IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EMILY ELIZABETH LAZAROU and AAFAQUE AKHTER, individually and on behalf of all others similarly situated	)	
Plaintiffs,	)	
v.	)	
	)	**No. 1:19-cv-01614**
AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY,	)	**Hon. Martha M. Pacold**
Defendant.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO
MOTION TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT

Defendant American Board of Psychiatry and Neurology ("ABPN") illegally ties its initial certification product, which it sells to new doctors to demonstrate completion of their medical education and assess the quality of their residency program, and its MOC product, which it requires some older doctors, but not all, to purchase throughout their careers to demonstrate lifetime learning or forfeit their initial certification. ABPN brings to the court's attention *Kenney v. American Board of Internal Medicine*, No. 18-5260, 2019 U.S. Dist. LEXIS 164725 (E.D. Pa. Sept. 26, 2019) ("*Kenney*"), and *Siva v. American Board of Radiology*, No. 19 C 1407, 2019 U.S. Dist. LEXIS 200645 (N.D. Ill. Nov. 19, 2019) ("*Siva*"). *Kenney* came first, followed by *Siva* which "agree[d] with the reasoning in *Kenney*." *Id.* at *11. [1]

Nothing in those opinions changes ABPN's unlawful conduct. A critical reading of the opinions and application of the universally accepted rule that well-pleaded factual allegations and

[1] The tying claims in *Kenney* were dismissed with prejudice without plaintiffs being allowed to amend, the court finding as a matter of law that separate products could never be alleged. Plaintiffs are appealing that ruling. The claims in *Siva* were dismissed without prejudice and plaintiff is filing an amended complaint on January 10, 2020.

all reasonable inferences therefrom must be taken as true compels the conclusion that *Kenney* and *Siva* were, respectfully, wrongly decided. Both rely heavily on *Kaufman v. Time Warner*, 836 F. 3d 137 (2nd Cir. 2016), which had not been cited by any of the parties in either case. *Kaufman* upheld dismissal of the *fourth* attempt to state a claim for tying set-top cable boxes and cable services due to the failure to allege separate demand. The plaintiff instead alleged "supply-side considerations," referred to markets outside of the United States, and made a failed analogy to internet services. *Id.* at 144-45. The Second Circuit was also persuaded by the market role played by the FCC, noting most importantly that regulatory price controls on the tied product made the tying claim "implausible as a whole." *Id*. at 145-47. [2]

Unlike the plaintiff in *Kaufman*, Plaintiffs here make numerous well-pleaded factual allegations supporting separate product demand, including: [3]

- Certification and MOC have been "sold separately in the past and still are sold separately." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992) -- ¶¶19, 22, 67, 70 (ABPN first sold certifications in 1935 and did not begin selling MOC until 2002); ¶¶22, 31, 59 (MOC still sold separately after purchase of initial certifications); ¶¶25-28, 54 (doctors "grandfathered" by ABPN not required to purchase MOC). *See also Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 693 (N.D. Ill. 2016).

- Other sellers of the tied product do so without selling the tying product. *See Eastman Kodak*, 504 U.S. at 462; *Viamedia*, 218 F. Supp. 3d at 693-94 -- ¶¶75-77 (NBPAS, a competing seller of lifetime learning products, does not sell an initial certification product).

- Consumers "differentiate between" the tied and tying products. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 22 (1984) -- ¶¶73, 84 (psychiatrists and neurologists do not want to buy MOC or would prefer to purchase lifelong learning products from other providers such as NPBAS); ¶¶75-77 (NPBAS sells only the tied product, reflecting differentiation by both another market participant and consumers); ¶78 (despite ABPN's anticompetitive conduct, some hospitals (though less than 1%) recognize NPBAS' product as demonstrating lifetime learning sufficient for maintaining certification). *See also Viamedia*, 218 F. Supp. 3d at 694.

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[2] A tie can either be "expressly instituted or effectively applied." *Viamedia, Inc. v. Comcast Corp.*, 335 F. Supp. 3d 1036, 1057 (N.D. Ill. 2018). ABPN argues it has not expressly instituted a tie, creating an issue of fact. Plaintiffs' allegations also support a claim that ABPN has "effectively applied" a tie.

[3] References to "¶ ____" are to paragraphs of the Class Action Complaint at Dkt. 1.

- "Grandfathering" confirms that ABPN also differentiates between the two products -- ¶¶26-28 (if there were a single product ABPN would not have freed half of psychiatrists and neurologists who have bought initial certification from buying MOC).
- Certification and MOC "have different purposes" -- ¶¶23, 71.

- The tying seller charges separately for the tied product. *Jefferson Parish*, 466 U.S. at 22 -- ¶¶ 22, 31, 59, 67, 82, 83, 94, 103 (ABPN charges for MOC separately).

Also unlike *Kaufman,* there is no FCC-type regulatory environment here which the Second Circuit relied upon in holding that the tying claim there "was implausible as a whole." [4]

While *Kenney* and *Siva* referred to some of the allegations of separate demand made by plaintiffs in those cases, they did not take those allegations as true. Instead, they accepted the defendants' interpretation that, as a matter of law, there could only be one product, *viz.*, certification. Thus, *Kenney* "disagree[d]" with and gave "very little weight" to plaintiffs' factual allegations of separate demand in order to "find" a single product. 2019 U.S. District LEXIS 164725 at *35, *37. Similarly, S*iva* accepted the defendant's argument that "it sells only one product: certification, of which MOC is a part" in deciding that it was not "convinced" there were separate products. 2019 U.S. District LEXIS 200645 at * 8, *9. [5] *Kenney* and *Siva* simply adopted the defendants' view of the world, thus arrogating to themselves the role of finder of fact. [6]

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[4] Another district court that has applied *Kaufman* to a tying claim, *Angio Dynamics, Inc. v. C.R. Bard*, No. 1:17-cv-00598, 2018 U.S. Dist. LEXIS 131206, *19-23 (N.D. N.Y. August 6, 2018), denied a motion to dismiss citing allegations like those here that consumers had purchased the two products separately (catheters and tip location systems that aid in placement of the catheters). The court accordingly found that plaintiff had "sufficiently pled the element of separate products."

[5] A similar argument made on a motion to dismiss in the single-serve coffee litigation, that the coffee pods are simply "aftermarkets" sold for use with the primary product (single serve brewers), was recently rejected. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 228, fn. 24 (S.D.N.Y. 2019) ("For purposes of the current motion [to dismiss], it suffices that the [plaintiffs] have plausibly alleged both [markets], discovery will illuminate which market is appropriate in which to analyze the alleged anticompetitive conduct.") (citation omitted).

[6] *Siva* also relied on *Kentmaster Manufacturing Company v. Jarvis Products Corp.*, 146 F. 3d 691 (9th Cir. 1998), another case that had not been cited or relied upon by any of the parties in either *Kenney* or *Siva*. That case involved predatory pricing and not tying, plaintiff's pricing allegations conceded a single

Kenney and *Siva* also relied heavily on a franchise analogy advocated by the defendants. In doing so, they accepted defendants' outside-the-record assertions in support of their analogy. For example, while *Kenney* credited defendant's contention that other suppliers of lifetime learning products would lead to "hospitals, insurance companies, and patients [losing] faith in the ABIM certification process," 2019 U.S. District LEXIS 164725 at *37, n. 2, and *Siva* accepted the defendant's argument that it was selling doctors "essentially an endorsement based on a formula including all that it entails," 2019 U.S. District LEXIS 200645 at *14 (internal quotation marks and citation omitted), no such allegations were made in either case. In fact, as here, plaintiffs in those cases alleged the opposite—that the driving force behind MOC is not to enhance or establish any ABPN "standard" but the substantial revenue it generates (*e.g.,* ¶¶4, 59, 82), and that years of studies and evidence show no causal relationship between MOC and any benefits to physicians, patients, or the public (*e.g.,* ¶¶54, 57). APBN is free to dispute these allegations later at the appropriate time; they must, however, be taken as true at this stage of the proceedings. [7]

The franchise analogy also fails on the facts: doctors are not licensing a product from ABPN, nor are they purchasing a uniform method of doing business (here, the practice of medicine, as opposed to selling prefabricated buildings, diet pills, or ice cream). And the economic arguments that might justify a franchisor's tying do not apply here. There are at best minimal efficiencies from having a monopoly supplier of both initial certification and MOC, and any such efficiency is

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product, there was no allegation or discussion of separate demand, and no antitrust injury was alleged. And unlike here it *was* possible to determine life cycle costs for the replacement parts. *See* ¶86 (because of ABPN's repeated changes to MOC, it is "impossible to calculate the life cycle cost.").

[7] Defendants in *Kenney* and *Siva* also claimed, as ABPN does here, that they would be forced to accept NBPAS's product as satisfaction of their own requirements for initial certification if plaintiffs were to prevail. Nowhere does any plaintiff seek such relief, precisely because two separate products exist.

outweighed by the efficiency losses from not having robust competition to provide alternatives to ABPN's lifetime learning product. Finally, the franchise analogy raises a myriad of factual issues, including the benefits of MOC asserted by defendants and their intent in implementing MOC, not properly resolved on a Rule 12 (b)(6) motion.

It is not the plaintiff's task on a Rule 12(b)(6) motion to convince the court that it will ultimately prevail. Nor is it the court's task to weigh or find facts. *See Dejbo Sales*, No. 14-4657, ECF Dkt. No. 73, pp. 2-3 (D.N.J. Jan. 28, 2016) (refusing defendant's invitation to rule as a matter of law on a motion to dismiss that the two products (textbooks and delivery of the textbooks) "can never be the subject of a tying claim.") (Exhibit 1 hereto). Defendants' arguments in *Kenney* and *Siva*, like ABPN's arguments here, far from being dispositive show there is a factual dispute whether separate products exist, which is why there is discovery and trials. *See In re Cox Enters.,* No. 12-MDL-2048-C, U.S. 2014 Dist. LEXIS 91331, *11) (W.D. Okla. July 3, 2014) (denying summary judgment on a tying claim despite defendant's evidentiary inferences: "Defendant's arguments … demonstrate only the existence of a material factual dispute.").

The Second Circuit has recently reaffirmed that consumer demand is the principal factor in determining an appropriate market. *US Airways, Inc. v. Sabre Holdings Corporation*, 938 F. 3d 43 (2nd Cir. 2019), reversed dismissal of a monopolization claim, finding a single brand of a product had been adequately alleged as a relevant market. In doing so, it noted that market definition "is a deeply fact-intensive inquiry" and courts "hesitate to grant motions to dismiss for failure to plead a market." 938 F. 3d at 64 (internal quotation marks and citation omitted). [8]

[8] The Eleventh Circuit also recently affirmed (on other grounds) a district court's denial of a motion to dismiss a tying claim. *Diverse Power, Inc. v. City of LaGrange*, 934 F. 3d 1270 (11th Cir. 2019). The district court in that case in denying the motion to dismiss, had held that "[a]t this stage" it need not decide what the relevant product market *is*, but only whether plaintiff "has adequately alleged its definition." *Diverse Power, Inc. v. City of Lagrange*, No. 3:17-cv-3-TCB, 2018 U.S. Dist. LEXIS 226681, *15, *16, n. 1 (N.D. Ga. Feb. 21, 2018).

Respectfully submitted,

Dated: December 11, 2019

/s/ C. Philip Curley

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Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

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917-297-4903

January 28, 2016

VIA ECF

LETTER ORDER

Re: Debjo Sales, LLC v. Houghton Mifflin Harcourt Publishing Corp.
Civil Action No. 14-04657

Dear Litigants:

This matter comes before the Court by way of Defendant Houghton Mifflin Harcourt Publishing Company's ("Defendant") Motion to Dismiss Plaintiff Debjo Sales, LLC's ("Plaintiff") Second Amended Complaint. Dkt. No. 69. The Court previously dismissed all claims without prejudice. Because Plaintiff's Second Amended Complaint remedies the earlier pleading defects, Defendant's motion is **DENIED**.

I. Newly-Alleged Facts

The facts and legal standards as laid out in this Court's earlier opinion are incorporated herein. See Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co., No. 14-4657, 2015 WL 1969380, at *2-*9 (D.N.J. Apr. 29, 2015). The Court will only discuss the new facts alleged in Plaintiff's Second Amended Complaint.

In New Jersey, purchases of over $17,500 made by schools, including delivery of textbooks, are subject to public bidding laws. Second Am. Compl. at 2 ¶ 4, Dkt. No. 64. Educational Data Services ("EDS") is a consortium of 388 school districts in New Jersey and 108 school districts in New York which solicits and awards bids for the school districts. Among the services solicited by EDS is "textbook freight consolidation." Id. EDS may pre-approve service providers, permitting school districts to enter contracts with them without having to conduct a public bid. Id. Plaintiff was pre-approved by EDS for textbook delivery. Id. at 2 ¶ 5.

School districts purchase K-12 school textbooks in bulk. Id. at 5 ¶ 2. All national textbook publishers Plaintiff services treat purchase and delivery of textbooks differently. Id. From 2009 to 2014, Plaintiff shipped textbooks for over 100 school districts in New Jersey for a total of about 400 purchase orders. Id. at 6 ¶ 3. The total value of K-12 textbook purchase orders picked up and delivered by Plaintiff from Defendant between 2009 and 2014 was about $8,500,000. These contracts span school districts in New Jersey, New York, and Maryland. Id. at 9 ¶ 11.

School districts forwarded purchase orders to Defendant and Plaintiff with an endorsement that specifically directs Defendant to have the order available for pick-up by Plaintiff. Id. at 3 ¶ 7; 5 ¶ 2. In summer 2014, nineteen school districts had contracted with Plaintiff to deliver fifty-nine purchase orders from Defendant to their districts. Id. at 4 ¶ 9. Combined, these orders were worth $866,266.08. Id. Defendant's policy change and subsequent conduct allegedly caused these orders to be shipped by Defendant instead. Id. As a result, Plaintiff lost $43,313.30 in shipping fees. Id. Other districts also did not seek out Plaintiff to deliver their books as a result of Defendant's policy change. Id. at 7 ¶ 5.

In an email sent on February 6, 2015, Defendant offered to waive its shipping fees for two orders and reduce its rate for future orders so that it, rather than Plaintiff, would ship the orders. Id. at 4 ¶ 10. The email mentions Plaintiff by name. Id. Defendant sent hundreds of similar emails to customers and prospective customers of Plaintiff in 2014 and 2015 in an attempt to put Plaintiff out of business. Id. at 5 ¶ 11.

II. Antitrust Tying (Count 1)

Defendant repeats the argument, rejected by this Court in its earlier opinion, that Plaintiff has not alleged antitrust injury. For the same reasons as before, Debjo Sales, LLC, 2015 WL 1969380, at *2-*4, and with the added allegations concerning Plaintiff's contracts with school districts further demonstrating injury to competition, the Court is not persuaded by this argument.

Defendant's argument that Plaintiff has not pleaded a plausible relevant market does not prevail. The Second Amended Complaint alleges that "The products in question – K-12 school text books and the like – are distinct articles of commerce, separate and apart from defendant's service of delivery of the same. Indeed, school districts purchase the same in bulk, such that K-12 text books constitute distinct articles of commerce." Second Am. Compl. at 5 ¶ 2. Because Plaintiff has alleged that K-12 textbooks are purchased in bulk by school districts, it has plausibly alleged a distinct product market. The Court will not dismiss the claim on this basis on the pleadings.

Defendant argues that Plaintiff has not pleaded separate demand for textbooks and textbook delivery in the K-12 market. The Court disagrees. The Second Amended Complaint alleges that school districts entered into hundreds of contracts for textbook delivery with Plaintiff, including specifically fifty-nine contracts in summer 2014. That alone is sufficient to plausibly allege that delivery of textbooks and their purchase have distinct demand such that it is efficient to provide them separately.

Defendant also claims that textbook sale and delivery cannot be distinct markets because textbooks may not be delivered without first being purchased. For this proposition, Defendant cites Jefferson Parish Hospital District No. 2 v. Hyde: "For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately without also purchasing the tying product." 466 U.S. 2, 39 (1984) abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006). This citation conflates concepts and ignores relevant precedent which establishes that the appropriate inquiry to define the relevant

markets is consumer's desire to purchase products separately, not a functional analysis of whether one market depends upon another.

For example, in Eastman Kodak Co. v. Image Technical Services, Inc., the Supreme Court rejected an argument that servicing of Kodak machines could never be performed without also having Kodak parts, so the markets could not be distinct: "By that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires." 504 U.S. 451, 463 (1992). The Court then cited Jefferson Parish in support, noting that "[w]e have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." Id. (citing Jefferson Parish, 466 U.S. at 19 n.30). Jefferson Parish itself rejects the kind of functional analysis Defendant proposes. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44 n.30 (1984) (collecting cases) abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006). Furthermore, Defendant's reasoning implies that all delivery of any product can never be the subject of a tying claim, yet Defendant cites no case supporting this broad proposition. The Court will not establish such a rule now.

Defendant also argues that Plaintiff had to plead the terms of each contract in order to survive at this stage. There is no support for that claim. Plaintiff pled the relevant components of each contract: terms of delivery, total cost, fees, and roughly which entities entered into contracts with them. No more is required at this stage.

Defendant next argues that there is no indication that a substantial amount of interstate commerce has been affected. But Plaintiff has identified shipped goods worth almost $866,266.08 affected in summer of 2014 alone, with fees of $43,313.30. Plaintiff also alleged that it delivered $8.5 million worth of HMH textbooks from 2009 to 2014. Second Am. Compl. at 6 ¶ 3. That is enough. See Int'l Salt Co. v. United States, 332 U.S. 392, 395 (1947) ($500,000 of salt sales sufficient to constitute substantial economic effect) abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006). There is no indication this market is shrinking or that Plaintiff's fees in summer 2014 are an aberration. Plaintiff also alleges that it has lost substantially more than the identified fees, because Defendant's actions have deterred many customers from contracting with Plaintiff in the first place. The Court finds that Plaintiff has stated facts sufficient plausibly to find a substantial amount of interstate commerce has been affected.

III. Intentional and Tortious Interference (Counts 2 and 3)

A. Malice

Defendant argues that Plaintiff, as before, has failed to allege malice. The Court disagrees. Malice requires that an action taken be without justification or excuse. Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31, 37 (N.J. 1989); see also Mu Sigma, Inc. v. Affine, Inc., No. 12-1323, 2013 WL 3772724, at *5 (D.N.J. July 17, 2013) (finding Plaintiff's allegation that Defendants maliciously sought to induce Plaintiff's clients to place orders with them instead was insufficient to plead malice).

As Defendant admits, the Second Amended Complaint adds an allegation that Defendant's new shipping policy was enacted for the sole purpose of harming Plaintiff's business. Second Am. Compl. at 11 ¶ 4. This denies that Defendant's reasoning—mitigation of shipping costs—was the actual justification for its policy. Plaintiff also identifies an email where Defendant offered to eliminate the fees temporarily in exchange for shipping through them rather than Plaintiff, and offered to waive fees in exchange for a denial of business to Plaintiff. Id. Finally, Plaintiff alleges that hundreds of similar emails were sent for the sole purpose of undercutting its business. That is sufficient to allege malice here.

B. Contracts and Economic Advantage

Defendant also argues that Plaintiff has not adequately alleged specific contracts. The Court disagrees.[1] In its amended pleadings, Plaintiff alleges it lost contracts to deliver Defendant's textbooks worth $8.5 million for $43,313.30 in shipping fees. Id. at 4 ¶ 9. There were fifty-nine purchase orders providing for delivery for nineteen school districts. Id. Plaintiff was also preapproved by EPS to provide textbook delivery service without going through a bidding process. Id. at 2 ¶ 5.

Defendant similarly argues that Plaintiff has not adequately alleged prospective economic advantage. The Court disagrees, as the allegations of specific contracts discussed above, combined with the allegation that many school districts declined to work with Plaintiff due to Defendant's policy change, are sufficient to state a claim.

Defendant's motion is therefore **DENIED**.

SO ORDERED.

/s Madeline Cox Arleo
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

[1] Defendant mischaracterizes Plaintiff's Second Amended Complaint as affirmatively pleading that contracts did not exist prior to the shipping policy. Plaintiff's complaint provides specifics for contracts following the policy change, but also indicates that it shipped $8.5 million worth of Defendant's books to school districts from 2009 to 2014.