No. 21-2334

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Sadhish K. Siva, *et al.*,

Plaintiff-Appellant,

v.

American Board of Radiology,

Defendant-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
Case No. 1:19-cv-01407
The Honorable Judge Jorge L. Alonso

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Oral Argument Requested

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INTRODUCTION

Appellee American Board of Radiology ("ABR") has framed the issue on this appeal as whether "it is entitled to set the parameters of its own certification requirements." Dkt. 14-1,¶ 5. The answer is "no" when ABR violates the antitrust laws by tying together two separate products. Just as with any other defendant.

A sense of entitlement permeates ABR's Brief. According to ABR, neither Plaintiff nor the courts should question its rationale and motives. Instead, all must accept without question its self-serving extra-judicial justifications for its illegal conduct, despite (1) Plaintiff's well-pled facts alleging that MOC is not about "maintaining" anything other than ABR's own bottom line, and (2) such justifications are affirmative defenses that under well-settled law are irrelevant on a motion to dismiss. ABR does not get a free pass for its unlawful conduct. The only proper question on this appeal of a Rule 12(b)(6) dismissal is whether Plaintiff's well-pled allegations plausibly state the elements of his claims. ABR's attempted reframing of the issue as well as the arguments in its Brief make clear that ABR steadfastly wants to avoid the facts Plaintiff has alleged and deny Plaintiff his day in court.

ARGUMENT

I. ABR's Justifications for Ignoring Plaintiff's Well-Pled Allegations Are Specious.

Plaintiff has laid out well-pled, specific factual allegations supporting every indicator of "separate demand" the Supreme Court identified in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1989). Appellant's Br. 27-41. The District Court largely disregarded those allegations, instead imposing its own mistaken impressions of the "nature" of certifications and of MOC. A-13. Because the First Amended Complaint ("FAC") alleges abundant facts supporting separate demand, satisfying the well-established test for separate products, the District Court's failure to take the allegations as true was reversible error. Appellant's Br. 41-51.

ABR has similarly chosen not to engage with most of Plaintiff's allegations of separate demand, instead labeling them generally as "conclusory" and arguing this Court can ignore allegations "that amount to" legal conclusions and opinions. ABR Br. 11. *See also*, *id.* 16 ("most" of Plaintiff's separate demand allegations "are not 'factual allegations' at all but mere conclusions and labels the Court can and should disregard"). ABR does not address any actual allegations from the FAC,

but instead misleadingly refers only to Appellant's discussion of the applicable law. ABR Br. 16 (citing pages of Appellant's Brief from the Summary of Argument and section introducing the Separate Demand argument).

This Court recognizes that "conclusory" is an "overused lawyers' cliché." *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992). Tellingly, ABR provides no legal authority or explanation why Plaintiff's many pages of detailed allegations of specific facts are "conclusory," instead pretending the allegations do not exist in order to avoid addressing them. Black's Law Dictionary defines "conclusory" as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." *Conclusory*, Black's Law Dictionary (11th ed. 2019). *Accord McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) ("legal conclusions and *conclusory allegations merely reciting the elements of a claim* are not entitled to the presumption of truth") (emphasis added).

In contrast, allegations that go beyond just reciting the elements and set forth the factual basis supporting the claim are not "conclusory." *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015). The

FAC clearly does not "merely recite" the conclusion that certification and MOC are separate products, but provides detailed allegations supporting every indicator of separate demand that *Jefferson Parish* and its offspring require courts to consider. As such, the FAC is anything but "conclusory."

For example, Plaintiff alleges radiologists differentiate between certification and MOC. Appellant's Br. 28 (citing *Jefferson Parish*, 466 U.S. at 22-23). If the FAC alleged nothing more than "Radiologists differentiate between certification and MOC," then ABR would be correct in calling that allegation "conclusory" and the District Court would have been equally correct not to consider it. But the FAC alleges numerous, specific facts supporting that allegation, including: (1) statements by ABR and ABMS confirming certifications assess whether new radiologists have successfully completed post-graduate residency programs, while MOC, like other CPD products, is designed to provide "individual lifelong learning" after certification; (2) radiologists bought CPD products separately from certifications from other vendors for decades before ABR began mandating MOC; (3) ABR sold certification for decades without selling its own CPD product; (4) many ABR

"grandfathers" do not buy MOC, proof that as consumers they do not consider MOC a component of certification; and (5) Plaintiff explains why he differentiates between certification and MOC, and that he purchased them at different times. *See* Appellant's Brief 28-29 and FAC paragraphs cited therein.

Under the commonly accepted definition of the word, these allegations are not "conclusory." The same is true for the allegations supporting every other separate demand factor. *See* Appellant's Brief 30-41 and FAC paragraphs cited therein. Plaintiff's well-pled allegations should not have been disregarded below, and for the reasons previously argued and explained further at pp. 9-26 *infra*, they sufficiently plead the separate products element of Plaintiff's tying claim.

Nor does the FAC contain mere "opinions" as ABR also contends. For example, it is not just Plaintiff's "opinion" that certifications and MOC are not voluntary. Rather, these allegations are supported by many pages of detailed factual allegations detailing how hospitals, insurers, and employers require certification and MOC, clearly demonstrating

they are an economic necessity for radiologists. (¶¶ 60-90). [1] Plaintiff also cites industry analyses and surveys confirming they are a necessity. (¶¶ 91-93). Similarly, it is not unsupported "opinion" that MOC does not improve patient care. The allegation is bolstered by specific allegations of industry studies and analyses reaching that very conclusion. (¶¶ 209-233).

II. Neither Plaintiff Nor This Court Have "Recognized" that Certification and MOC Are a Single Product.

ABR argues several of Plaintiff's allegations "confirm ABR certification is a single product." ABR Br. 15. This meritless argument rests on tortured interpretations of FAC allegations describing specific facts about the mechanics of ABR's tie of certifications and MOC.

ABR first points to an allegation in which Plaintiff supposedly "recognizes" that "[v]alidity of certification is contingent upon participation in [MOC]." ABR Br. 15 (citing FAC ¶ 9). But the FAC paragraph cited describes how ABR *enforces* its tie by "reporting the certifications of radiologists as invalid or 'Lapsed' if they do not later

[1] References to "¶ __" are to the First Amended Class Action Complaint ("FAC"), Dkt. 55, included in the Supplemental Appendix at SA-19-96.

buy ABR's own CPD product, even though those radiologists previously purchased certifications." This allegation in no way concedes the existence of a single product.

Similarly, allegations that Plaintiff knew of the MOC requirement when he purchased his certification and that ABR "automatically enroll[s]" radiologists in MOC do not "acknowledge" the products are one. ABR Br. 15 (citing FAC ¶ 176). Instead, they simply explain how ABR *executes* the tie. ABR cites no authority suggesting that knowledge of the tie when entering a transaction or "automatic enrollment" as a means of executing a tie precludes a finding of separate products. In fact, the opposite is true. *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 446-449 (7th Cir. 2020) (consumers signed with Comcast for ad rep services knowing of the tie).

ABR also contends the allegation that MOC "would never be successful on its own merits" somehow admits that MOC is not separate from certifications. ABR Br. 15-16 (citing FAC ¶ 144). This rests on a gross mischaracterization of the allegation. FAC paragraph 144 explains how ABR, after the failure of the voluntary ABMS "recertification" CPD product, understood that "[t]he only way it could

succeed was to force radiologists to buy MOC, and the only way to force radiologists to buy MOC was to use ABR's certification product as leverage." (¶ 144). This allegation of ABR's naked demonstration of its monopoly power strongly supports the existence of separate products and not a single product.

Finally, ABR lifts a phrase out of context from *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 15 F.4th 831, 832 (7th Cir. 2021), to argue this Court already has recognized certifications and MOC are one product. ABR Br. 15. Not so. The language ABR quotes simply acknowledges that ABR requires the purchase of MOC to remain certified, and was not addressing whether certification and MOC are separate. The District Court had found it "unclear which products and services [plaintiff claimed] are 'tying' or 'tied,'" though it appeared Plaintiff was alleging a tie between MOC and hospital staff privileges, not MOC and certifications. *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, No. 14-cv-02705, 2020 U.S. Dist. LEXIS 173853, *13-14 (N.D. Ill. Sept. 22, 2020). Anyway, this Court did not reach the separate products question,

holding the allegations of a conspiracy between ABMS and hospitals were not plausible. 15 F.4th at 834.

III. Plaintiff Plausibly Alleges Separate Demand and Distinct Products.

A. Contrary to ABR's Argument, Plaintiff Does Not Allege That Demand for MOC Is "Dependent" On Certification.

ABR argues there cannot be separate products because Plaintiff does not "allege that there is demand among radiologists to purchase MOC *without* initial certification." ABR Br. 19 (emphasis in original). But ABR does not explain why the absence of such an allegation precludes separate products as a matter of law, and ignores, among other things, that ABR simply will not sell MOC to radiologists unless they have already purchased certifications. (¶ 7).

In fact, *Jefferson Parish* forcefully belies ABR's argument. A consumer does not buy standalone anesthesiology services independent of a hospital's surgical services. Yet, anesthesia was found to be a separate product from the hospital's surgical services. *Jefferson Parish*, 466 U.S. at 19, n.30 ("We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices."). ABR's argument that MOC is

only useful to radiologists who already own certifications is a quintessential functional relationship argument, rejected in *Jefferson Parish* and other cases. Appellant's Br. 52-56. ABR does not even address this point, let alone refute it.

ABR also fails to advise that it stifles demand by *refusing* to sell MOC to radiologists unless they first buy certifications. That refusal bespeaks ABR's monopoly power over certifications and the effectiveness of its illegal tie, not a lack of separate demand. There is every reason to believe that some radiologists without certifications would buy MOC, which according to ABR helps keep radiologists current, if ABR permitted them to do so.

The FAC also alleges several thousand doctors bought the voluntary ABMS "recertification" CPD product independent of their certifications when they were sold in the 1980s. (¶ 132). And *today*, some "grandfathers" buy MOC even though ABR does not revoke their certifications if they do not. (¶ 158-159). For these "grandfathers," the demand for MOC is surely not "dependent" on certification since they need not purchase MOC to keep their certifications. At best, ABR's

dispute over demand requires a fact-intensive inquiry inappropriate for resolution on a pleading motion.

B. ABR's Reliance on Inapt Franchise Cases Ignores the Fundamental Difference Between Demand in the Franchise Setting and This Case.

ABR's misguided demand analysis rests primarily on cases arising in the franchise context. *See* ABR Br. 16-17 (citing *SubSolutions, Inc. v. Doctor's Assocs., Inc.*, 436 F. Supp. 2d 348 (D. Conn. 2006), and *Casey v. Diet Ctr., Inc.*, 590 F. Supp. 1561 (N.D. Cal. 1984)); ABR Br. 22 (citing *Casey*, as well as *Will v. Comprehensive Acct. Corp.*, 665 F.2d 665 (7th Cir. 1985), and *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980)). Franchise cases, however, are not relevant when a monopolist uses its monopoly power over an economically necessary tying product to force the purchase of a tied product. Franchisors are not monopolists and no franchisee is compelled by economic necessity to buy a particular franchise. Instead, the franchise relationship is truly voluntary and not necessitated by the economic realities facing radiologists here.

Courts, including this one, have long recognized this. *See*, *e.g.*, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 441 (3d Cir. 1997) ("franchise package … consistent with the existence of a competitive

market in which franchises are valued, in part, according to the terms of the proposed franchise agreement and the availability of alternative franchise opportunities. Plaintiffs need not have become Domino's franchisees"); *Will*, 776 F.2d at 673 ("Just about every conceivable method of organizing service is used in this business -- national partnerships with blanket coverage, independent one-man offices, smaller partnerships, franchised systems, and in-house production. Each, including methods that revolve around tied packages, may be beneficial to some customers. In a competitive market the customers will pick the arrangements that work best for them.").

For this reason, the analysis of demand in the franchise context is inapplicable to the market realities surrounding the relationship between the monopolist ABR and radiologists. Neither ABR nor the District Court has reckoned with this fundamental disconnect between franchises and the tying of certifications and MOC.

Other differences also make the franchise analogy inapt. Unlike franchisees, radiologists do not purchase licensing rights from ABR, share investment risk with ABR, or otherwise operate under the ABR brand. Instead, radiologists practice under their own names. *See Will*,

776 F.2d at 670 n.1 ("[a] franchiser and its franchisees are part of a business organization not altogether different from vertical integration"); Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1710c3, at 117 (4th Ed. 2018) ("Areeda & Hovenkamp") (in franchise cases, "the tie is being used not to extract monopoly prices or drive out competitors, but rather as a mechanism by which the franchisor and franchisee share the risk of investment and operations"). [2]

Despite these obvious differences ABR forces the analogy that like a franchisor, it is selling a "business method." ABR Br. 22. The analogy, however, fails for the reasons described above—a franchisee can freely choose among hundreds of potential franchise "business methods" and voluntarily enter a relationship with the franchisor of its choice.

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[2] *Principe* highlights this point. 631 F.2d at 310-11 ("because both McDonald's and the franchisee have a substantial financial stake in the success of the restaurant, their relationship becomes a sort of partnership that might be impossible under other circumstances. McDonald's spends close to half a million dollars on each new store it establishes. Each franchisee invests over $100,000 to make the store operational. Neither can afford to ignore the other's problems, complaints or ideas. Because its investment is on the line, the Company cannot allow its franchisees to lose money. This being so, McDonald's works with its franchisees to build their business …"). The economics of the relationship between radiologists and ABR are nothing like this.

Radiologists, on the other hand, need their ABR certifications for insurance, hospital privileges, and employment purposes, and thus have no choice but to buy ABR's MOC product.

The analogy also fails because no single "business method" is involved here. Plaintiff alleges, and ABR does not dispute, that certifications signify successful completion of post-graduate residency programs. MOC, on the other hand, in ABR's own words, is intended for "individual lifelong learning." (¶ 169). Because certifications and MOC serve different purposes, and because MOC is acknowledged by ABR itself to be individualized, there is no single "business method" here, and ABR does not even purport to describe one.

For these reasons, the franchise analogy does not fit this case, and the District Court erred by relying on it in support of dismissal.

C. The District Court's Finding That MOC is a Component of Certification Is Not a "Legal Conclusion" and Is Factually Without Basis.

ABR parrots the District Court's holding that "[w]hether MOC is a component of certification or a separate product from certification is a legal conclusion," which the District Court did not have to take as true. ABR Br. 17 (quoting A-9 n.2). However, the District Court erred by

imposing its own factual finding that MOC is a component of certification in the guise of a "legal conclusion." First, whether separate demand and distinct products exist requires fact-intensive inquiries into demand and other factors not susceptible of resolution on Rule 12(b)(6) motion. Second, as argued above, Plaintiff's well-pled factual allegations supporting separate demand are anything but "legal conclusions." *Supra* 2-5. Third, the case law is clear that whether products are "components" is not a "legal conclusion" but a factual characterization that only begs the separate products question and does not answer it. Appellant's Br. 60-63.

ABR attempts to distinguish Plaintiff's "component" cases, but courts consistently reject the very argument ABR makes—"changing" a product precludes a finding that it has bundled two separate products. For example, *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1547 (10th Cir. 1995), made clear that just because a tying defendant labels its conduct "efforts to improve" the tying product "by adding elements to it," a court nevertheless may find that the conduct "constitute[s] the bundling of a second product." *See also*, *United States v. Microsoft*

Corp., 253 F.3d 34, 89 (D.C. Cir. 2001); *United States v. Microsoft Corp.*, 147 F.3d 935, 949 (D.C. Cir. 1998).

The District Court also made the factual determination that ABR itself never sold MOC and certifications separately. A-8 (deeming this the "most critical[]" fact in finding the products are not separate). This finding is factually wrong for the reasons set forth at pages 32-35 of the Appellant's Brief and will not be repeated here. ABR's arguments seeking to buttress the District Court fare no better.

The FAC details ABR's participation as a Member Board in the development of the ABMS "recertification" CPD product, the forerunner of MOC, an entirely voluntary product sold independently of certifications. Appellant's Br. 10-13 and FAC paragraphs cited therein. Because it was voluntary, unlike MOC, the certifications of doctors who did not purchase "recertification" were not revoked. As Plaintiff alleges, MOC is "recertification" reborn, but with a different name and now made mandatory. *Id.*, 12. The FAC also details how some ABR "grandfathers" purchase MOC even though they are not required to do so, establishing that *today* radiologists purchase MOC separately from certifications. *Id.,* 13-14.

ABR makes no mention whatsoever of the "recertification" product or ABR's participation in its development, nor does it dispute that MOC is its direct descendant. Thus, it concedes Plaintiff's argument that his well-pled "recertification" allegations establish ABR's participation in the sale of a MOC-like CPD product, albeit voluntary, that was sold independent of certifications. Nor does ABR explain why the independent purchase of MOC by "grandfathers" does not constitute ABR's own sales of MOC separate from certifications.

At bottom, ABR's and the District Court's position rests on the false premise that historical sales of two separate products by ABR itself is the *sine qua non* of a separate product finding. Plaintiff, however, has already demonstrated that courts, including the Supreme Court in *Jefferson Parish*, also rely on the conduct of other market participants in assessing whether separate demand and distinct products exist. Appellant's Br. 34-35. *See also Multistate*, 63 F.3d at 1548 ("Other bar review industry participants view full-service and supplemental MBE courses as separate products"); [3] *Viamedia* 951 F.3d at 443, 469-70 (not

[3] ABR contends *Multistate* is distinguishable "because there was evidence the products subject to the alleged tie had been sold separately at various points." ABR Br. 18. It then acknowledges Plaintiff's similar

only did defendant sell the products separately both before and after the tie, but other MPVDs did too). Again, ABR's only response to Plaintiff's argument is a franchise case, *Casey*, 590 F. Supp. at 1564, which it cites as "recognizing that there is no tie-in where demand for the tied product was generated wholly by the customer's purchase of the tying product." ABR Br. 20. But, unlike ABR's monopolistic hold on the economically necessary certification tying product, the "customer's purchase of the tying product" of the franchise in *Casey* was truly voluntary, and thus irrelevant to this case.

Finally, ABR posits that "stripped of legal conclusions" Plaintiff's complaint is that ABR changed its product from a perpetual certification to one that is time-limited and now "require[s] MOC to retain certification." *Id.* 17-18. Even if this were so, and it is not, that is precisely the artificial construct ABR has designed to enforce its tie, taking full advantage of its undisputed monopoly power over certifications and the knowledge that certifications are an economic necessity for radiologists.

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allegations about the voluntary ABMS "recertification" CPD product and that ABR "grandfathers" buy MOC independent of certifications, but dismisses them as "conclusory" without explaining why.

D. The Argument That Only MOC Can "Maintain" Certification Is a False Construct, and Reflects the Ruthless Effectiveness of the Tie, Not a Lack of Separate Demand.

ABR echoes the District Court's finding that because only MOC can "maintain" certification, it is not "fungible" with other vendors' CPD products and, therefore, the demand for those other CPD products is irrelevant. ABR Br. 20. This argument fails for several reasons.

First, it improperly buys into the contrivance that certification, which a former ABMS Member Board president described as a credential signifying successful completion of a post-graduate residency program (¶ 53), can be "maintained" by a product designed to address something completely different—a radiologist's keeping current over the many decades of his or her practice. (¶¶ 136-138, 141). As the Plaintiff's well-pled factual allegations make clear, ABR and the other Member Boards did not invent the mandatory "maintaining" of certifications until they needed an alternative revenue stream after the market failure of the voluntary ABMS "recertification" product. (¶¶ 130-133, 135-143). These allegations expose the entire "maintaining" charade behind MOC as the ruse it is.

Second, this argument at the very least raises numerous fact issues about business justification that should not even be considered on a motion to dismiss, much less resolved. *See* Appellant's Br. 56-60. While ABR claims it "change[d] its certification product to adapt to the continually evolving field of medicine to ensure" that radiologists "*remain* current on the requisite knowledge, skill, and training" (ABR Br. 23, emphasis in original), there is absolutely no evidence of this at this stage of the proceedings. The Court should not take ABR's word for it when the FAC includes well-pled allegations that MOC's purpose is to generate needed revenue for ABR, and MOC is an inferior product that ensures nothing. ABR does not address these allegations, let alone explain why the Court should rely on an affirmative defense based on extra-judicial "facts" asserted by ABR. [4]

[4] ABR cites *California Computer Products v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 744 (9th Cir. 1979), but that case demonstrates that courts cannot just take a defendant's word on a business justification affirmative defense concerning the "right to redesign." Instead, the defendant must proffer actual evidence. There, the court looked at "the evidence at trial" to determine whether defendant's product integration "was a cost-saving step, consistent with industry trends, which enabled IBM effectively to reduce prices for equivalent functions," as well as "substantial evidence" that "the integration of control and memory functions also represented a performance improvement." *Id.* Here, the FAC includes well-pled facts, not "conclusions" or "opinions," alleging

Finally, the argument that MOC is not separate because it "maintains" certification is a prototypical functional relation argument that *Jefferson Parish* rejects. 466 U.S. at 19 n.30**.** Plaintiff has cited several cases in which a tied "maintenance" product was either found to be separate from the product it allegedly "maintained" or survived summary judgment because of fact questions raised. Appellant's Br. 53-56. ABR misconstrues and misapplies those cases, and does not bother even to mention two of them, including this Court's decision in *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1989) ("Repair parts and finished goods have been expressly held to be separate products capable of being tied."). [5]

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exactly the opposite – costs for MOC are higher than other CPD products, and available studies overwhelmingly find that MOC is not an improvement over other CPD products.

[5] ABR also ignores *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 684 (4th Cir. 1992) (rejecting, as improper "functional relationship" argument, defendant's contention that computer diagnostic product and its computer systems were a single product because the diagnostic product's sole purpose was to "maintain and repair" defendant's computer systems).

E. ABR's Attempt to Explain Away Admissions of Separate Products Only Highlights the Issues of Fact the Admissions Create.

The FAC includes verbatim statements made by both ABR and ABMS acknowledging the different purposes of certifications and MOC and demonstrating that they treat them as separate products for their own internal purposes. *See* Appellant's Br. 35-36 and FAC paragraphs cited therein. ABR does not dispute these statements. These admissions are also consistent with ABR's own ongoing sales of MOC to "grandfathers" independent of any requirement that they purchase MOC to "maintain" certifications, further confirming that ABR considers the products to be separate.

ABR's primary response to these allegations is to repeat failed arguments raised elsewhere. First, ABR repeats its "components" argument, contending that at most its statements and conduct mean ABR considers certifications and MOC "components" and not separate "products." ABR Br. 21. That semantic game fails for the reasons explained above. *See* Appellant's Br. 60-63; *supra* 14-16.

ABR also falls back on inapposite franchise cases, asserting the District Court properly found certifications and MOC are "components

of what is essentially a business method." ABR Br. 22. Again, Plaintiff has debunked the franchise analogy. *Supra* 11-14. [6]

Next, ABR asserts "grandfathers" are "of no consequence" because ABR changed its certification "process" "going forward." ABR Br. 22-23. But as this Court has made clear, whether products are separate must be determined before the tie was enacted, not after. *Viamedia*, 951 F.3d at 469 ("the market must be assessed at the pre-contract rather than post-contract stage") (internal quotation omitted). What matters is that CPD products and certifications were universally understood to be separate products before ABR changed its certification "process." In fact, it is *very* consequential that "grandfathers" purchase MOC independent of the need to "maintain" their certifications, as it shows ABR's ongoing sales of MOC independent of certifications.

[6] ABR cites *Will*, a franchise case that, as previously noted, highlights the difference between the franchise scenario and this case. Further, the tying claim in *Will* was tried to a jury (not decided on a pleading motion), and this Court held the claim's "fatal weakness" to be plaintiffs "did not establish market power" of the franchisor in the tying "business method" product, which was unrelated to the separate products issue. 776 F.2d at 671. Here, ABR's market (monopoly) power is undisputed.

Moreover, certification remains what it always has been, an "early career event" assessing whether new radiologists have successfully completed their residency programs. (¶¶ 3, 7, 48, 52). That ABR now revokes certifications of radiologists who do not later purchase MOC does not change the original and entirely separate purpose of certifications. If ABR seeks to proffer as an affirmative defense the competitive benefits of merging a CPD product with certifications, that only raises fact questions not properly resolved at this stage of the proceedings.

F. ABR's "Market Structures" Argument Ignores Critical Facts.

As Plaintiff previously demonstrated, courts examine "market structures and practices" to determine if efficiencies support offering the tying and tied products separately. Appellant's Br. 30-31. Extensive FAC allegations describe how different market participants have over time sold CPD products separately from certifications, including sales by Member Boards (with ABR's participation) of the voluntary ABMS "recertification" product, MOC's precursor. *Id.*, and FAC paragraphs cited therein. These well-pled facts establish that it is efficient to sell the products separately, further supporting separate demand. *Jefferson*

Parish, 466 U.S. at 23 n.39 ("other hospitals often permit anesthesiological services to be purchased separately").

ABR does not discuss market structures and practices at all, arguing instead that they do not matter because no other market participant sells a product that "maintains" ABR certification. ABR Br. 26. But what ABR fails to point out is that it sold certifications for decades without requiring them to in any sense be "maintained," and that its argument rests entirely on accepting the contrivance, contrary to Plaintiff's allegations, that MOC is about "maintaining" anything other than ABR's bottom line. *Supra* 19-21.

ABR's own restrictions, including its refusal to sell MOC to radiologists unless they have already purchased certifications, have created the distorted market structure and practices it now seeks to use to its advantage. Courts reject such paralogism. *See*, *e.g.*, *PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811, 816 (6th Cir. 1997) (rejecting similar argument because "Honeywell's own actions" in refusing to accept component parts from competitors for use in repairs of its circuit board "have essentially limited the existence of a separate market for components"); *Allen-Myland, Inc. v. IBM*, 33 F.3d 194, 214

(3d Cir. 1994) (the fact that "few [] upgrades were sold [separately from the installation] does not prove that there was no separate demand for installation services," where IBM's restrictions caused that limited market). In response, ABR relies on *SubSolutions* and other discussions of the franchise model. ABR Br. 26-27. That reliance, however, is misplaced for the reasons stated above. *Supra* 11-14.

G. Well-Pled Facts Support Certification as an Economic Necessity.

ABR does not dispute it has a monopoly over certifications, that hospitals require certification for admitting privileges, insurers require certification for coverage, and employers require certification before hiring radiologists. *See* Appellant's Br. 6-8 and FAC paragraphs cited therein. Nor does ABR deny the conclusions of ABMS officials and other medical industry sources that given these marketplace circumstances, certification is "not optional." *Id.* Moreover, as Plaintiff has pointed out, it is entirely plausible to find that certification is an economic necessity because other courts have concluded the same when hospital admitting privileges and insurance coverage are at stake. Appellant's Br. 43 and

cases cited therein. [7] ABR also does not take issue with well-settled law that "the economic realities of the market" are relevant to determining whether purchasing the tied product from another supplier is "a practical option." *Viamedia*, 951 F.3d at 471 n.17, 473.

It is entirely plausible, given these facts and the law, that ABR's conduct in refusing access to an economically necessary tying product (certifications) for failure to later purchase a tied product (MOC) is paradigm "forcing" supporting a tying claim. Areeda & Hovenkamp, ¶ 1700i, at 13 (illegal tie is "clearly present" when "the seller … continues to supply the tying product only to those who purchase its tied product"). At most, ABR's assertion that certification is "voluntary" raises a fact question that cannot be resolved without a full record. *Viamedia*, 951 F.3d at 470-74 ("a seller is not immunized from a tying claim if there is a factual dispute as to whether the buyer wished to purchase" the tied product "from the defendant with market power" in the tying product).

[7] ABR's attempt to distinguish these cases because they are not antitrust cases misses the point. They are cited only to point out the plausibility of Plaintiff's economic necessity allegations.

IV. Plaintiff Plausibly Alleges Antitrust Injury.

Antitrust injury includes injuries "of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Viamedia*, 951 F.3d at 481. Antitrust injury exists when the anticompetitive conduct affects "prices, quantity or quality of goods or services." *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996). *See also Chicago Prof'l Sports Ltd. P'ship v. Nat. Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992) (antitrust injury "comes from acts that reduce output or raise prices to consumers"). Consumers affected by the tie typically can state antitrust injury. *Viamedia*, 951 F.3d at 482.

The FAC is replete with allegations that ABR's anticompetitive conduct causes antitrust injury, including: forcing radiologists to buy MOC at monopoly prices (¶¶ 122, 234, 267-268, 329, 339); thwarting competition in CPD products (¶¶ 123-124, 164-166, 264, 329, 340, 341, 343); diminishing the quality of CPD products and inhibiting innovation (¶¶ 123-124, 210-228, 342); entrenching ABR's monopoly in certifications (¶ 344); raising the cost of practicing medicine for

radiologists (¶¶ 167, 204-205, 268, 345); and restricting the supply of radiologists, thereby harming competition (¶¶ 207, 345). These allegations support all three indicia of antitrust injury: ABR's conduct affects price (*e.g.*, ABR charges monopoly prices for MOC); quantity (*e.g.*, ABR thwarts competition in CPD products), and quality (*e.g.*, no relationship between MOC and any beneficial impact on physicians, patients, or the public). *See also Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 478 (1992) ("higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent").

ABR ignores the overwhelming majority of the above-cited antitrust injury allegations, arguing the FAC's allegations that radiologists would prefer not to purchase MOC precludes antitrust injury. ABR bases this argument on a misrepresentation of the FAC allegations that radiologists prefer to obtain CPD products from different vendors, and but for their certifications being revoked, would purchase CPD products for lifelong learning from others. (*e.g.*, ¶¶ 201, 204, 286-287, 330).

ABR supports its argument by taking language out of context from *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316, 319-20 (7th Cir.

2006), a summary judgment decision that did not address antitrust injury, but instead turned on whether the tie affected "a not insubstantial amount of interstate commerce." ABR's misapplication of *Reifert* is directly contrary to *Jefferson Parish*: "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." 466 U.S. at 12. [8]

ABR also wrongly contends Plaintiff's allegations of ABR raising the cost of practicing medicine for radiologists are akin to states imposing continuing education requirements for licensing and NBPAS requiring 50 hours of CME every few years. ABR Br. 30. This again misrepresents

[8] ABR also cites *Young v. Lehigh Corp.*, No. 80 C 4376, 1989 U.S. Dist. LEXIS 11575, *48 (N.D. Ill. Sept. 26, 1989), another summary judgment decision, which wrongly applied *Jefferson Parish's* analysis of market power to antitrust injury. *See Western Power Sports, Inc. v. Polaris Indus. Partners L.P.*, No. 90-35359, 1991 U.S. App. LEXIS 29993, *5 (9th Cir. Dec. 11, 1991) (interpreting *Jefferson Parish* market power passage in the context of antitrust injury "would appear to be at odds with" its discussion of how tying agreements restrain competition); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 814-15 (1st Cir. 1988) (same).

Plaintiff's allegations, which concern the imposition of "tens of millions of dollars in MOC-related fees" and time-consuming requirements for a product that is "redundant, worthless, and superfluous" in light of existing licensure requirements. (¶¶ 167, 204-205, 266-267, 345).

V. Plaintiff's Claims Are Timely.

ABR does not contend Plaintiff's antitrust claims are fully time-barred, but only that the statute of limitations "limits" those claims. ABR Br. 31. But statute of limitations is not an issue that can be resolved at this time, as it is well-settled that a motion to dismiss is not the proper mechanism to assert a limitations defense. *Richards v. Mitcheff*, 696 F.3d 635, 637-38 (7th Cir. 2012) (limitations normally a question of fact raised as an affirmative defense and not appropriate for Rule 12(b)(6) motion).

Further, even if limitations were properly considered now, ABR's ongoing illegal tying constitutes a continuing violation of the antitrust laws such that Plaintiff's claims are timely. "The period of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir.

2004). When a continuing violation exists, "the limitations period begins to run *not* when an action on the violation could first be brought, but when the course of illegal conduct is complete." *United States v. Spectrum Brands*, 924 F.3d 337, 350 (7th Cir. 2019) (emphasis in original). "Each discrete act with fresh adverse consequences starts its own period of limitations." *Xechem*, 372 F.3d at 902. "[I]f a continuing violation extends into the statutory period, the victim is entitled to complain about the whole violation, no matter how long ago it began." *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984) (Sherman Act).

ABR argues against applying the continuing violation exception, though it recognizes that a continuing violation is found when a defendant engages in "a new and independent act that is not merely a reaffirmation of a previous act" that "inflict[s] new and accumulating injury on the plaintiff." ABR Br. 31 (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987)). [9] More recently, the

[9] *Pace* was decided on summary judgment, not a motion to dismiss, 813 F.2d at 235, and the Ninth Circuit held that the filing of a lawsuit to enforce a prior anticompetitive agreement was a "new and independent act" starting the limitations period anew. *Id.* at 238, 239.

Ninth Circuit has explained that "an action taken under a pre-limitations contract was sufficient to restart the statute of limitations so long as the defendant had the ability not to take the challenged action." *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1203 (9th Cir. 2014) (reversing Rule 12(b)(6) dismissal, where during the limitations period defendant demanded plaintiff revise their prior license agreement and enforced the two licenses by collecting royalty payments). *See also Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) (continuing violation found where defendant "had the ability [to] and actually did enforce the tie during the limitations period") (internal quotation omitted). ABR's actions within the limitations period easily meet this standard.

Plaintiff alleges he took the 10-year MOC examination in 2012, and passed it with the well-informed belief he would not be subjected to any additional ABR examinations or tests for the next ten years. (¶¶ 256-257). In 2018, indisputably within the limitations period, Plaintiff learned ABR was changing MOC and would require him to take OLA tests, even though his 10-year MOC examination result was valid until 2022. He thus began taking OLA tests in January 2019. (¶ 258). ABR

currently reports Plaintiff's certification as "contingent upon participation in Maintenance of Certification," forcing him to purchase MOC because of this qualification on his certification. (¶ 260). ABR's revising of MOC during the limitations period, like the license revision in *Samsung*, subjected Plaintiff to new and burdensome requirements, which ABR enforced by qualifying his certification. ABR did not have to engage in this "new" act, which enforced the tie and inflicted new harm on Plaintiff. *Samsung*, 747 F.3d at 1203; *Eichman*, 880 F.2d at 160. At the very least, this raises fact questions that should not be decided on a pleading motion, particularly where the District Court did not even address them. [10]

[10] ABR also invokes an Eighth Circuit decision to argue that if Plaintiff was "fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed." ABR Br. 31. This does not apply. First, whether the certification exam application documents Plaintiff filled out in 2003 constitute a "contract" is a fact question. *See Gen. Cas Co. of Wis v. Techloss Consulting & Restoration*, No. 1:18-cv-6062, 2020 U.S. Dist. LEXIS 85703, *11 (N.D. Ill. May 15, 2020) ("existence or non-existence of an agreement is a question of fact"). But even if they were a contract, as noted above, ABR changed the terms each time it revised MOC, belying the assertion that Plaintiff was "fully aware of the terms" in 2003.

VI. Plaintiff Plausibly Alleges Unjust Enrichment.

ABR's arguments for dismissal of Plaintiff's unjust enrichment claim fail. Plaintiff and other radiologists confer a benefit on ABR (MOC fees) that ABR wrongfully obtains by forcing them to buy MOC, and it is unjust for ABR to keep this benefit. (¶¶ 368-372). Nothing more is required to state an unjust enrichment claim. *Stevens v. Interactive Fin. Advisors, Inc.*, No. 11 C 2223, 2015 U.S. Dist. LEXIS 21518, *50-51 (N.D. Ill. Feb. 24, 2015).

ABR contends Plaintiff purchased his certification and MOC "pursuant to contracts with ABR," thus barring an unjust enrichment claim. ABR. Br. 32-33. Plaintiff, however, does not allege the existence of a contract, or assert a contract claim. Nor do the certification and MOC application forms and other MOC-related documents in ABR's Supplemental Appendix establish a contract. They do not contractually bind Plaintiff. ABR's argument also skirts the many fact issues that must be resolved, including mutuality and consideration, before a

contract is found. *See Gen. Cas. Co.*, 2020 U.S. Dist. LEXIS 85703, at *11. [11]

But even if contracts exist, that would not preclude an unjust enrichment claim because ABR's illegal tie falls outside the subject matter of the supposed contracts. *Chatham v. Sears, Roebuck & Co.*, No. 05 C 4742, No. 05 C 2623, 2006 U.S. Dist. LEXIS 92169, *11-14 (N.D. Ill. Dec. 18, 2006) (where unjust enrichment claim was based on misrepresentation, existence of contract was "neither here nor there").

CONCLUSION

For the foregoing reasons and those in the Appellant's Brief, Plaintiff-Appellant respectfully asks this Court to reverse the dismissal of his First Amended Class Action Complaint.

Respectfully submitted,

Sadhish K. Siva, *et al.*,

Dated: January 31, 2022 By: /s/ C. Philip Curley
One of His Attorneys

[11] The FAC paragraphs ABR cites do not allege any contract, but merely discuss the selling of certifications, automatic enrollment in MOC after radiologists purchase certification, and that Plaintiff has signed MOC-related forms, none of which are contracts. (¶¶ 48, 171, 176, 255).

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

I, C. Philip Curley, counsel for Plaintiff-Appellant, certifies that this brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c). This brief was prepared in Century Schoolbook font in **Microsoft Word for Microsoft 365 MSO (Version 2110 Build 16.0.14527.20008)** software and has 6,978 words, including footnotes, according to the Microsoft Word count.

Dated: January 31, 2022

/s/ C. Philip Curley
C. Philip Curley

CERTIFICATE OF SERVICE

C. Philip Curley, counsel for Plaintiff-Appellant, certifies that on January 31, 2022, he caused to be electronically filed with the Clerk of the United States Court of Appeals for the Seventh Circuit **Reply Brief of Plaintiff-Appellant**, using the Court's CM/ECF system, which shall send notification of this filing to all counsel of record.

/s/ C. Philip Curley
C. Philip Curley