other CME products or a comparison of those costs with MOC. There simply is nothing in the record to support the Majority's finding that MOC costs more than other CME products.

Third, the Majority makes up out of whole cloth that there is a "longer list of requirements [to buy MOC], as opposed to annually purchasing their state's required CME from another vendor." Op. 15. If this argument had been raised during the briefing, Plaintiffs would have quickly dispelled the Majority's misguided notion that doctors can easily satisfy the hundreds of hours of CME requirements needed for state licensure by some sort of one-stop shopping with a minimum of "money, time, and effort."

CME credits are not simply purchased. They are earned. The Majority's assumption ignores that doctors buying other CME products must survey and evaluate the other CME vendors and products, select

the individual CME products, submit the necessary paperwork and payment to enroll and buy the selected products, and, of course, spend the time (often including travel) to then actually earn the CME credit, including attending lectures, classes, seminars, and conferences, as well as complete any subsequent follow-up work.

In short, there is no reason to believe MOC is more costly in "money, time, and effort" than other CME products. At minimum, whether MOC costs more and how, if at all, any such difference might impact whether MOC is a reasonable substitute for other CME products are fact questions that cannot properly be decided, as the Majority does, at the dismissal stage. *See* Op. 24-26 (Moldonado, J., dissenting).

.....

As the Dissent finds, after a comprehensive discussion of Supreme Court and Seventh Circuit precedent and given the particular circumstances and unique history of this case (Op. 18-26 (Moldanado, J. dissenting)), Plaintiffs have "complied with the pleading standards" by "plausibly alleging" that CME and MOC "are reasonably

interchangeable." *Id.* 26. By holding otherwise, the Majority Opinion conflicts with that precedent.[5]

II. The Majority Misapprehends The Law Of Product Market And Whether Products Are Reasonably Interchangeable.

There are three reasons why the Majority errs in affirming dismissal, even assuming MOC costs more than other CME products (it does not).

First, strict cross-price elasticity alone does not, as a matter of law, dictate whether products are interchangeable. *Tunis Brothers Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991) (when assessing reasonable interchangeability, the "[f]actors to be considered include price, use, and qualities") (citing *United States v. DuPont de Nemours & Co.*, 351 U.S. 377 (1956)). As *Siva* instructs, products need only "be 'reasonabl[y] interchangeab[le]' in the minds of relevant consumers." 38 F.4th at 578 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Here, as set out above, there are extensive factual allegations about the "use and qualities" of MOC and other CME products, factors

[5] A more fulsome discussion of the history of this case is found in the Brief of Plaintiffs-Appellants, at pp. 19-21. (Appeal Dkt. 12).

from which it can easily be inferred that MOC and other CME products are reasonably interchangeable in the minds of doctors.

The Majority's laser-like focus on price also ignores that ABPN revokes certifications of doctors who do not buy MOC (¶¶ 11, 96), forcing them to buy MOC regardless of price. This makes impossible any meaningful cross-price elasticity analysis, especially at this early stage of the proceedings without fact or expert discovery, as the price of MOC is set by ABPN and not determined by "normal competitive factors." (¶ 222). As explicitly alleged by Plaintiffs (but ignored by the Majority), but for ABPN's tying, the cross-price elasticity of MOC and other CME products would be high. (¶ 201). In other words, a price increase in MOC would lead to significant switching by doctors to other CME products, except that ABPN would revoke their certifications.

Second, by conceding MOC is a competitor in the CME product marketplace just not a true competitor, the Majority requires absolute interchangeability. Op. 10. But absolute interchangeability or fungibility is not required. *3M Co. v. Prybil*, 259 F.3d 587, 603 (7th Cir. 2001) (product need not be "perfect substitute" to be in same product market); *Gorlick Distribution Ctrs., LLC v. Car Sound Exhaust Sys.*, 723 F.3d

1019, 1025 (9th Cir. 2013) ("It doesn't matter whether Car Sound's products are fully interchangeable with those of its competitors because perfect fungibility isn't required."); *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 206 (3rd Cir. 1994) (interchangeability implies only "that one product is roughly equivalent to another for the use to which it is put"). Even if after discovery a cost difference were found, that would not render MOC not reasonably interchangeable as a matter law.

Third, and especially germane in light of the Majority's errors above, whether MOC falls within the CME product market is a highly fact-intensive inquiry not suitable for resolution on a Rule 12(b)(6) motion. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992) ("the proper market definition ... can be determined only after a factual inquiry into the commercial realities faced by consumers."); *Envirosource, Inc. v. Horsehead Resource Dev. Co.*, 95 Civ. 5106 (TPG), 1997 U.S. Dist. LEXIS 12570, *8 (S.D.N.Y. August 20, 1997) ("[e]xtensive analyses of reasonable interchangeability and cross-elasticity of demand ... are not required at the pleading stage ... [m]arket definition ... is generally ultimately a question of fact which can be determined only after a factual inquiry into the commercial realities

faced by consumers"). Rule 12(b)(6) dismissal is especially inappropriate here, where the Majority simply ignores the many actual factual allegations in the Complaint supporting interchangeability, and instead concocts an adverse inference based on a single outside-the-record finding.

CONCLUSION

While the Majority cannot "imagine" why a doctor would buy MOC assuming it costs more (Op. 15), the very nature of an illegal tie is that consumers (doctors) are forced to buy an overpriced tied product (MOC) because the seller of the tied product (ABPN) has market power in the tying product (certifications). *See generally Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Plaintiffs' tying claim is the answer to the Majority's dilemma; dismissing the Complaint is not.

For the reasons stated herein, Plaintiffs-Appellants request the Court grant this Petition and reverse the District Court.

Respectfully submitted,

Emily Elizabeth Lazarou, and Aafaque Akhter, individually and on behalf of all others similarly situated

Dated: November 12, 2025 By: /s/ *C. Philip Curley*
One of Their Attorneys

C. Philip Curley
Robert L. Margolis
ROBINSON CURLEY, P.C.
600 West Van Buren Street, Suite 700
Chicago, Illinois 60607
Tel. 312.663.3100
pcurley@robinsoncurley.com
rmargolis@robinsoncurley.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 40(d)(3)(A)

I, C. Philip Curley, counsel for Plaintiffs-Appellants, certifies that this petition complies with the type-volume limitations of Federal Rules of Appellate Procedure 40(d)(3)(A). This petition was prepared in Century Schoolbook proportional font in Microsoft Word for Microsoft 365 MSO (Version 2408 Build 17928.20114) software and excluding the parts of the document exempted by Fed. R. App. P. 32(f) has 3816 words, including footnotes, according to the Microsoft Word count.

Dated: November 12, 2025

/s/ *C. Philip Curley*

CERTIFICATE OF SERVICE

C. Philip Curley, counsel for Plaintiffs-Appellants, certifies that on November 12, 2025, he caused to be electronically filed with the Clerk of the United States Court of Appeals for the Seventh Circuit **Petition For Rehearing and Rehearing *En Banc* of Plaintiffs-Appellants**, using the Court's CM/ECF system, which shall send notification of this filing to all counsel of record.

/s/ *C. Philip Curley*