**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **GERARD KENNEY, ALEXA JOSHUA, GLEN DELA CRUZ MANALO, and KATHERINE MURRAY LEISURE,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 2:18-cv-05260-RK** |
| **AMERICAN BOARD OF INTERNAL MEDICINE,** | ) | **Trial by Jury Demanded** |
| **Defendant.** | ) | **CLASS ACTION** |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO ABIM'S MOTION TO DISMISS THE AMENDED COMPLAINT**

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**Rules**

Plaintiffs Gerard Kenney, Alexa Joshua, Glen Dela Cruz Manalo, and Katherine Murray-Leisure ("Plaintiffs") submit this Memorandum of Law in Opposition to Defendant American Board of Internal Medicine's ("ABIM") Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. No. 22).

## INTRODUCTION

Plaintiffs' claims against ABIM are more than sufficiently "plausible" on their face under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). ABIM ignores the detailed factual allegations against it and instead goes outside the Amended Complaint to inject irrelevant rhetoric. For example, with regard to its principal antitrust argument that initial certification and maintenance of certification ("MOC") are not separate products, a quintessential question of fact, ABIM ignores the allegation that it sold lifelong initial certifications for "more than fifty years" before it began forcing internists to purchase MOC. ¶ 52. [1] ABIM also fails to address its admission that MOC "means something different from initial certification." ¶ 53.

ABIM includes unsupported and irrelevant rhetoric as part of its re-imagining of MOC. But at issue is whether Plaintiffs have stated "plausible" claims, which they have, and not whether ABIM believes it may have plausible defenses. For example, ABIM's recurring theme that MOC is "scientifically supported," a "quality control measure," and "a tool for ensuring [ ] consistent quality" is irrelevant to whether ABIM uses its undisputed market power to force internists to purchase MOC. Def. Mem. 1-2, 12. ABIM's outside-the-record assertions are also

[1] References to "¶ __" are to paragraphs of the Amended Complaint. (Dkt. No. 18). References to "Def. Mem. __" are to pages in the Memorandum of Law of Defendant American Board of Internal Medicine in Support of its Motion to Dismiss Plaintiffs' Amended Complaint. (Dkt. No. 22-2).

directly contradicted by Plaintiffs' allegation that "no evidence-based relationship has been established between MOC and any beneficial impact on physicians, patients, and the public." ¶ 42. Similarly, ABIM's second recurring premise that MOC is a "voluntary ongoing certification process," that internists "choose to participate in MOC of their own accord," and that it is "each physician's choice to participate in MOC" (Def. Mem. 19, 21, 24) is contrary to Plaintiffs' factual allegation confirmed on the ABIM website that except notably for those "grandfathered" by ABIM, "initial certifications 'must be maintained through ABIM's MOC program.'" ¶ 44.

ABIM relies mostly on franchise cases to argue MOC is not a separate product. Putting aside for the moment that all of the cases it cites were decided on a fully developed factual record at summary judgment or after trial, ABIM's franchise analogy misses the mark. Physician care is not Baskins Robbins ice cream, and patient treatment is not a Subway sandwich. *See* Def. Mem. 9-10. Hence, the notion that ABIM can force MOC on internists in service of an illusory nationwide standard unilaterally imposed by ABIM offends the free market principles that are the hallmark of medical care in this country. [2] Plain and simple, MOC is a failed and extremely costly product that ABIM, using its undisputed market power, forces internists to buy. ¶¶ 51, 62,

[2] A doctor's practice, his or her patients, and the indicated medical protocol for each patient are localized, diverse, and individually-driven. For example, Dr. Kenney has a rural-based medical practice centered in Seneca, Pennsylvania. ¶ 74. Dr. Joshua practices in the Detroit urban area where she serves patients of ethnically and culturally diverse backgrounds, and cares for the insured, underinsured, and uninsured. ¶¶ 81, 84. Dr. Manalo has worked for Department of Veterans Affairs medical centers in Tennessee and Washington and a non-profit faith-based health system in Montana. ¶¶ 92, 100. And Dr. Murray-Leisure as a Lieutenant JG in the Commissioned Corps of the United States Health Service worked with leprosy patients and refugees in rural Louisiana. Later she worked on Saudi Arabia leishmaniasis in veterans of Operation Desert Shield and Operation Desert Storm in rural Pennsylvania and received national recognition from the Department of Veterans Affairs, Veterans of Foreign Wars, and the American Legion. She has thirty peer-reviewed publications in the field of infectious diseases. ¶ 103. Her practice is currently based in the suburban South Shore region of Massachusetts. ¶ 106.

70, 73. Its exploitation of internists is further aggravated because while ABIM deceptively wraps itself in the mantle of self-regulation, it has no legislative, regulatory, or administrative authority at all and answers to no one, and certainly not to the internist community it misleadingly claims to be self-regulating. ¶¶ 154-156.

## STATEMENT OF FACTS

ABIM began selling initial certifications to internists in 1936. ¶ 22. ABIM's initial certification product is sold to recent residency program graduates and, according to ABIM, "demonstrates that physicians have completed internal medicine and subspecialty training" through their medical school education and prescribed clinical residency experiences. ¶ 21. Approximately 200,000 internists, or one out of every four physicians in the United States today, have purchased initial certifications. ¶ 5. ABIM is the monopoly supplier of initial certifications for internists and has market power in the market for initial certifications. ¶¶ 2, 50, 51. Because its purpose is to test the residency "training" of new doctors, ABIM certifications were until recently lifelong and no subsequent examinations or other requirements were imposed by ABIM on internists. ¶ 24. ABIM sold its certifications for more than fifty years before it started requiring internists to purchase MOC. ¶ 52.

After voluntary professional development programs proved unsuccessful, ABIM announced that beginning in 1990 it would no longer issue lifelong certifications and instead require internists to take subsequent examinations and complete other burdensome MOC requirements "or have their certification terminated by ABIM." ¶ 49. According to ABIM, MOC "means something different from initial certification" and is "anchored in whether a physician is meeting a performance standard." ¶ 53. Thus, while initial certification tests whether the "training" of recent residency program residents is adequate, MOC purports to address whether a

"performance standard" is met by experienced doctors. ¶¶ 21, 53. The different consumers for ABIM's initial certification product (recent residency program graduates) and its MOC product (experienced doctors) reflect separate markets that are "not interchangeable or a component of one another." ¶ 52.

Beginning no later than 2000, ABIM-certified internists have been required to purchase MOC, *except that* internists who purchased certifications before 1990 are "grandfathered" by ABIM and not required to purchase MOC. ¶ 27. The President and Chief Executive Officer of ABIM has been quoted as admitting: "Grandfathering is a really vexing challenge. It's difficult to defend … I would not see those doctors as equivalent to those who recertify." *Id*. Thus, its rhetoric that MOC is "a tool for ensuring [ ] consistent quality" is disproved by ABIM absolving "grandfathered" internists from MOC. *See* Def. Mem. 12. About 40% of the 200,000 internists who have purchased initial certifications have been "grandfathered" by ABIM. ¶¶ 5, 29. Internists "grandfathered" by ABIM are reported as "Certified" on its website even though they do not meet MOC requirements. ¶ 27.

No evidence-based causal relationship has been established between MOC and any beneficial impact on physicians, patients, or the public. ¶¶ 42, 43, 133-142. That there is no relationship is supported by ABIM's decision to exempt "grandfathered" internists from MOC, and ABIM's acknowledgment that its own recently-funded research only "suggest[s] that MOC is a marker of care quality …." ¶ 43. According to two other ABMS medical specialty boards: "Many qualities are necessary to be a competent physician, and many of these qualities cannot be measured. Thus, board certification is not a warranty that a physician is competent." *Id*. [3]

[3] ABIM is a member board of the American Board of Medical Specialties ("ABMS"), an umbrella organization of twenty-four medical specialty boards that certify doctors in thirty-nine specialties and eighty-six subspecialties. ¶ 17.

The National Board of Physicians and Surgeons ("NBPAS") has offered a maintenance of certification product since January 2015. ¶ 56. NBPAS, however, does not sell an initial certification product. ¶ 58. ABIM does not recognize NPBAS maintenance of certification. ¶ 59. Because ABIM-certified internists are forced to purchase MOC or suffer substantial economic consequences, NBPAS has had very limited success with its product. ¶ 37, 59. Less than one percent of hospitals and no insurance companies accept NBPAS maintenance of certification. ¶ 59. *See also* ¶ 87 (Dr. Joshua), ¶ 113 (Dr. Murray-Leisure). NBPAS maintenance of certification requires less physician time and its fees are less than 15% of MOC fees. ¶ 57. ABIM uses its monopoly position to shut NBPAS out from a substantial portion of the maintenance of certification market. ¶ 68.

Since ABIM first imposed MOC on internists it has waged a campaign to deceive the public, including hospitals and related entities, insurance companies, medical corporations and other employers, and the media that MOC benefits physicians, patients and the public and constitutes self-regulation by internists. ¶¶ 131, 134-135. ABIM has induced hospitals and related entities, insurance companies, and medical corporations and other employers to require internists to be ABIM-certified 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. ¶¶ 63, 166.

With the assistance and encouragement of ABIM and/or persons affiliated with ABIM, and believing ABIM's misrepresentations about MOC to be true, hospitals, medical corporations and other employers have adopted by-laws mandating that physicians purchase MOC or risk the loss of admitting and consulting privileges. ¶¶ 6, 38, 166. *See also* ¶¶ 85-86, 88-89 (Dr. Joshua), ¶¶ 108-109, 113 (Dr. Murray-Leisure). Many Blue Cross Blue Shield ("BCBS") insurance

companies, also with the assistance and encouragement of ABIM and/or persons affiliated with ABIM and believing ABIM's misrepresentations about MOC to be true, have required internists to purchase MOC to participate in their networks. ¶¶ 6, 39, 166. *See also* ¶ 87 (Dr. Joshua). [4] Thus, ABIM-certified internists must purchase MOC or suffer substantial economic consequences. ¶¶ 6, 37, 40, 70, 155, 166. *See also* ¶¶ 76-78 (Dr. Kenney), ¶¶ 85-89 (Dr. Joshua), ¶¶ 93, 95-96, 101 (Dr. Manalo), ¶¶ 105, 108-109 (Dr. Murray-Leisure).

Like the unlawful tying of its initial certification and MOC products, ABIM's misrepresentations about MOC have allowed it to maintain its monopoly position in the initial certification market, create and maintain a monopoly in the market for maintenance of certification, and limit the growth of competition from new providers of maintenance of certification products such as NBPAS. ¶¶ 2, 61-62, 68, 70, 165. ABIM's unlawful tying and monopolization and its misrepresentations have driven sales of MOC and generated substantial new fees. ¶¶ 4, 164.

In exercising its monopoly power, ABIM has imposed a dizzying array of burdensome changes to its MOC product that cannot be efficiently summarized here, but are alleged in detail in the Amended Complaint. ¶¶ 26, 31-34. Internists have been required to take countless hours away from their practice and families to prepare for and take repeated MOC examinations and to complete other required MOC activities. ¶ 30. One analysis projects that complying with MOC costs an internist an average of $23,607 in money and time over a ten year period, up to $40,495 over a ten year period for certain ABIM subspecialties, and $5.7 billion overall for internists over the decade from 2015 to 2024, including time costs of 32.7 million physician hours. ¶ 36.

[4] Patients whose internists have been denied coverage by BCBS because they have not complied with MOC are typically required to pay higher "out-of-network" coinsurance rates (for example, 10% in-network versus 30% out-of-network). ¶ 39.

Plaintiffs and other internists have been forced to pay hundreds of millions of dollars in MOC fees to ABIM and incur additional out-of-pocket costs. ¶ 65. MOC also takes time away from patients and detracts from patient services, to the detriment of ongoing patient care. ¶ 30.

As confirmed on the ABIM website, internists are forced to purchase MOC or have their certifications terminated by ABIM. ¶¶ 44, 49, 61. By requiring internists to purchase MOC, ABIM created a wholly new and artificial market for maintenance of certification and has generated substantial new fees. ¶¶ 44, 62. In excess of 95% of the market for maintenance of certification is controlled by ABIM through its MOC product. ¶ 5. ABIM has monopoly power in the market for maintenance of certification. ¶ 68. MOC raises the cost of the practice of medicine for Plaintiffs and other internists; constrains the supply of internists (thereby harming competition, decreasing the supply of certified internists, and increasing the cost of medical services to patients and consumers); and presents barriers to patient care. ¶ 69.

ABIM has used its monopoly power in the market of maintenance of certification to thwart competition, eliminating meaningful competition in that market to the detriment of Plaintiffs and other internists who are forced to buy MOC at inflated monopoly prices or lose their initial certification. ¶ 68. Internists do not want to be forced to buy MOC and would seek to obtain maintenance of certification from a source other than ABIM. ¶¶ 55, 66. *See also* ¶ 89 (Dr. Joshua), ¶ 113 (Dr. Murray-Leisure). ABIM has increased MOC fees by 283% since 2000, extracting fees that far exceed what a competitive market would allow. ¶ 64.

MOC is an ever-increasing revenue source for ABIM. ¶¶ 143-148. ABIM has generated this lucrative new revenue source by imposing MOC on experienced doctors who, compared to the recent residency program graduates who buy initial certifications, have been practicing medicine for up to almost thirty years and have more financial wherewithal to pay ABIM's rising

MOC fees. ¶ 148. Since it imposed MOC, ABIM has paid overly generous compensation to its President and others in ABIM leadership, and has also made lavish pension plan accruals and contributions. ¶¶ 149-152. Between 1990 (the date ABIM announced it would stop selling lifelong certifications) to 2008, ABIM transferred $56 million to an affiliated entity, the ABIM Foundation, all or substantially all of which were certification fees paid by internists. ¶ 153.

## LEGAL STANDARD

Antitrust claims are subject to the notice-pleading standard of Federal Rule of Civil Procedure 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 317 (3d Cir. 2007). "Antitrust claims are generally construed liberally, making the standard for dismissal under Rule 12 rigorous." *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 U.S. Dist. LEXIS 140251, *15 (E.D. Pa. Sept. 28, 2012). Indeed, "[a]t the motion to dismiss stage, the standard for dismissal for antitrust claims is higher. … Courts liberally construe antitrust complaints at this stage of the proceeding." *URL Pharma, Inc. v. Reckitt Benckiser, Inc.*, No. 15-505, 2015 U.S. Dist. LEXIS 112859, *9-10 (E.D. Pa. Aug. 25, 2015). As a consequence, "[D]ismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)).

Courts when considering a motion to dismiss "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Broadcom*, 501 F.3d at 306. Plaintiffs sufficiently and "plausibly" allege: (1) the lone element of illegal tying disputed by ABIM, the existence of separate products; (2) the lone element of illegal

monopolization disputed by ABIM, its anti-competitive conduct; (3) antitrust injury; (4) RICO standing; (5) fraud with particularity pursuant to Rule 9(b); and (6) ABIM's unjust enrichment.

## ARGUMENT

### I. Plaintiffs State A Claim For The Illegal Tying Of Separate Products Under Section 1 Of The Sherman Act.

"[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." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). Plaintiffs allege ABIM uses its monopoly position in the market for initial certification to force internists to buy its MOC product. ¶¶ 4, 70. "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish*, 466 U.S. at 12.

The elements of a tying claim are: "(1) a defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992). [5] ABIM does not take issue with the second and third of these elements, nor could it, as Plaintiffs have adequately alleged ABIM's market power and that a

[5] These elements, all of which are alleged here, state a *per se* tying claim. *Town Sound*, 959 F.2d at 468. While ABIM refers to this case as requiring a "rule of reason" analysis, courts in this Circuit recognize that "[a] determination of the applicability of the *per se* rule is better undertaken after careful consideration of the evidentiary record." *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del. 2013) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)). In any event, even if the rule of reason were to apply, at the pleading stage that would mean only that Plaintiffs "must also allege harm to the competitive process in the tied market." *Kickflip*, 999 F. Supp. 2d at 689 (*citing Brokerage Concepts v. United States Healthcare*, 140 F.3d 494, 519 (3d Cir. 1998)). Plaintiffs clearly make such allegations. ¶¶ 37, 64, 68, 69, 70.

substantial amount of interstate commerce is affected. ¶¶ 5, 30, 36, 50-51, 65. ABIM contends only that initial certification (the tying product) and MOC (the tied product) are not separate products.

Plaintiffs, however, have alleged specific facts demonstrating the existence of separate products under well-established Supreme Court and Third Circuit precedent. Largely ignoring this precedent, ABIM contends instead that initial certification and MOC function together as "two items" and should be viewed as "components" of a single product (Def. Mem. 10), an analysis rejected long ago by the Supreme Court as improperly looking at functional relation rather than whether there is a separate demand. Finally, ABIM's franchise analogy fails both factually and legally.

### A. Plaintiffs Allege Sufficient Facts to Demonstrate a Separate Demand for Initial Certification and MOC.

*Jefferson Parish* sets out the test for whether products combined by a seller are separate products or a single product for purposes of a tying claim. "Our cases indicate … that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish*, 466 U.S. at 19. Thus, courts look at whether there is sufficient demand for the purchase of the tied product separate from the tying product. *Id.* at 21; *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 211-12, 216 (3d Cir. 1994) (reversing summary judgment for defendant on tying claim based on separate demand).

While ABIM refers to a "dearth of cases discussing tying in the context of certification" (Def. Mem. 10), it oddly neglects even to mention *Talone v. American Osteopathic Ass'n*, No. 1:16-cv-04644-NLH-JS, 2017 U.S. Dist. LEXIS 89395 (D.N.J. June 12, 2017). There, a district court in this Circuit denied a motion to dismiss a tying claim brought by osteopathic physicians

against the American Osteopathic Association ("AOA") "for its alleged unlawful tying of board certification [the tying product] and professional association membership [the tied product]." *Id.* at *1. As here, plaintiffs alleged they were forced to purchase a separate product or have their certifications terminated by defendant. The court found that plaintiffs' allegations "show that the AOA ties two distinct products." *Id.* at *15.

In looking for the requisite separate demand required by *Jefferson Parish*, courts have identified several important factors, all of which exist here and have been alleged by Plaintiffs. First, separateness can be satisfied by evidence that the two products have been "sold separately in the past and still are sold separately." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 462 (1992). Plaintiffs have alleged exactly that. ¶¶ 22, 26, 52 (ABIM first sold initial certifications in 1936 and did not begin selling MOC until 1990, more than fifty years later); ¶¶ 26, 31-32, 34 (MOC is purchased by internists several years after buying initial certifications); ¶¶ 27, 35, 43 (internists who are "grandfathered" by ABIM not required to purchase MOC); ¶¶ 44, 49, 61 (MOC sold separately).

Second, courts also consider whether other sellers of the tied product do so without selling the tying product. *See Eastman Kodak*, 504 U.S. at 462 ("[e]vidence in the record indicates that service and parts have been sold separately in the past [by different providers] and are still sold separately"); *PSI Repair Servs. v. Honeywell, Inc.*, 104 F.3d 811, 816 (6th Cir. 1997) (evidence that some repair services "do not even involve the purchase of components" is evidence that parts and services are separate products); *Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2007 U.S. Dist. LEXIS 2001, *10 (S.D.N.Y. Jan. 11, 2007) (evidence that other sellers "offer an MBE-only or specific-state course to buyers every year answers the question as to whether there is separate demand for separate courses"). Here, NBPAS has sold a maintenance

of certification product since January 2015, but does not sell initial certifications, demonstrating separate demand for maintenance of certification and initial certification products. ¶¶ 56-60.

Third, courts will look to whether consumers "differentiate between" the tied and tying products. *Jefferson Parish*, 466 U.S. at 22 ("the anesthesiological component of the package offered by the hospital could be provided separately and selected either by the individual patient or by one of the patient's doctors"). Well-pleaded factual allegations here show that internists "differentiate between" ABIM's initial certification and MOC products. ¶¶ 55, 66 (internists have the desire to purchase a maintenance of certification product from providers other than ABIM); ¶¶ 56-59 (NPBAS sells only a maintenance of certification product reflecting internists' differentiation between initial certification); ¶¶ 87, 89 (Dr. Joshua has purchased the NBPAS maintenance of certification product); ¶ 113 (Dr. Murray-Leisure's effort to have Jordan Hospital recognize NBPAS maintenance of certification).

Fourth, courts inquire whether the seller bills or charges separately for the tied product. *Jefferson Parish*, 466 U.S. at 22 ("anesthesiological services are billed separately from the hospital services petitioners provide"); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1575 (11th Cir. 1991) (fact that the "the bill for [the tied product] is separate" from the bill for the tying product is evidence of separate products). ABIM has always charged separately for MOC. ¶¶ 30, 31, 34, 64. ABIM also breaks down fee revenue on its financial statements between initial certification fees and MOC fees. ¶¶ 144-148. ABIM's practice of both charging for MOC fees separately and distinguishing between initial certification fees and MOC fees on its financial statements shows that ABIM itself "differentiate[s] between" its initial certification and MOC products.

This is further demonstrated by ABIM's "grandfathering" of internists who bought initial certifications prior to 1990. ¶ 27. If ABIM considered initial certification and MOC to be components of a single product, it would not have freed 40% of ABIM-certified internists from buying MOC. ¶¶ 27-29. Similarly, ABIM's admission in its 2016 IRS Form 990 that initial certification tests the "training" of recent residency program graduates, and that MOC "means something different" and purports to address whether a "performance standard" is being met by experienced doctors, further confirms that here, not only consumers (internists) but the seller (ABIM) "differentiate[s] between" the two products. ¶¶ 21, 53.

Unsurprisingly given the above, ABIM addresses demand only briefly, relying entirely on two district court cases outside the Third Circuit decided on summary judgment. Def. Mem. 12-13 (citing *Casey v. Diet Ctr., Inc.*, 590 F. Supp. 1561, 1562 (N.D. Cal. 1984) and *Sub-Solutions, Inc. v. Doctor's Assocs., Inc.*, 436 F. Supp. 2d 348, 349 (D. Conn. 2006)). First, the procedural posture of those cases counsels against deciding the quintessential fact issue of separate products on a Rule 12(b)(6) motion to dismiss. Second, as franchise cases, the courts framed the separate demand inquiry as whether anyone other than a franchisee purchased the tied product separately, which no one did. Thus, in *Casey*, there was "no such evidence … offered" that the diet supplement (the tied product) was ever purchased separately from the diet supplement franchise. 590 F. Supp. 2d at 1564. And in *SubSolutions*, plaintiffs conceded there was no separate demand for the Subway-specific "Point-of-Sale" system. 436 F. Supp. 2d at 355. Here by contrast, ABIM is not a franchise and internists have purchased a maintenance of certification product separately from another provider. [6] ¶¶ 55, 59, 89.

[6] ABIM's reliance on *Allyn v. Am. Bd. Of Med. Specialties, Inc.*, No. 5:18-cv-00355-OC-30PRL, 2019 U.S. Dist. LEXIS 10805 (M.D. Fla. Jan. 3, 2019), is misplaced. The claim in that case was dismissed on ripeness grounds because the challenged program had not been implemented. *Id.* at *10-11 ("Plaintiffs' antitrust claims are, therefore, not ripe and due to be dismissed"). To the extent the court

ABIM argues it would be useless for internists to purchase MOC unless they had already purchased initial certification. Def. Mem. 13. *Jefferson Parish*, however, notes that courts "have often found arrangements involving … products at least one of which is useless without the other to be prohibited tying devices." 466 U.S. at 19, n.30. *Accord*, *Downs v. Insight Communs. Co., L.P.*, No. 3:09-cv-00093, 2011 U.S. Dist. LEXIS 29616, *5 (W.D. Ky. Mar. 22, 2011) ("the issue is not whether the two products are inextricably linked or whether one is more or less useless without the other, but whether the products in question are "'distinguishable in the eyes of buyers'"); *Park*, 2007 U.S. Dist. LEXIS 2001, at *10 (rejecting argument that "course would be ineffective absent integration of MBE and state law instruction"). The two products analysis here turns on whether there is separate demand and not on whether an internist would have no use for MOC if they had not already purchased an initial certification. As Plaintiffs allege, many internists have no use for MOC even though they have purchased an initial certification, yet are nonetheless forced to purchase MOC or have their certification terminated by ABIM. ¶¶ 26, 35, 61, 66. Plaintiffs sufficiently and "plausibly" allege the necessary separate demand to support the existence of two products.

### B. ABIM's Functional Relation Argument Has Been Rejected by the Supreme Court.

ABIM's principal tying argument focuses not on whether there is separate demand, but on its assertion that initial certification and MOC are not separate products, but "two items" that should be viewed as "components" of a single product. Def. Mem. 10. Not only is ABIM's "two items" argument mere wordplay, it ignores the well-pleaded factual allegations described above

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discussed the substance of the claim, it noted the lack of allegations of "market power" and "forcing" and that "it [was] not clear from the complaint" what separate products were alleged. *Id.* at *14. Here, by contrast, the allegations of market power and forcing are clear and the separate products are plainly identified.

supporting separate demand and the existence of two products, and that initial certification and maintenance of certification "are not interchangeable or a component of one another." ¶ 52.

In ignoring Plaintiffs' allegations, ABIM relies on the functional relation between the two products: "a physician is certified [initial certification]" but then must demonstrate "continuing entitlement" through "compliance with standards set by ABIM [MOC]." Def. Mem. 12. This is precisely the analysis rejected by the Supreme Court in *Jefferson Parish*: "[T]he answer to the question whether one or two products are involved turns not on the functional relation between them." 466 U.S. at 19. *See also Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 684 (4th Cir. 1992) (reversing summary judgment because "inquiry into purpose and use is indistinguishable from the inquiry into the 'functional relationship' between products that was rejected in *Jefferson Parish*" and evidence established question of fact on separate demand); *Park*, 2007 U.S. Dist. LEXIS 2001, at *9-11 (rejecting argument on summary judgment that state-specific and multi-state test preparation products are "a single, functionally integrated package of services").

ABIM's "two items" argument hinges on its further assertion that MOC is "a tool for ensuring [ ] consistent quality." Def. Mem. 12. This outside-the-record assertion, however, is contrary to Plaintiffs' allegation that "there is no evidence of an actual causal relationship between MOC and any beneficial impact on physicians, patients, or the public." ¶ 42. Taking this allegation as true strips away ABIM's rhetoric seeking to justify MOC as some sort of quality control "item" or component of a single product. Instead, MOC is exposed for what it truly is, a failed and extremely costly product distinct from initial certification that ABIM uses its undisputed market power to force internists to buy. ¶¶ 51, 62, 70, 73.

ABIM string cites four cases in support of its "two items" argument. Def. Mem. 10. In each case, however, the separate products analysis turned not on what ABIM characterizes as the functional relation between the products, but on the absence of a separate demand or a separate market. Thus, in *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir. 1988), the court applied *Jefferson Parish* and in a highly factual inquiry determined that patients and physicians did not request alternative pathologists in place of those provided by the hospital. Absent such requests, the court found no separate demand. Here, by contrast, there are ample allegations that internists prefer to obtain a maintenance of certification product from other providers, or not at all. ¶¶ 55, 66. In *Yeager's Fuel v. Pa. Power & Light Co.*, 953 F. Supp. 617, 654 (E.D. Pa. 1997), the court found that an electric utility's requirement that residential developers purchase heat pumps in order to receive certain discounts did not tie two separate products (electric heat and the heat pump) because the demand for the electric heat was not separate from the demand for the heat pump. There was no demand for the purchase of heat separate from the means of delivering the heat. By the same token, there was no demand to purchase the means of delivering the heat separate from the heat. Here, by contrast, initial certification tests the "training" of new doctors, while MOC purportedly measures whether experienced internists meet a "performance standard." ¶¶ 21, 53. MOC is not only not necessary to initial certification, it is entirely unrelated to initial certification, other than through ABIM's unlawful tying of the two products.

Likewise, in *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988), a claim that membership in a local real estate board was a separate product tied to the multiple listing service failed because plaintiff provided "no evidence" that any broker would have purchased membership in any other real estate board. Plaintiffs here allege internists have a desire to purchase a maintenance of certification product from other providers, including

NBPAS. ¶¶ 55, 66, 89, 113. Finally, the district court's analysis in *Abraham v. Intermountain Health Care, Inc.*, 394 F. Supp. 2d 1312, 1320 (D. Utah 2005), upon which ABIM relies, was expressly rejected by the Tenth Circuit on appeal. *See Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1265, 1266 (10th Cir. 2006) (bundling of goods and services does not transform them into single product; district court decision affirmed because defendant had no economic interest in the tied product). Each of ABIM's four cases was also decided at summary judgment or after trial, after discovery and a lengthy discussion of the evidence, rather than on a motion to dismiss.

### C. ABIM's Franchise Analogy Fails Analytically.

Finally, ABIM makes a flawed analogy to tying claims brought by franchisees, gleaning from the cases a principle "that products integral to the overall reputation and quality of the franchise are components of the franchise" and not separate products. Def. Mem. 11-12. Even taking ABIM's understanding of the cases it cites at face value, as an initial matter, Plaintiffs do not allege that MOC is "integral" in any way to anything. ABIM's argument to the contrary is also belied by the allegations that ABIM sold initial certifications for "more than fifty years" before it began forcing internists to purchase MOC, and that initial certification and MOC "are not interchangeable or a component of one another." ¶ 52. Plaintiffs also allege that no evidence-based causal relationship has been established between MOC and any beneficial impact on physicians, patients, or the public. ¶¶ 42, 43, 133-142. Taking this allegation as true, MOC is a failed product and cannot be integral to anything. To the extent ABIM wants to try to amass evidence to prove otherwise, that dispute cannot be resolved on a Rule 12(b)(6) motion. [7]

[7] ABIM's franchise cases all turn on whether the tied product was "central" or "integral" to the tying product. *E.g.*, *SubSolutions,* 436 F. Supp. 2d at 354 (noting "central role" tied product plays); *Casey*, 590 F. Supp. at 1565 (tied product "an integral part of the Diet Center method"). Because there is no basis in the record here to support ABIM's argument that MOC is in any way "central" or "integral,"

In addition, the analogy between ABIM and a franchise fails due to fundamental differences between the two. A franchise is a method of doing business and inherently involves the bundling together of complex commercial approaches and business systems, so that the franchisee has at its disposal a complete turnkey, ready-made business opportunity. The very essence of the franchise business model is the joining together of the franchisor and the franchisee as part of a combined business organization. Internists, however, are not buying a method of doing business or a turnkey, ready-made business opportunity from ABIM, and certainly are not joining a combined business organization with ABIM. As ABIM should well know, that is not how physician care and patient treatment work. [8] Instead, new doctors buy initial certifications to test their residency "training" (¶ 21) and then are later forced as experienced doctors to buy MOC, which supposedly is about a "performance standard" (¶ 53), but is a failed product that tests or measures nothing. ¶¶ 42, 43. ABIM's analogy to a franchise fails at the most basic level. [9]

Courts have long-recognized the unique nature of the franchise business model. *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 974 (9th Cir. 2008) ("[f]ranchises, almost by definition, necessarily consist of 'bundled' and related products or services"); *Will v.*

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ABIM's cases are inapposite. In addition, the cases relied on by ABIM were all decided on summary judgment after full discovery into the fact-intensive issue of how "central" or "integral" the tied product was, if at all. Resolving fact issues about MOC, such as what may or may not be "central" or "integral," is beyond a Rule 12(b)(6) motion.

[8] *See* fn. 2, *supra*.

[9] ABIM asserts outside-the-record rhetoric about ABIM's reputation and brand protection not properly considered as part of its motion. Def. Mem. 12 ("Central to ABIM's reputation is its ability to set standards" in order to ensure that "'ABIM certification' is the gold standard in distinguishing qualified internists"). Plaintiffs allege nothing about ABIM's reputation or brand and there is no basis in the record for ABIM to argue that MOC's purpose is to prop up either. In fact, ABIM in its 2016 IRS Form 990 describes the purpose of MOC as testing for some sort of a "performance standard" without any reference to ABIM's reputation or brand. ¶ 53.

*Comprehensive Accounting Corp.*, 776 F.2d 665, 670 n. 1 (7th Cir. 1985) ("[A] method of doing business (the franchise) is not sold separately from the ingredients that go into the method of business. A franchiser and its franchisees are part of a business organization not altogether different from vertical integration."); *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616, 628 (4th Cir. 1979) ("the very essence of a franchise is the purchase of several related products in a single competitively attractive package"); *Casey*, 590 F. Supp. at 1566 (relied upon by ABIM at Def. Mem. 12-13) ("franchisees bargain for the right to use a package of products and services none of which represents a market distinct from that of the franchise itself").

Relatedly, the franchise business model has two major features, both of which are absent from this case: (1) because of the many different franchise opportunities available, franchisors typically lack market power in the tying product (the franchise), and (2) franchise relationships are governed by detailed franchise agreements so that franchisee complaints are typically governed by contract law and not antitrust law. Here, as to the first, ABIM has market power by virtue of its control of 95% of the maintenance of certification market. ¶ 5. Regarding the second, no franchise-type contractual relationship exists between ABIM and internists.

Courts regularly cite these two features of the franchise method of business when addressing tying claims in a franchise context. *See*, *e.g., Rick-Mik*, 532 F.3d at 972 (failure to allege market power, such as "what percentage of gasoline franchises are Equilon's (Shell/Texaco) as compared to other franchises like Chevron, Mobil, Marathon Oil, or Union 76"); *Casey*, 590 F. Supp. at 1569 (franchise only occupied between 13% and 19% of the market and lacked market power); *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 443 (3d Cir. 1997) ("where the defendant's 'power' to 'force' plaintiffs to purchase the alleged tying product stems not from the market, but from plaintiffs' contractual agreement to purchase the tying

product, no claim will lie"); *Smith v. Mobil Oil Corp.*, 667 F. Supp. 1314, 1331 (W.D. Mo. 1987) (franchise agreement).

## II. Plaintiffs Have Alleged The Required Anticompetitive Conduct To State A Monopolization Claim Under Section 2 Of The Sherman Act.

On the one hand, ABIM challenges whether Plaintiffs have sufficiently alleged the requisite anticompetitive conduct to state a Section 2 claim. Def. Mem. 14. On the other hand, ABIM does not dispute that unlawful tying can constitute the anticompetitive conduct necessary to state such a claim. *See, e.g., ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 278 (3d Cir. 2012) ("unlawful tying" has "long [been] recognized" as a form of exclusionary conduct considered anticompetitive). Because for all of the reasons stated above Plaintiffs have sufficiently and "plausibly" alleged unlawful tying, those allegations alone are enough to defeat ABIM's motion to dismiss. In addition, Plaintiffs have made substantial additional allegations of other anticompetitive conduct by ABIM. [10]

"Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Broadcom*, 501 F.3d at 308 (internal citation omitted). The Amended Complaint is replete with allegations that ABIM maintains and abuses its monopoly power on a basis other than on the merits of MOC. They include:

- Through its control of the market for initial certification and by requiring internists to purchase MOC or lose their initial certification, ABIM unlawfully obtained and maintains its monopoly power in the maintenance of certification market. ¶¶ 5, 44, 62.

- By refusing to recognize maintenance of certification from its only competing provider NBPAS, ABIM thwarts competition, shutting out NBPAS from a substantial portion of the maintenance of certification market. ¶¶ 5, 68.

[10] ABIM does not dispute the other element of Plaintiffs' Section 2 claim, that ABIM has monopoly power in the market for maintenance of certification.

- ABIM's board of directors includes active participants in the market for internists' services and related markets with their own private anticompetitive motives to restrain competition in the maintenance of certification market and force internists to purchase MOC. ¶ 71.

- ABIM deceives the public, including hospitals, insurance companies, medical corporations, and other employers that MOC has a beneficial impact. ¶¶ 6, 42, 43, 133-138. Thus, internists must purchase MOC to obtain hospital privileges, insurance reimbursement, employment, malpractice coverage, and other requirements of the practice of medicine. ¶¶ 6, 37-40, 70. *See also* ¶¶ 77-78 (Dr. Kenney), ¶¶ 85, 87 (Dr. Joshua), ¶¶ 95-96, 100-101 (Dr. Manalo), ¶¶ 108-109 (Dr. Murray-Leisure). This conducts locks in internists who are forced to purchase MOC from ABIM or suffer substantial consequences. ¶ 37.

- Using its monopoly power, beginning in January 2006, ABIM has imposed a dizzying array of burdensome changes to MOC, resulting in substantial additional MOC fees and additional cost for internists. ¶¶ 30-34.

- ABIM charges inflated monopoly prices for MOC and thwarts competition. ¶¶ 4, 64.

- Because of repeated changes to MOC and increases in MOC fees, internists cannot assess the lifetime cost of MOC over the several decades of their practice, making it impossible to calculate life cycle costs. ¶ 67.

ABIM either ignores these allegations altogether or simply avoids them by referring to them as conclusory. Def. Mem. 14-15. [11]

These allegations, however, "plausibly" describe well-recognized types of anticompetitive conduct and are more than sufficient to defeat ABIM's motion to dismiss. *See*, *e.g.*, *Eastman Kodak*, 504 U.S. at 458, 483 (plaintiffs presented sufficient evidence of "exclusionary action" based on Kodak changing its policy regarding customer use of independent service and parts making it impossible to calculate lifetime costs); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-05 (1985) (monopolist owner of three of four Aspen ski resorts violated Section 2 by terminating "all-Aspen ticket" thereby excluding

[11] While ABIM labels some of these allegations "conclusory," they allege types of anticompetitive conduct that the Supreme Court recognizes require discovery before a plaintiff can provide more details. *Hosp. Bldg. Co*, 425 U.S. at 746; *Poller*, 368 U.S. at 473.

competitor); *Avaya Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 404, 406-07 (3d Cir. 2016) ("exploitation of locked in customers" a basis for finding anticompetitive conduct); *Lepage's, Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003) ("exclusionary conduct"); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 397, 402 (3d Cir. 2000) (drug manufacturer engaged in anticompetitive activity by waging campaign of false statements); *Caldon v. Advanced Measurement & Analysis Group, Inc.*, 515 F. Supp. 2d 565, 571-72, 577 (W.D. Pa. 2007) (Section 2 claim based on defendant's "false and disparaging" statements).

Moreover, none of this anticompetitive conduct depends on whether ABIM can "control" hospitals and others as ABIM contends (Def. Mem. 15), but on whether ABIM has market power, which it uses to compete in the maintenance of certification market on a basis other than on the merits of MOC. *Broadcom*, 501 F.3d at 308. Finally, none of ABIM's cases support dismissing a Section 2 claim on a Rule 12(b)(6) motion to dismiss for failure to plead anticompetitive conduct adequately. *Mylan Pharm., Inc. v. Warner Chilcott Pub., Ltd. Co., LLC*, 838 F.3d 421, 427 (3d Cir. 2016) (summary judgment); [12] *Wisconsin v. Indivior, Inc. (In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.)*, No.13-MD-2445, 2017 U.S. Dist. LEXIS 145501, *67 (E.D. Pa. Sept. 8, 2017) (motion to dismiss denied, finding it sufficient that "the allegations of the Amended Complaint describe multiple actions comprising an overarching scheme"); *Synthes,* No. 11-1566, 2012 U.S. Dist. LEXIS 140251, at *42 at n.9 (anti-competitive conduct element "satisfied," but claim dismissed for failure to adequately identify relevant market); *Allyn*, 2019 U.S. Dist. LEXIS 10805, at *11-12 (claim dismissed because alleged anticompetitive program had not yet come into effect, not because of lack of

[12] In fact, the District Court in *Mylan* had previously denied the defendant's motion to dismiss, concluding it "cannot definitively address … without going beyond the pleadings" whether defendant's alleged conduct was anticompetitive. *Mylan Pharm., Inc. v. Warner Chilcott Pub.*, No. 12-3824, 2013 U.S. Dist. LEXIS 152467, *12 (E.D. Pa. June 11, 2013).

specificity in the pleadings); *Ass'n of Am. Physicians & Surgeons v. Am. Bd. of Med. Specialties, Inc.*, No. 14-cv-02705, 2017 U.S. Dist. LEXIS 205845 (N.D. Ill. Dec. 13, 2017) (plaintiff did not bring a Section 2 claim).

## III. Plaintiffs Have Pleaded An Antitrust Injury To Competition.

"[T]he existence of an 'antitrust injury' is not typically resolved through motions to dismiss." *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. 1995). To plead antitrust injury Plaintiffs "must allege facts showing 1) that they suffered the type of injury or harm the antitrust laws were intended to prevent (*i.e.,* type of injury) and 2) that the injury flows from the Defendant['s] unlawful or anti-competitive acts (*i.e.*, causation)." *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 534 (D.N.J. 2004). ABIM only challenges the "type of injury" prong, arguing Plaintiffs have not alleged "antitrust injury." To the contrary, Plaintiffs allege sufficient facts to satisfy this element and none of ABIM's arguments to the contrary has merit.

### A. Plaintiffs "Plausibly" Allege that ABIM's Conduct Affected Prices, Quantity, and Quality of Goods or Services.

Antitrust injury is established when the "challenged conduct affected the prices, quantity or quality of goods or services." *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996). *See also Premier Comp. Solutions, LLC v. UPMC*, 163 F. Supp. 3d 268, 276 (W.D. Pa. 2016). Plaintiffs allege that ABIM's activities cause antitrust injury by, among other things, forcing Plaintiffs and other internists to purchase MOC or suffer substantial economic consequences; charging inflated monopoly prices for MOC; thwarting competition in the maintenance of certification market; shutting NBPAS out of a substantial portion of the maintenance of certification market; raising the cost of the practice of medicine for Plaintiffs and other internists; constraining the supply of internists (thereby harming competition, decreasing the supply of certified internists, and increasing the cost of medical services to patients and

consumers); presenting barriers to patient care; and creating and increasing barriers to entry to the market for internists' services. ¶¶ 37, 61, 64, 68, 69, 70.

Further, Plaintiffs also allege that ABIM is the "monopoly supplier of initial certifications for internists;" ABIM controls "in excess of 95% of the market for maintenance of certification of internists;" ABIM has obtained and maintains its monopoly power in the market for maintenance of certification services "for the anti-competitive purpose of requiring internists to purchase MOC and not deal with competing providers of maintenance of certification services;" that "there is no evidence of an actual causal relationship between MOC and any beneficial impact on physicians, patients, or the public;" and that "ABIM does not recognize NBPAS maintenance of certification." ¶¶ 2, 5, 43, 59.

Thus, Plaintiffs' allegations demonstrate all three of the *Matthews* indicia of antitrust injury: that ABIM's conduct affects price (*e.g.*, ABIM charges monopoly prices for MOC), quantity (*e.g.*, ABIM has shut out its only competitor NBPAS from the maintenance of certification market and thwarts competition in that market), and quality (*e.g.*, there is no relationship between MOC and any beneficial impact on physicians, patients, or the public). With such reduced competition, "higher prices are almost inevitable." *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 862 (W.D.N.Y. 1994); *see also LePage's*, 324 F.3d at 159 ("[E]ven the foreclosure of one significant competitor from the market may lead to higher prices and reduced output.") (internal quotations omitted). These are not mere conclusions but well-pleaded factual allegations demonstrating precisely the types of antitrust injury courts have identified.

There is nothing extraordinary about this type of antitrust injury. It is "well recognized that a purchaser in a market where competition has been wrongfully restrained has suffered an

antitrust injury." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 531 (3d Cir. 2004). "More is not required at the pleading stage, particularly given that antitrust injury involves complex questions of fact, ill-suited for resolution on a motion to dismiss." *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 757 (E.D. Pa. 2014) (internal quotations omitted).

### B. ABIM Ignores Plaintiffs' Well-Pleaded Allegations and Relies on Inapposite Case Law.

ABIM ignores these allegations entirely, instead focusing on Plaintiffs' lost income and employment opportunities. Def. Mem. 16-18. These additional damages suffered by Plaintiffs, however, do not minimize or eliminate the effect of ABIM's misconduct on price, quantity and quality detailed above. Rather, they demonstrate the further impact of ABIM's misconduct in violation of the antitrust laws.

ABIM cites inapposite cases involving "claims against medical boards" in which plaintiffs complained of a lost opportunity to charge cartel-inflated fees when they were denied certification. Def. Mem. 17. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 438-39 (2d Cir. 2005) (doctors' "theory of injury" is their inability to "command super-competitive renumeration"); *Sanjuan v. Am. Bd. of Psychiatry & Neurology*, 40 F.3d 247, 251-52 (7th Cir. 1994) (same); *Shaywitz v. Am. Bd. of Psychiatry & Neurology*, 675 F. Supp.2d 376, 386 (S.D.N.Y. 2009) ("A plaintiff has not established an antitrust injury when the aim of his lawsuit is to join the alleged cartel rather than disband it."). But as Plaintiffs make clear above, their antitrust injury is wholly different here—injury to competition in the maintenance of certification market, being forced to pay excessive MOC fees, and the inability to purchase maintenance of certification from other providers. *See*, *e.g.*, ¶¶ 34, 36, 57, 64 (discussing inflated "monopoly" MOC fees compared to NBPAS). Plaintiffs are not seeking to "join the cartel," but to "disband it."

Next, ABIM argues Plaintiffs' "desire not to participate in MOC" does not constitute antitrust injury, relying on *Buyer's Corner Realty, Inc. v. N. Ky. Ass'n of Realtors*, 410 F. Supp. 2d 574 (E.D. Ky. 2006). Def. Mem. 18. But *Buyer's Corner* wrongfully applied the discussion of market power from *Jefferson Parish* to an antitrust injury analysis. *Id.* at 580. [13] Both *Buyer's Corner* and ABIM ignore the holding of *Jefferson Parish* concerning antitrust injury that, "the 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. *Buyer's Corner* notwithstanding, ABIM's argument that forcing Plaintiffs to purchase a product they do not want (MOC) cannot constitute antitrust injury is simply not reconcilable with the holding in *Jefferson Parish*. Indeed, other courts have recognized that the *Jefferson Parish* discussion regarding market power has no relevance to an antitrust injury analysis. *See*, *e.g.*, *Wells Real Estate*, 850 F.2d at 814-15 (language is "not … relevant to the issue of plaintiffs' injury and standing to sue"); *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 market power passage from *Jefferson Parish* in the context of antitrust injury "would appear to be at odds with" *Jefferson Parish*'s discussion of how tying arrangements restrain competition).

Finally, ABIM contends that Dr. Manalo, who refused to purchase MOC, cannot have suffered an antitrust injury. Courts, in fact, hold otherwise. In *Booklocker.com, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89 (D. Me. 2009), plaintiff, an independent "print-on-demand" book publisher, alleged that Amazon "tied" the requirement to use an Amazon printing subsidiary to the sale of plaintiff's books on Amazon. Plaintiff refused to purchase the services

[13] Moreover, unlike in *Buyer's Corner*, *id.* at 581-582, ABIM does not dispute its market power in both the initial certification and maintenance of certification markets. ¶¶ 5, 50, 51, 62.

of the Amazon printing subsidiary. The court nonetheless found that plaintiff sufficiently pleaded antitrust injury because several authors refused to publish through plaintiff when they learned plaintiff did not agree to Amazon's requirement. *Id.* at 106 (plaintiff alleged "market effects" from the tying that were "detrimental" to it). Here, Dr. Manalo refused to purchase MOC and St. Vincent's Healthcare terminated him and other employers have refused to hire him. ¶¶ 95-96, 100-101. Dr. Manalo has "plausibly" alleged antitrust injury.

Similarly, in *Wells Real Estate*, the court did not grant defendant summary judgment because plaintiff had not purchased the real estate board membership at issue. In fact, the court expressly held that "[a] plaintiff need not have actually consented to the purchase of the tying and tied products in order to bring a claim under the Sherman Act." 850 F.2d at 814. As these cases make clear, where tying injures competition harming a plaintiff, antitrust injury is established even when that plaintiff does not purchase the tied product. [14]

## IV. Plaintiffs Have Standing Under Section 1962(c) Of The RICO Act, And Have Pleaded Fraud With Particularity.

### A. Plaintiffs Have Alleged Sufficient Facts to Establish RICO Standing.

RICO plaintiffs establish standing by alleging injury to their business or property, caused by the defendant's violation of RICO Section 1962(c). *In re Avandia Mktg.,* 804 F.3d 633, 638 (3d Cir. 2015). ABIM argues Plaintiffs have not made sufficient allegations to meet either of these elements. Def. Mem. 20-26. But ABIM mistakenly characterizes reliance as an element of

[14] The cases ABIM cites do not hold otherwise. The plaintiff in *Heartland Payment Sys. v. Micro Sys.*, No. 3:07-cv-5629-FLW, 2008 U.S. Dist. LEXIS 74972, *39-40 (D.N.J. Sept. 29, 2008), was a purchaser of the tied product, but received the tying product for free, so the court did not address the issue for which ABIM cites the case. Moreover, the plaintiff survived the motion to dismiss. In *Abraham v. Intermountain Hlth. Care Inc.*, 461 F.3d 1249 (10th Cir. 2006), the ophthalmologist plaintiffs alleged the tying of products–surgical eye care–for which they were not consumers at all. Here, by contrast, the plaintiffs are consumers in the market for maintenance of certification, though they prefer not to be.

Plaintiffs' Section 1962(c) claim, ignores Plaintiffs' many allegations of reliance, and misrepresents Plaintiffs' RICO injuries.

**1. Plaintiffs have sufficiently alleged injuries directly caused by ABIM's fraudulent RICO conduct.**

While analyses of RICO standing typically begin with the first element, injury to business or property, before moving on to the second element, causation, ABIM reverses this normal sequence and attacks causation first. Def. Mem. 20-24. Plaintiffs will respond in like fashion. ABIM argues reliance must be alleged as an element of a RICO claim, and that Plaintiffs have failed to do so. Def. Mem. 21. ABIM is wrong on both counts. First, ABIM is wrong that reliance must be alleged as an element of a RICO claim at the pleading stage. *Id.* ABIM cites *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 656 (2008), for this proposition, but the discussion of reliance to which ABIM refers involved common law fraud and the Restatement of Torts, and not the RICO claim. In fact, as the Supreme Court went on to explain in *Bridge*, even if reliance of some sort is necessary to prove causation at a later point in the proceeding, for example to prove damages, that does not necessarily make reliance a required element of a RICO claim at the pleading stage. *Id.* at 659. The Third Circuit has not ruled whether a RICO plaintiff must allege reliance at the pleading stage to establish the causation element of RICO standing. *See Devon Drive Lionville, LP v. Parke Bancorp, Inc.*, No. 15-3435, 2018 U.S. Dist. LEXIS 125011, *14 (E.D. Pa. July 26, 2018). But a fair reading of *Bridge* and *Avandia Mktg.* presage that the Third Circuit would not require reliance.

Second, ABIM is wrong because Plaintiffs do specifically allege reliance by hospitals, insurance companies, and others targeted by ABIM's fraudulent scheme:

> ABIM has successfully waged a campaign in violation of RICO 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 constitutes self-regulation by internists. Believing ABIM's misrepresentations to be true, hospitals and related entities, insurance companies, medical corporations and other employers require internists to participate in 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. *See also* ¶¶ 38, 39, 63, 131, 166. Thus, ABIM-certified internists must purchase MOC or suffer substantial economic consequences. ¶¶ 6, 37, 40, 70, 155, 166. *See also* ¶¶ 76-78 (Dr. Kenney), ¶¶ 85-89 (Dr. Joshua), ¶¶ 93, 95-96, 100-101 (Dr. Manalo), ¶¶ 105, 108-109 (Dr. Murray-Leisure). It makes perfect sense that hospitals, insurance companies and others rely on and believe ABIM's false and misleading statements about MOC. Having required internists to purchase MOC, can they deny reliance on ABIM's misrepresentations that MOC has a beneficial impact on physicians, patients, and the public?

The purpose of ABIM's campaign of deception is to drive sales of MOC and generate MOC fees. ¶ 164. Given its earlier unsuccessful voluntary professional development programs, ABIM could successfully generate MOC fees only if internists were forced to buy MOC to keep their initial certifications from being terminated. ¶¶ 25-26, 44, 49, 61. Again, very "plausible." ABIM would not generate substantial MOC fees if internists could freely decline MOC without suffering loss of 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.

Thus, ABIM launched its scheme and began making public misrepresentations about MOC. In an ABIM newsletter in 1999, ABIM's then-Chair, Dr. Christine Cassel, made the misleading statement that, "the current certification process and new evolving recertification initiative which is dedicated to continued professional development serve those needs and

produce a reliable indicator of physician quality." ¶ 134. This was before the first MOC examination had even been administered, making it impossible for Dr. Cassell to know whether MOC would ever be "a reliable indicator of physician quality" as represented.

Over the next twenty years, ABIM knowingly and repeatedly made other fraudulent, false, and misleading statements of fact about MOC on its website, including: "there is compelling evidence" and "evidence shows" that doctors who purchase MOC "are more likely to meet important quality metrics," to "provide better patient care," and "are more likely to … save more lives, adhere to guidelines, [and] reduce health care costs." ¶¶ 135, 136. ABIM knows these statements are false and misleading because, among other things: (1) it is aware there is no evidence-based causal relationship between MOC and any benefit to physicians, patients, or the public, ¶¶ 43, 136-137; (2) ABIM knows the MOC examinations lack predictive validity for assessing physician competence, ¶¶ 138-141; and (3) ABIM's "grandfathering" of older internists belies its contention that MOC ensures physician competence, ¶ 142.

The success of ABIM's campaign is demonstrated by the fact that MOC-related revenue has nearly tripled since MOC was introduced, driven by the significant percentages of hospitals and insurance companies that require internists to purchase MOC or lose admitting and consulting privileges or participation in insurance networks. ¶¶ 38, 39, 144. Moreover, just as ABIM does not recognize NBPAS maintenance of certification, most hospitals and all insurance companies follow ABIM's lead and do the same. ¶¶ 58, 59. Plaintiffs allege as specific examples of this:

- In 2009, Detroit Medical Center ("DMC") began for the first time to require doctors to maintain their certification with the ABMS board that issued their initial certification. ¶ 85. Because ABIM requires internists to purchase MOC to keep their certification from being terminated, they were forced to buy MOC.

¶ 44. When Dr. Joshua did not pass her MOC examination in 2014, DMC transferred her patients to another physician who, because he had never been certified, was not required to purchase MOC. ¶ 86.

- The by-laws of St. Vincent's Healthcare in Billings, Montana require internists to buy MOC. ¶ 95. Dr. Manalo lost his staff privileges at St. Vincent after his ABIM gastroenterology certification expired, even after offering to take CME credits beyond what the St. Vincent by-laws required. *Id.* The St. Vincent Chief Medical Officer acknowledged that MOC was "not particularly relevant to [his] clinical practice in medicine," but reiterated that because the by-laws, as well as insurers, required MOC, he could not keep Dr. Manalo on as a colleague. ¶ 98.

- Jordan Hospital in Plymouth, Massachusetts has by-laws requiring physicians with staff privileges to maintain certification in their area of specialty. ¶ 108. After Dr. Murray-Leisure did not pass her infectious diseases MOC examination in 2009, Jordan Hospital revoked her infectious diseases privileges (but not her "grandfathered" internal medicine privileges) until she passed the infectious diseases MOC examination in 2012. ¶ 109. Thereafter, Dr. Murray-Leisure worked with other staff to change the Jordan Hospital by-laws to eliminate MOC requirements and to recognize the NBPAS maintenance of certification product, to no avail. ¶ 113.

- Insurers like Blue Cross Blue Shield ("BCBS") require internists to participate in MOC. After her certification was terminated by ABIM in 2014, Dr. Joshua was advised by BCBS that it would no longer cover her and required Dr. Joshua to certify "through the American Board of Internal Medicine only." ¶ 87. Although she obtained NBPAS maintenance of certification in 2015, BCBS still denied coverage to Dr. Joshua. *Id.*

These facts more than "plausibly" allege that "[t]he conduct that allegedly caused plaintiffs' injuries is the same conduct forming the basis of the RICO scheme alleged in the complaint," which is all the Third Circuit requires to establish the causation prong of RICO standing. *Avandia Mktg.*, 804 F.3d at 644.

ABIM also contends that reliance cannot be pleaded by Plaintiffs "because the causal chain is too tenuous." Def. Mem. 22. In *Avandia Mktg.*, however, the Third Circuit in a RICO case analogous to this case rejected ABIM's argument. The plaintiffs there were third party payors who alleged that GlaxoSmithKline LLC ("GSK") concealed the risks of its drug Avandia by manipulating data and scientific literature to increase sales. *Id.* at 636. GSK moved to dismiss

the RICO claim arguing that intermediary physicians who prescribed the drug broke the causal chain between GSK and the plaintiff third party payors because they were the ones who relied on GSK's misrepresentations. *Id.* at 644-645. The Third Circuit affirmed the denial of GSK's motion to dismiss, explaining that the presence of intermediaries did not destroy proximate cause because the plaintiff third party payors, who paid for the drug, were the "'primary and intended victims of the scheme to defraud.'" *Id.* at 645, *quoting Bridge*, 553 U.S. at 650.

Here, plaintiff internists allege ABIM misrepresented MOC to generate MOC fees. ABIM has moved to dismiss arguing that intermediary hospitals, insurance companies, and others broke the causal chain between ABIM and the plaintiff internists because they were the ones who allegedly relied on ABIM's misrepresentations. But just as in *Avandia Mktg.*, the presence of intermediaries here does not destroy proximate cause because the plaintiff internists who pay the MOC fees, are "the primary and intended victims of the scheme to defraud." *Id*. Just as the doctors in *Avandia Mktg.* were targeted by GSK, here the hospitals, insurance companies, and others are targeted by ABIM. And just as GSK's scheme to defraud caused injury to the plaintiff third party payors, ABIM's scheme to defraud caused injury to the plaintiff internists.

ABIM's fallback argument that Plaintiffs do not allege "that anyone specifically relied on any misrepresentations" (Def. Mem. 21) fares no better under *Avandia Mktg*. While ABIM cites to paragraph 79 of the First Amended Class Action Complaint in *Avandia Mktg.*, it fails to mention that no specific doctor (or other individual or group responsible for selecting drugs) is identified in that paragraph (or elsewhere) as having relied on GSK. Instead, paragraph 79 refers to GSK's "marketing campaign" to deceive groups of persons and entities. First Amended Class Action Complaint, *In re Avandia Mktg*., *Sales Practices and Prod. Liab. Litig*, MDL No. 1871 (*Allied Services Division Welfare Fund v. SmithKline Beecham Corporation*, No. 09-730), ¶ 79

(E.D. Pa. Oct. 12, 2010). So too here, Plaintiffs need not allege that any specifically identified person or entity relied on ABIM's many misrepresentations about MOC. The allegation that ABIM "waged a campaign … to deceive the public, including but not limited to hospitals and related entities, insurance companies, medical corporations and other employers, and the media" is more than sufficient under *Avandia Mktg*.

The proper focus of a causation inquiry at the pleading stage is whether the RICO conduct was targeted to cause injury, as is the case here, not whether any specifically identified person or entity relied on the misrepresentations. While the Court in *Devon Drive* suggested that a specific allegation of reliance was an element of a RICO claim (while also noting that the Third Circuit had not yet ruled on the issue), it did not rule on that basis and instead dismissed the RICO claim because plaintiffs had failed to allege that the fraudulent communications targeted anyone other than the defendants' own co-conspirators. 2018 U.S. Dist. LEXIS 125011 at *16-17. A scheme to defraud that targets only co-conspirators could not plausibly cause the plaintiffs' injuries since the co-conspirators knew the communications were fraudulent and by definition could not have relied on them. ABIM also cites *Coleman v. Commonwealth Land Title Ins. Co.*, 318 F.R.D. 275 (E.D. Pa. 2016). But the discussion of reliance there arose in the context of a class certification motion. There is no mention of requiring an allegation of reliance at the pleading stage. *Id.* at 287-289.

None of ABIM's other cases advance its position. In *Plumbers & Pipefitters Local 572 Health & Welfare Fund v. Merck & Co.*, No. 12-1379, 2013 U.S. Dist. LEXIS 61051 (D.N.J. April 29, 2013), causation was discussed in the context of Article III and not RICO. *Id.* at *20-21. The RICO claim there failed because there was no allegation that the "Plaintiffs were forced to purchase medications they otherwise would not have, if not for the existence of the

Programs." *Id.* at *24. Here, by contrast, Plaintiffs and other internists are forced to purchase MOC and would not do so but for ABIM's scheme to defraud. ¶¶ 44, 49, 55, 61, 66. In *Dist. 1199P Health & Welfare Plan v. Janssen, L.P.*, 784 F. Supp. 2d 508 (D.N.J. 2011), the RICO claim was dismissed because plaintiffs "fail[ed] to allege the connection between Defendants' misrepresentation and Plaintiffs' injuries." *Id.* at 524. Plaintiffs allege such a "connection" here: ABIM targeted hospitals, insurance companies, and others who then required internists to purchase MOC, assuring ABIM that MOC revenue would continue to grow. ¶¶ 38, 39, 144. The Court in *In re Actimmune Mktg. Litigation*, 614 F. Supp. 2d 1037 (N.D. Cal. 2009), noted that plaintiffs had not identified the target of defendants' misleading marketing activities, "no … plaintiff has even alleged that their injuries resulted from defendants' purported fraud," and, thus, there were no allegations that the injury was "sufficiently related to the alleged fraudulent conduct to satisfy RICO." *Id.* at 1052. Here, Plaintiffs have made those requisite allegations. ¶¶ 6, 38, 39, 144, 166. [15]

**2. Plaintiffs have sufficiently alleged RICO injury.**

ABIM contends Plaintiffs have not alleged a concrete financial loss because there is no allegation they failed to receive the MOC product and MOC benefits for which they paid, but

[15] In *Larry Pitt & Assocs. v. Lundy Law, LLP*, No. 13-2398, 2017 U.S. Dist. LEXIS 29032, *19 (E.D. Pa. Feb. 28, 2017), the Court did not discuss allegations of reliance at all. Instead, it refused to allow plaintiff to amend its complaint to add a RICO claim because plaintiff's allegations of lost revenue were too tenuous to establish that they were directly caused by the alleged fraudulent conduct. The Court in *Martinelli v. Petland, Inc.*, No. CV-09-529-PHX-DGC, 2010 U.S. Dist. LEXIS 5965, *10 (D. Ariz. Jan. 26, 2010), dismissed some of the claims at issue because of a failure by plaintiffs to plead that they relied on any misrepresentations. As ABIM recognizes, however, RICO does not require plaintiff's reliance. Def. Mem. 21, citing *Bridge*, 553 U.S. at 656.

instead merely allege "they would rather not have purchased MOC." Def. Mem. 24-25. ABIM's argument ignores Plaintiffs' damages allegations. *Id.* at 24-26. [16]

Plaintiffs were forced to purchase MOC or have their certification terminated by ABIM. ¶¶ 44, 49, 61. Internists either do not want to buy MOC at all, or desire to purchase it from a provider other than ABIM, such as NBPAS. ¶¶ 55, 66, 89, 113. [17] The requirement to purchase MOC not only causes internists to suffer the out-of-pocket cost of the MOC fees themselves, but it raises the cost of the practice of medicine for Plaintiffs and other internists. ¶¶ 65, 69. Plaintiffs also allege that an alternative product exists in the form of NBPAS maintenance of certification that is significantly less expensive and time consuming for internists. ¶¶ 55-57. Allegations such as these establish a concrete injury. Plaintiffs would not have purchased MOC at all, or would have purchased a maintenance certification product elsewhere at a lower price, but for ABIM's fraudulent scheme. Such out-of-pocket losses are sufficient to allege a RICO injury. *See Avandia Mktg.*, 804 F.3d at 637, citing *Maio v. Aetna*, 221 F.3d 472, 483 (3d Cir. 2000) (allegations of out-of-pocket loss sufficient to satisfy RICO injury requirements); *In re Johnson & Johnson Talcum Powder Products Mktg., Sales Practice and Liability Lit.*, 903 F.3d 278, 282 (3d Cir. 2018) (recognizing that a plaintiff may successfully plead economic injury by alleging she would have purchased an alternative product that was less expensive).

This is not a case where Plaintiffs complain they were damaged because they purchased an inferior product. *Cf. Maio*, 221 F.3d at 484, 488 (plaintiffs did not allege facts sufficient to

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[16] ABIM's contention that Plaintiffs received the "benefits" of MOC fly in the face of their allegations that there is no benefit to MOC. *See, e.g.*, ¶¶ 42, 43, 136, 137, 142.

[17] Dr. Manalo suffered injury to his business or property as a result of ABIM's requirement to purchase MOC because St. Vincent's Healthcare's revocation of his staff privileges caused him out-of-pocket loss. ¶¶ 95-96. St. Vincent's decision—driven as explained above by ABIM's scheme to defraud—directly caused Dr. Manolo's injury, the loss of his job. *See Avandia Mktg.,* 804 F.3d at 645.

establish that product was inferior as a result of defendants' wrongful conduct); *In re Johnson & Johnson*, 903 F.3d at 290 (plaintiff's claims failed because she did not allege that she bargained for a product worth a given value but received a product less than that value). In both of those cases relied on by ABIM, the Third Circuit focused on the speculative nature of the alleged injuries. In *Maio*, there were no allegations that the plaintiffs received inferior health care as a result of their purchase of the health plan and so they had not sufficiently alleged that the health plan was worth less than they paid for it. 221 F.3d at 488. And in *In re Johnson & Johnson*, plaintiff had not alleged any physical injury from the baby powder she purchased, which she claimed increased her risk of developing ovarian cancer. 903 F.3d at 281. By contrast, here Plaintiffs were damaged because they were forced to purchase a product they otherwise would not have purchased, were forced to purchase it at monopoly prices, and suffered other out-of-pocket losses.

**B. Plaintiffs Have Pleaded Fraud with Sufficient Particularity.**

ABIM argues Plaintiffs' allegations of mail and wire fraud do not meet the particularity requirements of Rule 9(b). Def. Mem. 26-27. In the Third Circuit, a plaintiff describes the "circumstances" of the fraud consistent with Rule 9(b) by either including the "date, time, or place" of the misrepresentations, or "through 'alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'" *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). *See also Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658 (3d Cir. 1998) ("purpose of Rule 9(b) is to provide notice of the 'precise misconduct' with which defendants are charged and to prevent false and unsubstantiated charges.").

Plaintiffs do both. First, plaintiffs have included detailed allegations of misleading statements made by Dr. Cassel, former ABIM Chair, and Dr. David Johnson, former ABIM Board member, and the dates and locations of the statements. ¶¶ 134, 154. In addition, plaintiffs include precise quotations of misleading and fraudulent statements made by ABIM on its website regarding MOC. ¶ 135. ABIM's suggestion that these allegations are "vague assertions" is conclusory. Def. Mem. 27. Plaintiffs' allegations of fraud are more than sufficient to give ABIM notice of the "precise misconduct" with which it is charged, and, thus, meet the requirements of Rule 9(b). *See Rolo*, 155 F.3d at 658. *See also Argabright v. Rheem Mfg. Co.*, 201 F. Supp. 3d 578, 608 (D.N.J. 2016) (quotations from marketing statements on defendant's website meet Rule 9(b) specificity requirement).

## V. Plaintiffs State A Claim For Unjust Enrichment.

Plaintiffs allege they conferred a benefit on ABIM (their MOC-related fees), that ABIM wrongfully obtained those fees by forcing Plaintiffs and other internists to purchase MOC or have their certifications terminated, and that it would be unjust for ABIM to retain MOC fees obtained as a result of its unlawful conduct. ¶¶ 4, 42, 49, 65, 70, 163, 173-74. This is all that is required at the pleading stage to state a claim for unjust enrichment. *Glob. Ground Support, LLC v. Glazer Enters*., 581 F. Supp. 2d 669, 675 (E.D. Pa. 2008) (*citing Com. ex. rel. Pappert v. TAP Pharm. Prods., Inc*., 885 A.2d 1127, 1137 (Pa. 2005)). [18]

[18] ABIM's argument that the unjust enrichment claim should be dismissed because Plaintiffs do not specify which state law applies is a red herring. Def. Mem. 27. A court need only engage in a choice of law analysis when there are material differences between the possible state laws at issue. Here, "there is no actual conflict between the laws concerning unjust enrichment claims, and the parties have not presented an issue concerning choice of law for these claims. It is established that there are minimal actual differences between the unjust enrichment laws in each of the 50 states. Thus, the Court need not engage in a choice of law analysis for the unjust enrichment claims." *AFSCM v. Cephalon, Inc. (In re Actiq Sales & Mktg. Practices Litig*.), 790 F. Supp. 2d 313, 322 (E.D. Pa. 2011). *See also In re Mercedes–Benz*, 257 F.R.D. 46, 58 (D.N.J. 2009); *Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007), *vacated on other grounds*, 328 Fed. App'x. 121 (3d Cir. 2009); *Lucker Mfg. v. Home Ins. Co*., 23

ABIM nevertheless argues for dismissal on two grounds. First, it contends that because a written agreement governs the parties' relationship, Plaintiffs cannot state a claim for unjust enrichment. Def. Mem. 28. But Plaintiffs have neither pleaded the existence of a contract nor a breach thereof. *Cf., e.g., Montanez v. HSBC Mortg. Corp. (USA),* 876 F. Supp. 2d 504, 515 (E.D. Pa. 2012) (unjust enrichment claim dismissed where plaintiff pleaded *both* breach of express contract and unjust enrichment). Plaintiffs here do not plead unjust enrichment as an alternative to a contract claim. The only mention of an alleged governing contract is in ABIM's papers, which are outside the four corners of the Amended Complaint.

Even assuming *arguendo* that there were a contract, "Rule 8(d)(2) nonetheless permits a plaintiff to plead unjust enrichment in the alternative in certain circumstances, 'even where the existence of a contract would preclude recovery for unjust enrichment.'" *Vantage Learning (USA), LLC v. Edgenuity, Inc*., 246 F. Supp. 3d 1097, 1100 (E.D. Pa. 2017) (internal citations omitted). Such circumstances "require either that (i) the contract at issue covers only a part of the relationship between the parties, or that (ii) the existence of a contract is uncertain or its validity is disputed by the parties." *Id.*

As to the latter, Plaintiffs have not pleaded existence of a governing contract or that ABIM breached any such contract. As to the former, "a claim for unjust enrichment will not be barred if it concerns conduct outside the scope of the original agreement or contract." *Kraus Indus. v. Moore*, No. 06-00542, 2007 U.S. Dist. LEXIS 68869, *29 (W.D. Pa. Sep. 18, 2007). Here, Plaintiffs do not allege that ABIM failed to provide the MOC product or otherwise failed to comply with any purported contractual provision. Rather, Plaintiffs claim that ABIM was unjustly enriched due to its unlawful conduct related to MOC in the maintenance of certification

F.3d 808, 813 (3d Cir. 1994). The Court therefore can properly apply Pennsylvania law to its analysis of Plaintiffs' unjust enrichment claim.

market, forcing Plaintiffs to purchase MOC at an inflated price. These allegations are outside the scope of any agreement into which the parties could have purportedly entered.

ABIM's argument that Plaintiffs received the benefit of their bargain, and therefore cannot maintain an unjust enrichment claim is similarly flawed. Def. Mem. 28-30. Contrary to ABIM's rhetoric, Plaintiffs were forced to purchase MOC. There was no MOC "bargain" at all, much less any "benefit" to Plaintiffs and other internists. ¶¶ 42, 43. That Plaintiffs and other internists bought MOC to keep their certifications from being terminated does not end the unjust enrichment analysis. The soundness of the claim hinges on how ABIM obtained the MOC fees. Each of the cases on which ABIM relies involved the voluntary purchase of the product at issue. *See In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, No. IA MDL 1871, 2013 U.S. Dist. LEXIS 152726, *14, 41-42 (E.D. Pa. Oct. 23, 2013) (voluntary purchase of drug); *Mazur v. Milo's Kitchen, LLC*, No. 12-1011, 2013 U.S. Dist. LEXIS 89126, *2 (W.D. Pa. May 24, 2013) (plaintiff voluntarily purchased dog treats); *Tatum v. Takeda Pharm. N. Am., Inc.*, No. 12-1114, 2012 U.S. Dist. LEXIS 151031, *1 (E.D. Pa. Oct. 19, 2012) (plaintiff voluntarily purchased drug).

Here, ABIM wrongfully secured MOC fees from internists by forcing them to buy MOC or have their certifications terminated by ABIM. ¶¶ 4, 26, 35, 70, 166. Under such circumstances, Plaintiffs have plausibly alleged that ABIM's wrongful conduct "resulted in the conferral of a benefit … [that] was unjust." *Bral Corp. v. Johnstown Am. Corp.*, 919 F. Supp. 2d 599, 621 (W.D. Pa. 2013) (denying summary judgment on unjust enrichment because a reasonable jury could conclude it was unjust for counter-defendants to retain benefits from alleged misrepresentations).

## CONCLUSION

For all of the reasons stated above, Defendant ABIM's Motion to Dismiss the Amended Complaint should be denied in its entirety.

Date: April 30, 2019

Respectfully submitted,

/s/ C. Philip Curley

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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|---|---|---|
| **GERARD KENNEY, ALEXA JOSHUA, GLEN DELA CRUZ MANALO, and KATHERINE MURRAY LEISURE,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 2:18-cv-05260-RK** |
| **AMERICAN BOARD OF INTERNAL MEDICINE,** | ) | |
| **Defendant.** | ) | **CLASS ACTION** |

**[PROPOSED] ORDER**

AND NOW, this __ day of _____, 2019, upon consideration of the Motion of Defendant American Board of Internal Medicine to Dismiss Plaintiffs Gerard Kenney, Alexa Joshua, Glen Dela Cruz Manalo, and Katherine Murray Leisure's Amended Complaint, IT IS HEREBY ORDERED that said Motion is DENIED in its entirety.

**BY THE COURT:**

_____
**Honorable Robert F. Kelly**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **GERARD KENNEY, ALEXA JOSHUA, GLEN DELA CRUZ MANALO, and KATHERINE MURRAY LEISURE,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 2:18-cv-05260-RK** |
| **AMERICAN BOARD OF INTERNAL MEDICINE,** | ) | **Trial by Jury Demanded** |
| **Defendant.** | ) | **CLASS ACTION** |

**CERTIFICATE OF SERVICE**

I, Cynthia H. Hyndman, an attorney, hereby certify that I caused a copy of the foregoing **Plaintiffs' Memorandum of Law in Opposition to ABIM's Motion to Dismiss the Amended Complaint** to be served by electronic transmission via CM/ECF on April 30, 2019 on the following persons:

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