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

SADHISH K. SIVA, Plaintiff, vs. AMERICAN BOARD OF RADIOLOGY, Defendant.	CASE NO. 1:19-CV-01407 HON. JORGE L. ALONSO

DEFENDANT AMERICAN BOARD OF RADIOLOGY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

INTRODUCTION

On November 19, 2019, this Court dismissed Plaintiff Dr. Sadhish K. Siva's original Complaint for failure to state a claim. ECF No. 48. The Court properly dismissed Plaintiff's tying claim under Section 1 of the Sherman Act because Plaintiff did not "plausibly show" that there were two separate products at issue—a requirement under the Act.[1] *Id.* at 13. In so holding, the Court explicitly rejected Plaintiff's theory that Defendant American Board of Radiology's ("ABR['s]") certification of radiologists encompassed two "products"—*i.e.,* initial certification as separate and distinct from ABR's maintenance of certification ("MOC") requirements designed to ensure that radiologists who wish to maintain their board certification remain current in the field. *Id.* at 9. Instead, the Court recognized that "now as ever, there is only one product." *Id.* at 7. The Court, however, permitted Plaintiff an opportunity to replead.

Following the Court's dismissal of his Complaint, Plaintiff filed his First Amended Complaint ("FAC") on January 24, 2020. ECF No. 55. The FAC has ballooned to over 70 pages and almost 400 paragraphs of allegations. However, the gist of Plaintiff's claims remains the same and the volume of additional allegations does nothing to change the result—*all* of Plaintiffs' claims should be dismissed with prejudice. As before, Plaintiff alleges in the FAC that ABR unlawfully ties two products—initial certification and MOC under a *per se* tying theory (Count I). Plaintiff also brings a separate tying claim, in the alternative, under the rule of reason (Count II) and again raises a claim for unjust enrichment (Count III). Plaintiff brings all claims on behalf of a purported putative class of radiologists certified by ABR.

[1] In its November 19 Order, the Court also dismissed Plaintiff's monopolization claim under Section 2 of the Sherman Act and declined to exercise supplemental jurisdiction over Plaintiff's unjust enrichment claim from his original Complaint. Plaintiff did not resurrect his Section 2 monopolization claim in the FAC.

Plaintiff's transparent efforts to plead around the Court's previous Order fall far short. The pages upon pages of additional, irrelevant, and otherwise conclusory allegations in Plaintiff's FAC do not remedy the fatal flaw underlying all of Plaintiff's claims: ABR's certification is a single product. Radiologists do not purchase "initial certification" or "MOC," but rather ABR certification generally, including all its component parts. Both Plaintiff's factual allegations and the law confirm that result. As Plaintiff must acknowledge, Plaintiff's own application materials with ABR, embraced by the FAC, confirm that Plaintiff willingly sought out a single product—certification by ABR; that the terms applicable in 2003 when Plaintiff sought certification included both his initial certification and continuing MOC components; and that Plaintiff benefited from the relationship. ABR did not—and could not—force Plaintiff to "buy" its certification or to pay the fees associated with its continuing MOC components or place any restriction on Plaintiff's practice as a radiologist. Moreover, when considering multi-stage certification processes like this one, courts, including this Court, have concluded that they do not—as a matter of law—run afoul of the antitrust laws.

Because the material allegations in Plaintiff's FAC mirror those allegations from the original (and now dismissed) Complaint, and because Plaintiff's fundamental misconception about the nature of the entire certification product offered by ABR remains unchanged, this Court can and should apply the same analysis it did before to reach the same conclusion. As set forth more fully below, Plaintiff's allegations in the FAC are not sufficient to plausibly state an antitrust claim or an unjust enrichment claim, and must be dismissed with prejudice.

BACKGROUND

ABR's motion to dismiss Plaintiff's original Complaint sets forth the relevant background for this case. ABR respectfully refers the Court to those filings and related exhibits as well as the legal analyses set forth therein. *See* ECF No. 33-1 (opening memorandum); ECF No. 42 (reply

memorandum). To briefly summarize, ABR is an independent, not-for-profit national medical specialty board[2] that provides assessment and certification of radiologists. FAC ¶¶ 21, 40. ABR's certification process is designed to determine if candidates have acquired the requisite standard of knowledge, skill, and understanding essential to the practice of radiology. *Id.* ¶¶ 23–24. MOC exists "to provide continuous quality improvement, professional development, and quality patient care." Ex. 1, ABR's 2016 IRS Form 990, at 2.[3] Since 2002, ABR has required that all ABR-certified radiologists participate in MOC in order to maintain certification. FAC ¶ 171.

ABR certification is separate from state licensure of physicians. *Id.* ¶ 22. ABR certification is also voluntary; ABR cannot and does not force physicians to obtain certification.[4] Still, most clinical radiologists purchase ABR certification. *Id.* ¶ 59. Many independent third parties in the health care industry, including hospitals and insurers, have concluded that ABR's certification is valuable and accordingly may make decisions regarding the physicians they choose to work with based on a physician's certification status. *Id.* ¶¶ 57, 60. That certification provides value is not in dispute.

Plaintiff is a radiologist who ABR certified in 2003. *Id.* ¶ 251; Ex. 2.[5] By the explicit

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[2] ABR is one of twenty-four boards that are members of the American Board of Medical Specialties ("ABMS"). FAC ¶ 21.

[3] ABR's publicly available 2016 IRS Form 990 is attached as Exhibit 1. This Form is incorporated by reference and quotation in Plaintiff's FAC at ¶ 168, and is therefore appropriately considered by the Court on ABR's motion to dismiss. *See Griswold v. E.F. Hutton*, 622 F. Supp. 1397, 1402 (N.D. Ill. 1985).

[4] Plaintiff attempts to plead around the voluntary nature of ABR certification by suggesting that economic circumstances "necessitate" board certification. *See, e.g.*, FAC ¶¶ 59, 60. That allegation, however, is a red herring, as Plaintiff has plead no facts that plausibly infer that *ABR* can force certification on anyone. Instead, because ABR certification has value, Plaintiff sought it out—a decision that he made on his own (*see, e.g.*, *id.* ¶¶ 248, 250)—and that was not dictated by any professional requirements, including state licensure (*id.* ¶ 22), or by ABR.

[5] Exhibit 2 constitutes all forms and agreements executed by Dr. Siva related to his application for

terms of his certification with ABR agreed to by Plaintiff, Plaintiff is required to participate in MOC in order to maintain his ABR certification. FAC ¶¶ 254–56; *see also* Ex. 2 at 17 ("I, the undersigned applicant, recognize the Trustees of [ABR] as the sole and only judge of my qualification to receive *and retain* a certificate issued by the Board"). Plaintiff enrolled in MOC and passed the required examination to maintain his certification in 2012. *Id.* ¶ 256. He again enrolled in MOC in 2019 by beginning participation in the Online Longitudinal Assessment ("OLA") cognitive test, and alleges that he is completing MOC activities towards maintaining his ABR certification going forward. *Id.* ¶ 258. Plaintiff complains that he suffered harm because he was "forced" by ABR to purchase enrollment in MOC to maintain his ABR certification and incurred costs and fees in the process. *Id.* ¶¶ 260–62, 268.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits the Court to dismiss a complaint if a plaintiff fails to state a claim upon which relief may be granted. To survive a motion to dismiss for failure to state a claim, Plaintiff's allegations against ABR must "raise [his] right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). Allegations that are as consistent with lawful conduct as they are with unlawful conduct are not sufficient. *Twombly*, 559 U.S. at 570. In reviewing a complaint under Rule 12(b)(6), the court must first identify pleadings that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679; *see also McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011) ("[W]e accept the well-pleaded facts in the complaint as true, but legal conclusions and conclusory allegations merely reciting the

examination leading to a Certificate of Qualification in Diagnostic Radiology and his enrollment in the MOC program administered by ABR. These forms and agreements are clearly incorporated and referenced in the FAC. *See* FAC ¶¶ 250–52, 254–55; *see also Griswold*, 622 F. Supp. at 1402.

elements of the claim are not entitled to this presumption of truth."). Second, the court should "determine whether [the non-conclusory factual allegations] plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. If a plaintiff's complaint fails to meet these standards, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court," warranting dismissal. *Twombly*, 550 U.S. at 558 (quotations omitted).

ARGUMENT

I. PLAINTIFF'S TYING CLAIMS FAIL AS A MATTER OF LAW (COUNTS I-II)

As he did in his original, now-dismissed Complaint, Plaintiff asserts in the FAC that ABR engaged in an illegal tying arrangement in violation of Section 1 of the Sherman Act. FAC ¶¶ 277–345. Unlike his original complaint, Plaintiff now explicitly raises an alternative tying claim under the rule of reason. *Id.* ¶¶ 346–66.[6] But to prevail on *either* of his tying claims, this Court has already found Plaintiff must plausibly allege the existence of two separate products. ECF No. 48 at 5 n.1 ("[U]nder either the *per se* rule or the rule of reason, plaintiff must plausibly allege that there are two separate tied products . . . ."); *see also Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316–17 (7th Cir. 2006).

Nothing in Plaintiff's FAC changes the fate of his tying claims because Plaintiff has not and cannot plausibly allege two distinct products. "[N]ow as ever" ABR's initial certification and MOC constitute a single product—certification of radiologists. ECF No. 48 at 7. In the absence of plausible factual allegations of two distinct products, tying cannot exist as a matter of law and Plaintiff's tying claims must be dismissed.

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[6] Indeed, the Seventh Circuit recently recognized that "the factual elements that must be proven in a tying claim capture much of what must be demonstrated in a rule of reason case," including assessment of market power, predictions of anticompetitive harm, and consideration of procompetitive justifications. *See Viamedia, Inc. v. Comcast Corp.*, No. 18-2852, 2020 WL 879396, at *29 (7th Cir. Feb. 24, 2020).

In addition, Plaintiff's Sherman Act Section 1 claims must be dismissed in light of the absence of any other well-plead factual allegations of anticompetitive conduct by ABR and for lack of plausible allegations of antitrust injury. Finally, to the extent the Court disagrees dismissal is again appropriate, Plaintiff's claims must be significantly narrowed by the applicable four-year statute of limitations.

A. Plaintiff's Tying Claims Fail Because He Cannot Plausibly Allege that MOC Is a Distinct Product From Initial Certification

In order for a tying claim to survive dismissal, a plaintiff must allege sufficient facts with respect to each of the following elements: "(1) a tie exists between two separate products;" (2) the defendant "has sufficient economic power in the market for the tying product to restrain free competition in the tied product market . . . ; (3) the tie affects a not-insubstantial amount of interstate commerce in the tied market;" and (4) the defendant "has some economic interest in the sales of the tied product." *Reifert*, 450 F.3d at 317.

As before, Plaintiff's tying claims fail on the first element because Plaintiff does not allege plausible facts supporting the existence of two distinct products—initial certification and MOC—that are being tied. Rather, Plaintiff's FAC impermissibly relies on the same defective assumptions already squarely rejected by this Court (*e.g.*, "ABR sells its certification product separately from MOC"[7]; "radiologists may purchase ABR's certification without buying MOC," FAC ¶¶ 285, 294) and unsupported legal conclusions (*e.g.*, "[t]here is a separate market for certification products and

[7] This particular allegation was raised in the original Complaint and *explicitly* rejected in the Court's November 19, 2019 Order. There, the Court concluded that "there never was a time when [initial certification and MOC] were sold separately." ECF No. 48 at 7. Plaintiff offers no plausible new factual allegations that demonstrate otherwise. *See Weslowski v. Zugibe*, 96 F. Supp. 3d 308, 316–18 (S.D.N.Y. 2015) (holding that "[t]he mere filing of an Amended Complaint does not entitle Plaintiff to re-litigate his claims absent new factual allegations;" and applying the doctrine of law of the case in support of dismissal again where "Plaintiff advance[d] no new allegations addressing the deficiencies the Court [previously] identified").

[MOC]," *id.* ¶ 283) and that led to dismissal of Plaintiff's original Complaint. Stripped of those assumptions and conclusions, well-settled case law (and Plaintiff's remaining allegations) actually support the opposite conclusion: ABR offers a single product, the certification of radiologists, first achieved by passing a certification exam and then maintained by participation in programs that permit that certification to remain in effect. Plaintiff's attempt to redefine that certification in his FAC does not make it so—and indeed, his own allegations acknowledge they are not distinct. *See, e.g.*, FAC ¶ 9 ("'Validity of certification is contingent upon participation in Maintenance of Certification . . . .'"). And when the alleged products of a tying arrangement "are not [] separate and distinct . . . they combine in the form of one product, not two tied products. Without two products, the alleged tying arrangement is impossible." *Collins v. Assoc. Pathologists, Ltd.*, 844 F.2d 473, 478 (7th Cir. 1988). Such is the case here.

A comparison between Plaintiff's original (and dismissed) Complaint and the FAC make clear that Plaintiff's "new" allegations do not move the needle with respect to the controlling legal issue: the existence—or more precisely, the *lack* of existence—of two distinct products. For example, Plaintiff raises new attacks on the value of MOC generally. *See, e.g.*, FAC ¶¶ 13 (characterizing MOC as "redundant, worthless, and superfluous"), 166 ("[N]o causal relationship has ever been established between MOC and a beneficial impact on radiologists, patient care, or the public . . . ."), 167 ("MOC is nothing more than a device to force radiologists to pay tens of millions of dollars in MOC-related fees . . . ."), 211–33 (same). Plaintiff's personal views on MOC—with which ABR strongly disagrees but accepts the Court must take as true for purposes of this motion—are wholly irrelevant to the determination of whether ABR's initial certification and MOC are separate products. ECF No. 48 at 11 (Plaintiff's criticisms of MOC did not make it an independent product). They are not.

As another example, Plaintiff embarks on an irrelevant exploration of the history of "[t]he practice of medicine in the United States," the genesis of specialty medical boards, and the history of continuing medical education. FAC ¶¶ 25–28, 29–47, 48–52, 57–58, 94–115. Plaintiff then selectively quotes purported medical literature—not authored by ABR, and, in many cases, attributed to unknown authors and publications—to seemingly extrapolate that ABR certification is a "snapshot assessment" and therefore categorically different from MOC. *See, e.g.*, *id.* ¶¶ 52, 58. But even if initial certification is aimed at assessing a candidate's qualifications for entry into radiology practice, MOC ensures (as Plaintiff concedes) that the candidate remains deserving of certification in the future. *Id.* ¶ 9. In other words, ABR certification is a multi-stage process for a single product: board certification. Accordingly, Plaintiff's "new" allegations do not plausibly support a finding of two products. ECF No. 48 at 7 ("[U]ltimately ABR sells only one product: certification of radiologists . . . . This was once a one-stage process, and it is now a multi-stage process, but it does not follow that the certification process consists of separate products . . . .")

Similarly, Plaintiff summarily concludes that "[t]here is separate consumer demand by radiologists for ABR's certification product and [MOC] products" because "other vendors have sold [MOC] products for decades without selling a certification product." FAC ¶ 11; *see also id.* ¶¶ 115 ("No CME vendor sells a certification product to radiologists."), 118 ("No medical school sells a certification product to radiologists."), 125 ("[National Board of Physicians and Surgeons] does not sell a certification product to radiologists."). But the relevant inquiry is not whether other sellers offer distinct MOC services for radiologists, but instead whether there is a demand for *ABR's* MOC program separate and apart from ABR's initial certification. *Casey v. Diet Ctr., Inc.*, 590 F. Supp. 1561, 1564 (N.D. Cal. 1984) (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). Here,

Plaintiff admits there is not; according to Plaintiff, ABR's MOC program "would never be successful on its own merits." FAC ¶ 144.

To the extent that Plaintiff raises these allegations to suggest that he would like to buy MOC services but not from ABR, and have the Court determine that as a result of his claims ABR must acknowledge those services for certification to continue, the result is the same. As this Court previously stated, "there can be no foreclosure of competitive access to any market for certification from ABR, whether at the initial or MOC stage, because no one *can* provide certification in ABR's name but ABR." ECF No. 48 at 12 (quotations omitted) (emphasis in original); *see also Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir. 1978).

As yet another example, Plaintiff alleges in great detail the many reasons why hospitals and insurers often incorporate ABR certification into privileging, employment, compensation, and coverage decisions. FAC ¶¶ 60–93. But there is no punchline. Nor could there be, because even taking those allegations as true, none plausibly infer that *ABR* controls those decisions or somehow interfered with the ability of those third parties to make their own independent assessment and decisions regarding the value of board certification. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F. 3d 436, 444–45 (7th Cir. 2011). Any alleged harm to Plaintiff caused by employment or similar decisions made by third parties such as hospitals or insurers is not antitrust injury. *Sanjuan v. Am. Bd. of Psychiatry & Neurology*, 40 F.3d 247, 251–52 (7th Cir. 1994) ("The claim that a practice reduces [physicians'] incomes has nothing to do with the antitrust laws . . . . [I]t does not even state an antitrust injury."); *see also Allyn v. Am. Bd. of Med. Specialties, Inc.*, No. 5:18-cv-355-Oc-30PRL, 2019 WL 297459, at *6 (M.D. Fla. Jan. 3, 2019), *adopted by* 2019 WL 293277 (M.D. Fla. Jan 23, 2019).

As a final example, Plaintiff criticizes ABR's MOC process because it was "recently" instituted and, according to Plaintiff, was strategically named in order to avoid antitrust suspicion. FAC ¶¶ 143, 145–46. Regarding the former, the Court previously made clear that there is "no reason why ABR should not be allowed to modify its certification process over time." ECF No. 48 at 13 (citation omitted) (quotations omitted); *see also Kentmaster Mfg. Co. v. Jarvis Prods. Corp.*, 146 F.3d 691, 694–95 (9th Cir. 1998) (concluding that slaughterhouse equipment and spare blades were a single product, sold over time). Regarding the latter, there are no well-pleaded facts—not a single one—supporting Plaintiff's wild speculation regarding ABR's decision to label its MOC program to "avoid" antitrust scrutiny. The Court should recognize this allegation for what it is and disregard it.

The conclusory and irrelevant allegations highlighted above are further belied by the decisions of numerous courts, including this Court, in which analogous tying claims have been squarely rejected. As ABR established in its motion to dismiss Plaintiff's original Complaint, the Middle District of Florida recently dismissed a tying claim against ABMS and the American Board of Dermatology, Inc. ("ABD") based on allegations concerning ABD's certification of dermatologists in a surgical subspecialty because "it [was] not clear from the complaint what two separate products are allegedly being tied together." *Allyn*, 2019 WL 297459, at *6. Likewise, courts have found that continuing requirements related to an overall composite package purchased at the outset do not constitute two separate, distinct products. *See Principe v. McDonald's Corp*, 631 F.2d 303, 304, 308 (4th Cir. 1980) (a lease on the restaurant location, security deposit note, and license from McDonalds to operate with its trademark were "not separate products but component parts of the overall franchise package"); *see also Kenney v. Am. Bd. of Internal Med.*, No. cv-18-5260, 2019 WL 4697575, at *11 (E.D. Pa. Sept. 26, 2019) (concluding that the character

of the demand for the initial certification and the MOC is the same). These cases remain good law and their principles apply here. Plaintiff purchased a single product—certification—which, by its terms, required at the outset that Plaintiff take an examination to qualify in the first instance and then to take certain steps in order to maintain it, including meeting the MOC requirements. *See* Ex. 2, at 12 (Plaintiff acknowledging ABR "as the sole and only judge of my qualifications to *receive and maintain*" certification (emphasis added)).

The underlying principle that demand of the tied product must be distinct from the demand of the tying product is further fatal to Plaintiff's claim. *Collins*, 844 F.2d at 477–78 (pathology services not distinct product from hospital services, rendering tying claim "impossible"). No such plausible showing can be made here, and in fact, Plaintiff concedes the opposite: "[MOC] would never be successful on its own merits." FAC ¶ 144; *see also Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, No. 14-4657, 2015 WL 1969380, at *4 (D.N.J. Apr. 29, 2015) (plaintiff could not plead facts to show that consumer demand for *delivery* of educational materials was independent from the actual *sale* of the materials, and thus were not separate and distinct products); *Young v. Lehigh Corp.*, No. 80 C 4376, 1989 WL 117960, at *13 (N.D. Ill. Sep. 28, 1989) ("A tying arrangement exists only when two products, distinct in the eyes of the buyers, are linked." (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 18-22 (1984)).

Nor does Plaintiff plausibly allege that initial certification and MOC are distinct products from the perspective of a radiologist. He admits he knew that MOC would be a requirement to continue to maintain ABR certification when he was initially certified in 2003. FAC ¶ 255. This admission is also fatal to his claim. *See SubSolutions, Inc. v. Doctor's Assocs., Inc.*, 436 F. Supp. 2d 348, 355 (D. Conn. 2006) (inability to "demonstrate that anyone other than a Subway franchisee would want to purchase a Subway-tailored POS-system" meant that plaintiffs could not satisfy the

"essential element of their tying claims [] that a Subway franchise and a POS-system are two distinct products"). It is implausible, contrary to judicial experience and common sense, and in fact not alleged by Plaintiff that anyone—radiologist or not—would have any interest in purchasing MOC *were they not already ABR-certified*.

Finally, the lack of a plausible tying arrangement with two separate products illustrates Plaintiff's further inability to adequately allege that ABR has (and used) sufficient economic market power to force him to enroll in MOC (as opposed to contractual power). *See Rocha v. FedEx Corp.*, 15 F. Supp. 3d 796, 811 (N.D. Ill. 2014) (granting motion to dismiss tying claims where "Plaintiffs purchased [the allegedly tied products] because they contractually agreed to do so, . . . not because of FedEx's overwhelming market power."); *see also Oracle Am., Inc. v. CedarCrestone, Inc.*, 938 F. Supp. 2d 895, 902–03 (N.D. Cal. 2013). Plaintiff *knew* when he sought certification that MOC was part of the package deal, and nonetheless agreed to it. *See* FAC ¶¶ 255–58; *see also* Ex. 2, at 13 ("This is a ten-year time-limited certificate. Information relative to Maintenance of Certification will be sent to you in the near future."). That Plaintiff desires certification (and all that comes with it, including MOC) in order to take advantage of opportunities with independent third parties, like hospitals, insurers or other health care entities—does not mean that ABR coercively "forces" it upon him. Indeed, Plaintiff admits those entities are independent of ABR, FAC ¶¶ 60, 62–64, and determine their own criteria, *id.* For all these reasons, both of Plaintiff's tying claims must be dismissed.

B. Plaintiff's Tying Claims Also Fail As A Matter of Law for Lack of Antitrust Injury

Plaintiff's Sherman Act tying claims also fail based on his failure to properly plead "antitrust injury." In order to do so, Plaintiff "must show injuries that reflect the anticompetitive effect of either the violation or the anticompetitive acts made possible by the violation." *James*

Cape & Sons Co. v. PCC Constr. Co., 453 F.3d 396, 399 (7th Cir. 2006) (citing *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977)). Antitrust injury must involve "loss [that] comes from acts that reduce output or raise prices to consumers." *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992) (citations omitted).

Plaintiff's claimed antitrust injury that he was "forced" to purchase enrollment in MOC from ABR at an elevated price, when he otherwise would not have purchased it is insufficient as a matter of law. FAC ¶¶ 329, 338, 364. "Forcing a buyer to purchase a product he otherwise would not have purchased is insufficient to establish the foreclosure of competition." *Reifert*, 450 F.3d at 318 (7th Cir. 2006). Because the "crux of the plaintiff's 'tying' claim . . . is that he was 'forced' to purchase a product that he did not want and would not have purchased from anyone[,] . . . competition in the [relevant] market could not have been affected adversely[.]" *Young*, 1989 WL 117960, at *14–15 (citing *Jefferson Parish*, 466 U.S. at 16). Plaintiff lacks antitrust injury because he would prefer not to have purchased and enrolled in MOC from ABR at all, requiring dismissal of his Sherman Act claims.[8]

C. Plaintiff's Tying Claims Are Partially Barred by the Statute of Limitations

Should the Court conclude that Plaintiffs' tying claims do survive Rule 12(b)(6)—which as articulated above ABR contends they do not—Plaintiff's Sherman Act claims must be narrowed to the extent that they are rooted in any alleged "harm" four years prior to February 26, 2019, the date of the filing of the original Complaint. Federal antitrust claims must be filed "within four years after the cause of action accrued." 15 U.S.C. § 15b. "There is no question that, absent tolling for one reason or another, the four year antitrust statute of limitations begins to run at the time that

[8] Plaintiff does not allege that he would have purchased a maintenance product from NBPAS—or any other entity. Indeed, he cannot plausibly do so in light of his allegations that the NBPAS product has no current value. FAC ¶ 123.

the alleged violation occurs." *Jackson v. Union Nat'l Bank*, 715 F. Supp. 892, 895 (C.D. Ill. 1989) (citing *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 268 (7th Cir. 1984)). "In the context of a tying arrangement, this typically means that a plaintiff must show that the defendant had the ability to and actually did enforce the tie during the limitations period." *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc.*, No. 3:11-CV-268, 2016 WL 8292207, at *11 (N.D. Ind. Mar. 18, 2016) (quotations omitted). "[T]he harm that creates the . . . cause of action must be *antitrust* harm, i.e., a continuing injury to *competition,* not merely a continuing pecuniary injury to a plaintiff." *Young*, 1989 WL 117960, at *18 (quotations omitted) (emphasis in original).

Here, while the full basis of Plaintiff's alleged harm is unclear, it is clear that any alleged injury—including any alleged injury arising out of Plaintiff's initial certification and his 2012 MOC participation fall outside the four-year limitations period. Even assuming that Plaintiff has stated some valid antitrust claim at the pleading stage, his claims should be dismissed to the extent that he proceeds on a theory based on any alleged "harm" suffered before February 26, 2015.

II. PLAINTIFF FAILS TO STATE AN UNJUST ENRICHMENT CLAIM (COUNT III)

Plaintiff re-alleges that ABR has been unjustly enriched when Plaintiff was forced to pay MOC-related fees. FAC ¶¶ 368–72. But Plaintiff clearly purchased his certification and paid MOC-related fees pursuant to contracts with ABR, *see, e.g.*, Ex. 2 at 5, 7, and makes no claim that those contracts are invalid. "[A] plaintiff may not state a claim for unjust enrichment when a contract governs the relationship between the parties." *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985) (citations omitted).[9] "This is true even

[9] For the purposes of this motion, ABR assumes that Illinois law applies. *Transamerica Commercial Fin. Corp. v. Stockholder Sys., Inc.*, No. 89 C 917, 1990 WL 186088, at *2 n.2 (N.D. Ill. Nov. 8, 1990) (citing *Checkers, Simon & Rosner v. Lurie Corp.*, 864 F.2d 1338, 1345 (7th Cir. 1988)).

when the contract does not address the specific issue in contention." *Pace Am., Inc. v. Elixir Indus.*, No. 06 C 4661, 2009 WL 211953, at *7 (N.D. Ill. Jan. 27, 2009). Further, Illinois unjust enrichment law requires that "[f]or a cause of action based on a theory of unjust enrichment to exist, there must be an independent basis that establishes a duty on the part of the defendant to act and the defendant must have failed to abide by that duty." *Phila. Indem. Ins. Co. v. Pace Suburban Bus Serv.*, No. 1-15-1659, 2016 WL 6804622, at *11 (Ill. App. Ct. Nov. 17, 2016). Plaintiff alleges no such duty. *See* FAC ¶¶ 368–72. Plaintiff's unjust enrichment claim thus fails.

CONCLUSION

Plaintiff has not and cannot plausibly allege any tying claim under the Sherman Act against ABR because, as this Court has already acknowledged, ABR's certification, a multi-stage certification comprised of initial certification and continuing MOC requirements to confirm that a radiologist continues to possess the qualities commensurate with the standards for a board-certified radiologist, is "now, as ever" a single product. Nothing in Plaintiff's FAC supports otherwise, as Plaintiff does not allege plausible factual allegations that suggest the existence of two separate products—certification as separate and distinct from MOC. As a result, Plaintiff's second bite at the apple on his tying claims suffers from the same fatal flaws as his first, requiring dismissal. Nor has Plaintiff plead any plausible allegations that ABR has been unjustly enriched when Plaintiff himself admits he *agreed* to certification with MOC from the outset pursuant to his original application. The Court should grant ABR's Motion to Dismiss Plaintiff's FAC in its entirety with prejudice.

Dated: March 13, 2020

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CERTIFICATE OF SERVICE

I certify that I have on this 13th day of March, 2020, filed the foregoing **DEFENDANT AMERICAN BOARD OF RADIOLOGY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** using the Court's ECF system, which will give electronic notification to the following parties of record:

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