No. 20-1007

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GERARD KENNEY, ALEXA JOSHUA, GLEN DELA CRUZ MANALO, and KATHLEEN MURRAY-LEISURE,

Plaintiffs-Appellants,

v.

AMERICAN BOARD OF INTERNAL MEDICINE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:18-cv-5260-WB
The Honorable Judge Wendy Beetlestone

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I. PLAINTIFFS' ALLEGATIONS PREVAIL OVER OUTSIDE-THE-RECORD SPECULATION, AND THE TYING CLAIMS ARE ADEQUATELY ALLEGED.

ABIM's monopoly power over certifications is undisputed. Certifications are an economic necessity for a successful medical practice. From 1936 to today ABIM certifications have assessed one thing: postgraduate medical education. Realizing that only so much in certification fees can be extracted from new residency graduates, MOC allows ABIM not only to charge internists a one-time certification fee at the outset of their practice, but to force internists to purchase MOC by revoking their "initial" certifications if they do not, requiring them to pay inflated MOC fees throughout their entire decades-long careers.

The two products are separate because, in ABIM's own words, MOC "means something different" from certifications and "speaks to the question of whether or not an internist is staying current." (¶ 53). MOC's true purpose, however, is to create a lucrative revenue stream for ABIM, resulting in hundreds of millions of dollars in new fees. (¶ 65). There are other products—not sold by ABIM—that help internists stay current, including continuing medical education

products ("CME"). (¶ 54 ("MOC serves substantially the same function as CME")).[1]

MOC is ABIM's fourth attempt to sell a product distinct from certifications to help keep internists current. Thousands of internists bought three previous voluntary MOC products separately from their certifications as part of ABIM's Continuous Professional Development Program ("CPD"). (¶ 25). "Grandfathers" today also purchase MOC separately from their certifications. (¶ 35). Purchases by internists of MOC, CME, and other non-ABIM CPD products to stay current, demonstrate distinct demand for those products separate from the demand for certifications.

ABIM's earlier versions of MOC failed to generate the hoped-for revenue because ABIM did not revoke certifications of internists who did not buy them. That ABIM's voluntary products were unsuccessful reflected internists' preferences to buy products from others to stay current. (¶ 55). ABIM ensured, however, that MOC succeeded by tying

[1] References to "¶ ___" are to paragraphs of the Amended Class Action Complaint ("Complaint"), included in the Appendix at A-42-A92.

it to "initial" certifications and making it mandatory. Plaintiffs' claims do not threaten ABIM "standards" any more than ABIM's earlier voluntary MOC products did. Plaintiffs ask only that ABIM's illegal tie be severed and that MOC once again be voluntary.

A. The Tying Claims Have Not Been "Altered" On Appeal.

Plaintiffs have not "altered" their tying claims. The tying product is what ABIM now calls "initial" certifications, and the tied product is MOC. Only when ABIM announced it would force internists to buy MOC or revoke their certifications, did certifications become "initial" certifications. But only ABIM's choice of terminology changed; "initial" certifications remain limited to the assessment of postgraduate medical education. As did the district court, Plaintiffs refer to "certifications." If ABIM finds comfort placing "initial" in front of certifications, Plaintiffs' tying claims are not altered.[2]

[2] ABIM acknowledges the word play behind "maintenance of certification," arguing MOC "by its very language connotes connection to ABIM's certification." ABIM Br. 14. Notably, ABIM does not use "initial" with certification, an omission for which it castigates Plaintiffs.

When the district court misguidedly took it upon itself to "find" that certifications (or "initial" certifications) and MOC are a single product (A-29), it disregarded Plaintiffs' allegations about the separate origin, purpose, and development of the two products. As explained recently in *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 436-444 (7th Cir. 2020), however, understanding the history of the tying and tied products is essential. Before MOC, certifications were "lifetime" because they assessed postgraduate medical education of new residency graduates. So too after MOC, but for ABIM's illegal tie, certifications remain "lifetime" because ABIM cannot rescind an assessment of postgraduate medical education years or decades later.

The district court disregarded Plaintiffs' allegations detailing the separate origin, purpose, and development of certifications and MOC, including:

- In ABIM's own words, certifications evaluate internists' "training" and thus are an early career event and a snapshot assessment of new residency graduates. (¶ 21).

- Again in ABIM's own words, MOC "means something different" from certifications and "speaks to the question of whether or not an internist is staying current." (¶ 53).

- ABIM sold three earlier MOC products separately from certifications as part of its own Continuous Professional Development Program ("CPD"). (¶ 25).

- ABIM's earlier CPD products, like MOC, were intended to help internists stay current, but were voluntary and ABIM did not revoke certifications if internists did not buy them. (*Id.*).

- ABIM Chair Dr. Cassel referred to MOC as "dedicated to continued professional development." (¶ 134).

- ABIM sells certifications and MOC to different consumers, the former to new residency graduates and the latter to older, more experienced internists. (¶ 148).

- MOC serves substantially the same function as CME. (¶ 54).

- CME and the NBPAS product are examples of other products that, like MOC, are CPD products that help internists stay current, and are sold separately from certifications. (¶¶ 20, 58).

- CME products have been bought by internists for decades to keep current, including for licensure purposes. (¶ 20).

ABIM feigns umbrage at Plaintiffs' use of CPD to describe MOC. But ABIM used that very term to describe its earlier voluntary MOC products. (¶ 25). Plaintiffs also used that terminology below to describe MOC and the earlier voluntary MOC products sold as part of ABIM's CPD Program. A-104 ("After voluntary professional development programs proved unsuccessful …"); A-130 ("Given its earlier

unsuccessful voluntary professional development programs ..."); *id.* (MOC "dedicated to continued professional development").[3]

B. Plaintiffs Plausibly Allege Separate Demand.

Plaintiffs allege abundant facts supporting the indicia for separate demand cited in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), and its progeny. By "find[ing]" that certifications and MOC are a single product (A-29), the district court decided the ultimate factual issue, improperly weighed facts, resolved inferences against Plaintiffs, considered "facts" asserted by ABIM outside the Complaint, and erroneously considered affirmative defenses. Appellants' Br. 24-38.[4] ABIM fails to engage these shortcomings, continues to divert attention

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[3] *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 444 (3d Cir. 1997), is inapposite because Plaintiffs allege and argued below the separate origin, purpose, and development of certifications and MOC. That those allegations were given short shrift below does not bar Plaintiffs from discussing on them on appeal.

[4] The district court declared repeatedly that it was "unconvinced" by Plaintiffs' fact allegations. A-29, A-33, A-35. But "judges must not make findings of fact at the pleading stage" and "cannot reject a complaint's plausible allegations by calling them 'unpersuasive.' Only a trier of fact can do that, after a trial." *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012).

from Plaintiffs' allegations, and relies on cases decided on full factual records.

ABIM refers to "standards" twenty-three times, but Plaintiffs' claims are not about "standards," and, as acknowledged by ABIM, they disclaim any such motivation. While ABIM may assert its illegal tying is a justified attempt to preserve undefined "standards," that inherently fact-driven affirmative defense relies on facts outside the pleadings, is inappropriate on a motion to dismiss, is contradicted by Plaintiffs' well-pled allegations that MOC does not benefit physicians, patients or the public or improve patient outcomes, and is a defense courts routinely reject. *See, e.g., Jefferson Parish* 466 U.S. at 25 n. 41 ("we reject … that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care."). [5]

[5] The dissertation on "standards" by *Amici Curiae* is blind to the allegations actually before the Court, and accepts without scrutiny ABIM's procedurally premature and substantively flimsy business justification affirmative defense. They rely on outside-the-complaint studies and theses that, even accepting their validity, do not speak to the facts here: MOC is about generating revenue and has nothing to do with "standards." Presumably, *Amici Curiae* would agree that implementing an illegal tie under the guise of protecting "standards" to collect hundreds of millions in dollars in new fees is inimical to their ideology.

1. ABIM's Requirement That Certifications Must First Be Purchased to Buy MOC Reflects the Effectiveness of ABIM's Tie and Not Lack of Separate Demand.

The opening paragraph of ABIM's argument on demand embraces nearly every one of the district court's failings described above. ABIM Br. 17-19. ABIM first assumes its desired conclusion, characterizing MOC and certifications as "components of the same product," without any supporting facts or analysis, and contrary to Plaintiffs' express allegation MOC is not a component. (¶ 52). *See* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1744h, at 200 (4th Ed. 2018) ("Areeda & Hovenkamp") (noting "unremarkable view that things can be separate products even if they are complements"). ABIM then cites two cases where single product "findings" were made on voluminous summary judgment records, not motions to dismiss. *Id.* (citing *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 701 (7th Cir. 1984), and

Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bur., 701 F.2d 1276, 1279 (9th Cir. 1983)).[6]

Next, ABIM endorses the district court's adoption of its own business justification affirmative defense that MOC "ensure[s ABIM's] standards are met," again without any supporting facts or analysis. Finally, ABIM cites Plaintiffs' "concession" that this case is about "standards" despite their explicit statement otherwise. Topping off its house of cards, ABIM argues there "cannot" be separate demand because Plaintiffs do not allege "demand for MOC by physicians who were not certified in the first instance." ABIM Br. 19.

ABIM cites no authority for its position. *Jefferson Parish* stands for the opposite. A patient does not buy standalone anesthesiologist services without other hospital services, yet separate products were found to exist. *Jefferson Parish*, 466 U.S., at 19, n.30 ("We have often

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[6] ABIM reads too much into *Klamath*, citing it for the proposition that separate products cannot be found when consumers "made just one decision" to buy the products. *See* Areeda & Hovenkamp, ¶ 1745g4, at 218 ("[L]iterally applied, [*Klamath*'s] logic suggests that all ties involve single products."). Even if a useful inquiry, whether one or two decisions are made is a fact question that cannot be determined on a motion to dismiss.

found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices."). Concluding that products are not separate simply because one is "useless without" the other "is unacceptable" and "approves the most dangerous ties." Areeda & Hovenkamp, ¶ 1751a, at 279. ABIM's argument that MOC is useless without certifications is a quintessential functional relationship argument, rejected in *Jefferson Parish* and subsequent cases. Appellants' Br. 40-42.

ABIM also fails to advise that it stifles demand by *refusing* to sell MOC to internists unless they first buy certifications. (¶ 49 ("ABIM certification is required by ABIM to purchase MOC.").) That refusal bespeaks ABIM's monopoly power over certifications and the effectiveness of its illegal tie, not lack of separate demand. But for ABIM's refusal to sell MOC unless certifications are bought first, there is every reason to believe that at least some of those internists would consider buying MOC, which according to ABIM helps internists stay current, if permitted to do so. *See PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811, 817 (6th Cir. 1997) (defendant's "own restrictive policy [ ] assured the absence of a component market").

Thousands of internists bought voluntary MOC products separately from their certifications as part of ABIM's CPD Program. Some "grandfathers" also buy MOC even though ABIM does not revoke their certifications if they do not.[7] These facts, along with the purchase by internists of CME and other CPD products to stay current, demonstrates a demand for those products, including MOC, separate from the demand for certifications. At best, ABIM's dispute over separate demand requires a fact-intensive inquiry inappropriate for resolution on a motion to dismiss.[8]

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[7] ABIM had not yet invented the term "initial" certifications when it sold its voluntary MOC products or when "grandfathers" purchased their certifications.

[8] ABIM relies predominantly on summary judgment cases decided on full factual records. In addition to *Jack Walter* and *Klamath*, the following cases relied upon by ABIM were decided on summary judgment: *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Serv. & Training v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992); *Collins v. Associated Pathologists,* 844 F.2d 473 (7th Cir. 1988); *SubSolutions, Inc. v. Doctor's Assocs.*, 436 F. Supp. 2d 348 (D. Conn. 2006); *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561 (N.D. Cal. 1984). The district court in *Siva v. Am. Bd. of Radiology*, 418 F. Supp. 3d 264 (N.D. Ill. 2019), unlike the district court here, allowed plaintiff to amend, and an amended complaint has been filed.

2. ABIM Embraces the District Court's Improper Reliance on its "Protect the Brand" Affirmative Defense.

Alleged business justifications are affirmative defenses that should not be considered at the pleadings stage. Appellants' Br. 43-47. ABIM does not contest this basic tenet. Nor does ABIM deny the district court adopted its defense that ABIM's otherwise illegal tie is somehow required to "protect the brand." Thus, it seems ABIM agrees, at least *sub silentio*, that the ruling below rests on a legally improper foundation.

Merely "asserting a quality-protection defense does not itself establish it, for the challenged tie may in fact serve a different function. Hence, the defendant must show how the tie actually promotes quality and protects goodwill." Areeda & Hovenkamp, ¶ 1716a3, at 196. "[B]alancing anticompetitive effects against [ ] hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings." *Viamedia*, 951 F.3d at 460. *See also Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1215 (9th Cir. 1982) (fact questions precluded summary judgment on business justification defense).

ABIM highlights the district court's unsubstantiated conclusions that the tie is necessary to "ensure" ABIM's "standards," to avoid "disrupt[ing] the trust hospitals, patients, and insurance companies place on the ABIM certification," and for internists who "could not keep up with the advances in their particular field." ABIM Br. 30. ABIM does not dispute, however, that these conclusions rest on bare factual assertions outside the Complaint, are contested, and are often contradicted by Plaintiffs' allegations. Appellants' Br. 43-45.

For example, ABIM does *not* contend ABIM-certified internists failed to meet ABIM "standards" before MOC; that ABIM's "brand" was in decline before MOC; that making MOC mandatory protects ABIM's "brand"; or that hospitals, patients, and insurance companies had less "trust" in ABIM's "brand" before MOC was made mandatory. Plaintiffs, in fact, plead the opposite.

No causal relationship has been established between MOC and improved patient care, suggesting MOC does nothing to "protect the brand." (¶¶ 42-43, 133-139). Hospitals and insurance companies required certifications before MOC became mandatory—that they continue to require certifications says nothing about whether *MOC* is

relevant to their "trust" in the ABIM "brand." Finally, Plaintiffs allege ABIM's tie is motivated by the need to generate new MOC fees to augment limited certification revenues, not to "protect the brand." (¶¶ 144-148). Neither the district court nor ABIM has cited any purported "facts" that support a "protect the brand" defense sufficient to warrant dismissal as a matter of law.

3. The Franchise Analogy is a Reprise of ABIM's "Protect the Brand" Affirmative Defense.

Franchise cases are not relevant to a monopolist who uses monopoly power over a tying product to force the purchase of an economically necessary tied product. Because franchise opportunities are plentiful, no franchisee is compelled by economic necessity to enter a particular franchise; thus, the relationship between franchisors and franchisees is contractual, and not market-based. Appellants' Br. 47-48. ABIM does not address this fundamental disconnect between franchises and its tying of certifications and MOC. Instead, ABIM reverts to its wholly unsupported "protect the brand" rhetoric, arguing that it "sells a single formula – its certification of internists – upon which it stakes its reputation." ABIM Br. 26.

For the reasons stated above, there is no basis, substantive or procedural, to credit or even consider ABIM's "protect the brand" defense on a motion to dismiss. But even if "protect the brand" were considered anew, ABIM's franchise analogy adds nothing. Plaintiffs allege, and ABIM does not dispute, that certifications assess postgraduate medical education. MOC, on the other hand, in ABIM's own words, is "something different," designed to help practicing internists stay current. Because certifications and MOC serve different purposes, there is no "single formula" and ABIM does not even purport to describe one.

Next, ABIM argues that it "shares a relationship with ABIM-certified internists, who hold themselves out … as meeting the standards set by ABIM." ABIM Br. 26. But there is nothing in the record suggesting any such relationship-sharing or that the performance of internists reflects on ABIM. Internists practice under their own names and not under ABIM's mantle. Unlike a diner who walks into a McDonald's franchise to buy a Big Mac, patients do not walk into an ABIM store to buy individualized internist care. Nor are there any record facts supporting the supposition that the "faith" ABIM

asserts "hospitals, insurance companies, and patients" have in the "certification process" would be lost without MOC. *See* ABIM Br. 26. The speculation upon which ABIM's franchise analogy is based, at best, raises even more fact questions.[9]

4. Plaintiffs' Allegations Satisfy *Jefferson Parish* and its Progeny, and ABIM Disputes Just Two of the Five Indicia of Separate Demand Alleged, Raising Only Fact Questions.

Plaintiffs' allegations support the following indicia of separate demand recognized by *Jefferson Parish* and its progeny: (1) internists differentiate between certifications and MOC; (2) ABIM has always sold them separately; (3) ABIM treats the two products as separate; (4) ABIM bills and accounts for certifications and MOC separately; and (5) other vendors sell CPD products like MOC that keep internists current without also selling certifications. Appellants' Br. 24-38.

[9] Both franchise cases ABIM relies upon were decided on full factual records. *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 134 (9th Cir. 1982) (Rule 41(b) motion during trial); *Principe v. McDonald's Corporation*, 631 F.2d 303 (4th Cir. 1980) (summary judgment and directed verdict during trial).

ABIM addresses only indicia (2) and (5), not disputing the others. ABIM does not contest the most salient indicia of *Jefferson Parish*: that internists differentiate between certifications and MOC. *See* 466 U.S. at 23. Not every indicia of separate demand alleged must be sustained to survive a motion dismiss. Finally, ABIM's fact challenges to indicia (2) and (5) provide no basis for affirmance.[10]

a. ABIM sells certifications and MOC separately.

ABIM has long sold certifications and MOC separately. Appellants' Br. 27-29. ABIM, however, contends the clock for separate sales starts not when it began selling certifications in 1936 but after the tie, and that anything before 1990 is irrelevant. ABIM Br. 29-30. This self-serving construct ignores the history of certifications and MOC that illustrates how the demand for each developed separately over time. Courts recognize that taking such history into account is crucial for a

[10] ABIM does not dispute it describes MOC as "something different" and bills and accounts for certifications and MOC separately. ABIM Br. 30-32. Whether those facts are more "consistent" with MOC being separate from certifications as Plaintiffs allege, or MOC simply being a "component" as ABIM advocates, is for a jury to decide on a full factual record.

separate products inquiry. *See*, *e.g.*, *Viamedia*, 961 F.3d at 436-44 (analyzing history of the products, focusing on before the tie was implemented). The *Viamedia* imperative to assess demand before the tie makes perfect sense because focusing on demand after the tie is forced on consumers inevitably rewards the defendant who has already successfully reduced competition, the very goal of the illegal tie.

ABIM dismisses *Viamedia* as a "distraction," making fruitless attempts to distinguish it. ABIM Br. 22-23. It argues first that the two products in *Viamedia* "were not inextricably connected." But as their separate origin, purpose, and development demonstrate, neither are certifications and MOC. For example, "grandfathers" are not forced to buy MOC, confirming it is not "inextricably intertwined" with certifications. In fact, "grandfathers" who voluntarily buy MOC and do not pass are *still* reported as certified by ABIM. (¶ 35). And according to ABIM, the "crucial" distinction with *Viamedia* is that the defendant there sold the two products separately. But ABIM sold its earlier voluntary MOC products separately from certifications, and sells MOC to "grandfathers" separately today.

ABIM contends that because its earlier voluntary MOC products were sold only to internists who had already bought certifications, they do not constitute a separate sale. ABIM Br. 28. But voluntary MOC purchases by thousands of internists without any requirement that they do so, after they had already bought their certifications, supports separate demand for the two products. Also telling is that thousands of other internists did *not* buy ABIM's voluntary MOC products, showing that internists today purchase MOC because they are forced to do so, not because they conflate certifications and MOC.

ABIM's attempt to condone the MOC exemption bestowed upon "grandfathers" is equally unavailing. ABIM Br. 29-30. The very existence of "grandfathers," whose certifications are not revoked if they do not buy MOC, confirms MOC is not a "component" of certifications. And those "grandfathers" who do purchase MOC separately from certifications even though it is not required, also support separate demand. Finally, ABIM allowing tens of thousands of "grandfathers" to hold themselves out as ABIM-certified without buying MOC is

persuasive that ABIM does not truly consider MOC essential to "protect the brand."[11]

b. ABIM's argument that only MOC "maintains" certifications is another reprise, reflecting the effectiveness of ABIM's tie and not lack of separate demand.

ABIM dismisses as "irrelevant" that other vendors sell CME and other CPD products, because those other products do not "maintain" certifications. ABIM Br. 32-33. First, this is simply the converse of ABIM's earlier argument that internists must first buy certifications before ABIM will allow them to buy MOC, and it should be rejected for the same reasons. *See* pp. 8-11, *supra*.

Second, ABIM did not invent "maintaining" certifications until it needed a new revenue source, laying bare as a pretense the entire "maintaining" justification for MOC. Third, while ABIM's manipulation

[11] Whether ABIM truly decided to "change" certifications (ABIM Br. 30), or made MOC mandatory to generate new revenue as Plaintiffs allege, is a fact question. In *Cal. Comp. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 734, 739 (9th Cir. 1979), the "finding" that a product design change was not a "technological manipulation" was made on extensive evidence presented at trial. *See also* Appellants' Br. 32-34.

of MOC to function so that it "maintains" certifications may be innovative, it does not make certifications and MOC a single product. Areeda & Hovenkamp, ¶ 1746, at 231 ("[I]nnovation need not always take the form of building a better mousetrap. Instead, the 'innovation' may be an anticompetitive tie that no one has tried before.").

Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 835 (7th Cir. 1978), is instructive. There, a "protect the brand" defense was rejected because the jury could reasonably have concluded that the tie created a "captive market" forcing licensees to purchase tied parts at "a premium price." Creation of a captive MOC market that did not exist before ABIM's tie is precisely what Plaintiffs allege here. (¶ 44 ("ABIM created a wholly new and artificial market for maintenance of certification that has generated substantial additional fees for ABIM.")).

ABIM, like the district court, wrongly considers the demand only of internists who have already bought certifications and are forced to "maintain" them by purchasing MOC, in other words, those already victimized by ABIM's tie, excluding other internists and other CPD products available to internists to stay current. But even considering *only* those who purchased certifications previously, separate demand is

supported by the thousands of internists who, separately from their certifications, bought the earlier voluntary MOC products, as well as by today's "grandfathers." Whether separate products exist is, at bottom, a question of fact. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1573 (11th Cir. 1991) ("[t]he parameters of a given market are questions of fact").

Citing "unfairness," ABIM presumes Plaintiffs seek to benefit only themselves, while "thousands of internists" would continue to buy MOC due to some unspecified obligation. ABIM Br. 34. But Plaintiffs do not request special treatment, and ask that MOC be made voluntary for "all internists required by ABIM to purchase MOC." (¶ 7). The history of ABIM's voluntary CPD Program shows that once the tie is severed, some internists will buy MOC and others will not, based on each internist's own individual needs and MOC's merits, not any sense of obligation.[12]

[12] ABIM also speculates, like the district court, that other CPD products could be "possibly inferior." ABIM Br. 34. The merits of MOC and competing CPD products should be decided by the internists themselves, however, and not ABIM.

5. ABIM Forces Internists to Buy MOC.

ABIM has monopoly power over certifications. According to ABIM, however, internists are nonetheless free "not to purchase MOC." ABIM Br. 35. But like the district court, ABIM ignores that certifications are an economic necessity for a successful medical practice, and that it revokes the certifications of internists who do not buy MOC. Courts recognize certifications are an economic necessity when, as alleged here, doctors depend on them for hospital privileges or insurance. *Busse v. Am. Bd. of Anest., Inc.,* No. 92 C 5613, 1992 U.S. Dist. LEXIS 18948, *8 (N.D. Ill. Dec. 11, 1992) (economic necessity when necessary to access area hospitals); *Liberman v. Am. Ost. Ass'n*, No. 13-15225, 2014 U.S. Dist. LEXIS 153012, *16-17 (E.D. Mich. Oct. 9, 2014) (insurance).

Foreclosing access to a tying product for failure to later purchase a tied product is paradigm "forcing" supporting an illegal tie. 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 best, ABIM raises fact questions about "forcing" that cannot be resolved without a full record. *See 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). Internists desire to purchase products to stay current from others, but ABIM's monopoly power over certifications and its illegal ties forces them to buy MOC. (¶ 55).

Finally, whether internists know of the tie when buying certifications, *i.e.*, that MOC is mandatory, is of no legal consequence given ABIM's monopoly power over certifications constraining their ability to choose freely. *See* ABIM Br. 35. Awareness that a tie exists does not make the tie any less coercive. *See Viamedia*, 951 F.3d at 446-449 (consumers signed with Comcast for ad rep services knowing of tie). ABIM cites no authority to the contrary.[13]

[13] The tying claim in *Smugglers' Notch Homeowner's Ass'n v. Smugglers' Notch Mgmt. Co.*, 414 Fed. App'x 372, 375-376 (2d Cir. 2011), failed because defendant did not have market power over the tying product -- "vacation properties" near ski resorts. *See* ABIM Br. 35. Here, ABIM has monopoly power over certifications. The other cases ABIM cites are franchise cases and inapposite for reasons discussed above.

6. Plaintiffs Adequately Allege Rule of Reason Tying Claims.

Because Plaintiffs adequately allege *per se* tying claims, the Court need not at this time (as the district court did not), decide whether *per se* or rule of reason governs. Well-settled law also provides that rule of reason applies only when "appreciable tying market power cannot be shown." *Brokerage Concepts v. U.S. Healthcare*, 140 F.3d 494, 511 (3d Cir. 1998). Because ABIM has monopoly power over certifications, a *per se* analysis applies here.

Notwithstanding, Plaintiffs' alternative rule of reason tying claims are also adequately alleged. ABIM has "unreasonably restrained competition" in the tied product market. Appellants' Br. 49-50. ABIM's argument that there is "no competition" because only MOC "maintains" certifications (ABIM Br. 38-39), fails for the reasons stated above. *See* pp. 20-22, s*upra*. Nor does ABIM dispute that whether competition has been "unreasonably restrained" raises fact questions, making dismissal on the pleadings improper. *See* Appellants' Br. 50-51.[14]

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[14] When, as here, illegal tying injures competition, a plaintiff who does not purchase the tied product is nonetheless injured. *See, e.g.,*

Because the rule of reason tying claims are adequately alleged, the Court need not address ABIM's argument that *every* antitrust claim against a "professional society" is governed by the rule of reason. ABIM Br. 38. And while rule of reason may be appropriate when "bona fide, non-profit professional associations" adopt a restraint "motivated by 'public service or ethical norms,'" *U.S. v. Brown University*, 5 F.3d 658, 672 (3d Cir. 1993) (quoting *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 349 (1982)), that is not the situation here.

To the contrary, ABIM's tying of certifications and MOC is a revenue-driven commercial endeavor, motivated by hundreds of millions of dollars in new MOC fees spent lavishly by ABIM for its own benefit. (¶¶ 148-153). ABIM's motivations cannot be determined on a motion to dismiss, without a full factual record.[15]

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Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 814 (1st Cir. 1988). ABIM does not address *Wells* or this well-settled proposition with regard to Plaintiff Manalo. ABIM Br. 45-46.

[15] *Mass. School of Law v. ABA*, 107 F.3d 1026 (3d Cir. 1997), concerned accreditation standards for law schools, with no allegation of a "revenue maximizing purpose. " *Brown University*, 5 F.3d at 672.

Plaintiffs seek only to break up the artificial market ABIM created for MOC. Eliminating the illegal tie, dismantling ABIM's captive MOC market, and once again making MOC voluntary, will allow the marketplace to decide the merits of MOC, as the antitrust laws require.

II. PLAINTIFFS ADEQUATELY ALLEGE MONOPOLIZATION.

ABIM has created an artificial, captive MOC market. (¶ 44). Its monopoly power over certifications, an economic necessity, also gives ABIM monopoly power over MOC. Plaintiffs allege ABIM illegally created and maintains a monopoly in MOC by requiring internists to buy MOC to "maintain" their certifications. (¶¶ 2, 62).

Rather than address the substance of these allegations, ABIM instead parrots the erroneous conclusion below that a market for MOC "does not exist" as a matter of law (ABIM Br. 40), based on the district court's unwarranted "find[ing]" (A-29) that certifications and MOC are a single product. *See* Appellants' Br. 24-38. Because Plaintiffs' tying allegations prevail over ABIM's outside-the-record speculation, separate demand and distinct products are plausibly alleged. At minimum, it is a fact question whether the market defined by Plaintiffs is cognizable.

Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 199 (3d Cir. 1992) ("determination of a relevant product market or submarket … is a highly factual one best allocated to the trier of fact").

ABIM's response to *Viamedia* is that Plaintiffs did not argue "bundling" in the district court. ABIM Br. 42. But "bundling" is a form of tying, and Plaintiffs argued below that ABIM's tying constituted anticompetitive conduct for Section 2 monopolization purposes. A-121.[16] Plaintiffs also allege a wealth of facts in addition to tying supporting ABIM's anticompetitive conduct. Appellants' Br. 55-56. While it disputes them, ABIM only underscores the many fact questions that cannot properly be resolved on a motion to dismiss.

III. PLAINTIFFS ADEQUATELY ALLEGE RICO STANDING.

After ABIM was unable to generate hoped-for fees from its first three voluntary MOC products sold as part of its CPD Program, it realized it must force internists to buy MOC. ABIM did so by revoking

[16] ABIM also argues that in *Viamedia* and the other cases relied upon by Plaintiffs, separate products had been found to exist or stipulated. ABIM Br. 42. Given the chance to develop a full factual record, Plaintiffs will prove separate products exist here.

the certifications of internists who did not buy MOC. In furtherance of its scheme, ABIM waged a campaign of fraudulent misrepresentations to deceive the public, including but not limited to hospitals and related entities, insurance companies, medical corporations and other employers, and the media, that MOC, among other things, benefits physicians, patients and the public and improves patient outcomes. As a result, ABIM has collected hundreds of millions of dollars in MOC fees under false pretenses. Appellants' Br. 57-59.

ABIM never addresses this RICO scheme. Its only plausibility argument is that ABIM could not successfully deceive what it characterizes as a nationwide network of hospitals and insurance companies. ABIM Br. 53. Even this, however, assumes facts outside the pleadings, including that hospitals and insurance companies have combined together to form a single, monolithic body, rather than the de-centralized physician-based health care system that defines the medical industry. Moreover, ABIM confuses and conflates reliance and proximate cause.

A. Plaintiffs Allege Reliance As Part Of The RICO Scheme.

ABIM contends Plaintiffs have failed to allege reliance, which it argues must be pleaded for RICO standing. ABIM Br. 47-49. ABIM is wrong on both counts. While reliance is not required to plead RICO standing, Plaintiffs nonetheless allege reliance as part of ABIM's scheme.

In *Devon Drive Lionville LP v. Parke Bancorp, Inc.*, 791 Fed. App'x 301, 307 (3d Cir. 2019), this Court suggested that *proof* of a direct relation between injury and the RICO conduct "requires reliance." But the Court did not hold—or even suggest—that reliance must be alleged to survive a motion to dismiss. In fact, the Supreme Court has held the opposite: "it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to *prove* causation. 'But the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action.'" *Bridge v. Phoenix Bond & Indemnity Co.*, 553

U.S. 639, 659 (2008) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 478 (2006)) (emphasis added).

In any event, Plaintiffs do allege reliance. ABIM made statements it knew to be false about MOC, "to the public, including but not limited to hospitals and related entities, insurance companies, medical corporations, and other employers," including that MOC "improves the value of care," doctors who participate in MOC "provide better patient care," and MOC "makes a difference." (¶ 135). "Believing these misrepresentations to be true," hospitals and related entities, insurance companies, medical corporations and other employers require internists to buy MOC in order to obtain hospital consulting and admitting privileges, reimbursement by insurance companies, employment by medical corporations and other employers, malpractice coverage, and other requirements of the practice of medicine. (¶¶ 6, 166).[17]

[17] Thus, ABIM's contention that Plaintiffs have not alleged "to whom" misrepresentations were made is simply wrong. ABIM Br. 53. Moreover, in the single case upon which ABIM relies, *Lum v. Bank of Am.*, 361 F.3d 217 (3d Cir. 2004), there is no discussion of reliance or proximate cause. The RICO claim was dismissed in *Lum* because plaintiff did not plead fraud with specificity, an argument not made here by ABIM. *Id.* at 220, 224.

ABIM argues employers "are independent decision makers that may have decided to require certification for any number of reasons." ABIM Br. 51. ABIM does not suggest what those other reasons—independent of ABIM misrepresentations—might be. But even if it did, any such reasons would be outside the pleadings and raise fact questions not properly considered on a motion to dismiss. Moreover, given Plaintiffs' allegations that, "no evidence-based relationship has been established between MOC and any beneficial impact on physicians, patients, or the public," it is plausible that hospitals, insurance companies, and others require internists to buy MOC in reliance on ABIM's misrepresentations. (¶¶ 42, 136). Plaintiffs are entitled to prove their reliance allegations.

B. Plaintiffs Allege Proximate Cause.

ABIM argues there is no proximate cause as a matter of law because hospitals, insurance companies, and others who require MOC break the causal chain between ABIM's misrepresentations and Plaintiffs' injuries. ABIM Br. 51-53. This precise argument, however, was rejected in *In re Avandia Mktg.*, 804 F.3d 633, 645 (3d Cir. 2015). There, defendant argued that doctors and their patients had relied on

the misrepresentations, thereby destroying proximate causation. Finding Plaintiffs' alleged injuries sufficiently direct, this Court disagreed, explaining, "This fraudulent scheme could have been successful only if plaintiffs paid for Avandia, and this is the very injury that plaintiffs seek recovery for." *Id.*

Here, ABIM's scheme could be successful only if internists bought MOC. Payment of MOC fees is "the linchpin of the scheme's success," *Brokerage Concepts,* 140 F.3d at 521, making internists the "direct target of the alleged scheme." While ABIM misrepresented MOC to third parties, it did so with the intent of forcing internists to buy MOC, thereby directly causing their injuries.

The cases cited by ABIM do not compel a different conclusion. In most, third parties suffered the direct injuries and plaintiffs' injuries were derivative.[18] *See Anza*, 547 U.S. at 460 (injuries derivative of injury of State of New York); *Devon Drive*, 791 Fed. App'x. at 307

[18] In *Bonavitacola Elec. Ctr. v. Boro Developers, Inc.*, 87 Fed. App'x. 227, 234 (3d Cir. 2003), the complaint was dismissed because the misrepresentation did not occur until after plaintiff had lost the bid, and so could not have directly caused the injury.

(injuries derivative of FDIC's); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 932, 933 (3d Cir. 1999) (expenses for smoking-related illnesses derivative of injury caused to smokers). Here, no injury has been suffered by hospitals, insurance companies, or other third parties and the injuries suffered by internists—hundreds of millions of dollars paid for MOC fees—are not derivative.

IV. PLAINTIFFS ADEQUATELY ALLEGE UNJUST ENRICHMENT.

The district court's sole rationale for dismissing Plaintiffs' unjust enrichment claims is its conclusion that ABIM "did not 'force' Plaintiffs to purchase MOC." A-41. ABIM similarly repeats its argument that internists "chose" to "pursue and maintain their certifications." ABIM Br. 54. Plaintiffs have already debunked this argument, and clearly allege "forcing" notwithstanding the erroneous conclusions and arguments of the district court and ABIM. *See* pp. 23-24, s*upra*; *see also* Appellants' Br. 5-7, 9, 38-39.

ABIM points out that certifications are not required for licensure. But it does not deny certifications *are* required for admitting privileges,

insurance, and other requirements of a successful medical practice, and accordingly are an economic necessity. Finally, the district court opinion in *In re Avandia Mtkg.*, No. 2007-MDL-1871, 2013 U.S. Dist. LEXIS 152726 (E.D. Pa. Oct. 22, 2013), does not support ABIM, as the unjust enrichment claim there failed for several reasons not pertinent here, most importantly because, unlike MOC, the purchases were voluntary. *See* ABIM Br. 55-56.

CONCLUSION

Plaintiffs-Appellants respectfully ask this Court to reverse the dismissal of the Amended Class Action Complaint.

Dated: July 27, 2020

Respectfully submitted,

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CERTIFICATION

I, C. Philip Curley, one of the counsel for Plaintiffs- Appellants, and a member of the bar of this Court, hereby certify as follows:

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

(2) This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared in Century Schoolbook font on Microsoft Office Word 2016 and has 6,491 words according to the Microsoft Word count.

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

(4) Pursuant to Circuit Rule 31.1(c), a virus check was performed on this brief using Trend Micro agent version 6.7.1293/14.2.1161 and no virus was detected.

Dated: July 27, 2020

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