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

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

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

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INTRODUCTION

Defendant American Board of Radiology ("ABR") sells one product – certification of radiologists. When Plaintiff, a radiologist, sought certification in 2003, Maintenance of Certification ("MOC") was automatically a component of certification, requiring that the diplomate, or certified radiologist, maintain certification through multiple criteria, including an exam at the 10-year mark, in order to retain the benefits of the certification. This certification is not sold separately or piecemeal.

In his opposition, despite his own allegations to the contrary, Plaintiff contends that ABR "terminates" the certification at the end of the "initial" certification period and requires its diplomates to purchase MOC separate and apart from initial certification. But Plaintiff's own allegations in his amended complaint and the documents embraced by those allegations demonstrate, without any ambiguity, that Plaintiff willingly and knowingly sought out a single product—certification from ABR; that the terms applicable in 2003 when he sought certification included both the initial certification examination and continuing MOC components; and that Plaintiff benefited from the relationship with ABR. First Am. Compl., ECF No. 55 ("FAC") ¶¶ 248–49, 251, 254–55. ABR did not force Plaintiff to purchase its certification, nor is ABR's certification (including any maintenance of it) a restraint on Plaintiff's ability to practice as a radiologist.

Instead, as he did in his original Complaint, Plaintiff seeks to impermissibly attempt to force a market leader (ABR) to change its product (certification) to permit other inferior competitors to compete with, and actually benefit from, ABR certification. This is not the purpose of antitrust law and no viable antitrust theory supports such a claim. As another court has recognized in a nearly identical case, "[i]t would entirely alter the nature of the certification if

outside vendors could re-certify internists and potentially disrupt the trust hospitals, patients, and insurance companies place on the ABIM certification." *Kenney v. Am. Bd. of Internal Med.*, 412 F. Supp. 3d 530, 546 (E.D. Pa. 2019).

Plaintiff's FAC is fatally defective. His Section 1 tying claim should be dismissed, whether analyzed as a per se violation or under a rule of reason analysis, because Plaintiff fails to plead separate products. Plaintiff also failed to identify a single paragraph in the Complaint alleging any plausible factual allegations of anticompetitive conduct by ABR in its opposition. Instead, Plaintiff's argument rests on conclusory allegations that because ABR is successful, such success must have been gained through unlawful monopolistic means rather than through the development and innovation of a sought-after product. But conclusory, boilerplate allegations like these are insufficient to survive a motion to dismiss.

Nor has Plaintiff alleged any actionable antitrust injury sufficient to support his antitrust claims—instead relying on conclusory statements that ABR's conduct "thwarts" competition in the "CPD [continuing professional development] market." *See* FAC ¶¶ 340. But conclusory allegations cannot create a claim where none exists. And, to the extent Plaintiff's antitrust claims rely on any alleged anticompetitive conduct before February 2015 (including his 2003 purchase of certification which required continuing MOC, and including the exam he alleges he took in 2012), they should be dismissed as untimely.

Finally, Plaintiff's unjust enrichment claim fails because—despite Plaintiff's vigorous protest that he nor ABR ever plead the existence of a "contract"—his own factual allegations plainly demonstrate a valid contract between Plaintiff and ABR regarding the subject matter of Plaintiff's claim (*i.e.*, payment of certification fees).

ARGUMENT

I. PLAINTIFF'S SECTION 1 TYING CLAIMS FAIL AND MUST BE DISMISSED

Despite all the bluster in Plaintiff's Response to ABR's Motion to Dismiss the FAC (ECF No. 66 ("Pl.'s Br.")), Plaintiff's tying claim cannot survive, either under a rule of reason analysis or a per se violation analysis, because there is no plausible allegation that ABR offers two separate products. To state a Section 1 tying claim, a plaintiff must allege, among other things, that "the tying arrangement is between two distinct products or services." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316–17 (7th Cir. 2006) (quotations omitted); *see also* ECF No. 48, at 5 n.1 ("[U]nder either the *per se* rule or the rule of reason, plaintiff must plausibly allege that there are two separate tied products . . . ."). That a radiologist obtains certification, and then chooses to participate in MOC as required in order to maintain the standards set for certification, does not split the certification into two separate and distinct products with separate and distinct markets necessary to proceed with a tying claim.

A. Plaintiff Again Fails To Plausibly Allege That MOC and Initial Certification Are Separate Products

The importance of Plaintiff's own allegations cannot be understated where, as here, Plaintiff acknowledges certification is a single product. *See, e.g.*, FAC ¶ 9 ("Validity of certification is contingent upon participation in Maintenance of Certification . . . ." (quotations omitted)), ¶ 176 ("Radiologists are today automatically 'enrolled' in MOC by ABR after they purchase their certifications."). When the alleged products of a tying arrangement "are not [] separate and distinct . . . they combine in the form of one product, not two tied products. Without two products, the alleged tying arrangement is impossible." *Collins v. Assoc. Pathologists, Ltd.*, 844 F.2d 473, 478 (7th Cir. 1988). Nothing in Plaintiff's opposition to ABR's motion to dismiss can save him from this fundamental, fatal defect in his claims.

As the progeny of cases following *Jefferson Parish v. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) explain, "the proper inquiry [under *Jefferson Parish*] is whether there is a demand for [the tied product] that is independent of the demand for [the tying product]." *SubSolutions, Inc. v. Doctor's Assocs., Inc.*, 436 F. Supp. 2d 348, 355 (D. Conn. 2006) (citing *Jefferson Parish*) (finding no one other than a purchaser of the alleged tying product would want to purchase the alleged tied product). When demand for the supposed tied product is not separate from the alleged tying product, but is in fact dependent on it, those separate components are deemed to be one product for antitrust purposes. *Id.* Such is the case with ABR's certification. Plaintiff does not allege—and indeed cannot allege—that radiologists who are not certified by ABR have a reason to participate in MOC. Put another way, ABR's MOC component is dependent on a board-certified radiologist having already received certification from ABR—demonstrating it is a single product. Since any alleged demand for MOC is completely dependent on demand for certification, they cannot be considered separate products under *Jefferson Parish* and its progeny. *See id.*; *see also Casey v. Diet Ctr., Inc.*, 590 F. Supp. 1561, 1564 (N.D. Cal. 1984) ("Were it not for the Diet Center's franchised weight control program, there would be no market for the Diet Supp.").

Plaintiff attempts to sidestep these flaws in his FAC by pointing to the Seventh Circuit's recent decision in *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020) as support for his argument that markets for two separate and distinct products exist. *See* Pl.'s Br. 7–8, 10. But *Viamedia* does not support Plaintiff's position. In *Viamedia*, the alleged tying product was interconnect services (which enabled cable providers to sell advertising targeted to different regional audiences) and the alleged tied product was advertising representation services (related to spot advertising). *Id.* at 435–37. Crucially, the plaintiff in *Viamedia* alleged that the defendant continued to sell the two products *independently* in some markets. *See id.* at 469–70. Plaintiff does

not—and indeed cannot—make such an allegation here. *Cf.* FAC ¶¶ 9, 144, 176. Thus, as part of its analysis, the *Viamedia* court looked at demand for the tying product prior to the challenged contract because before the alleged tying occurred, there were, indeed, two products. *Id.* at 469.

Plaintiff then claims, relying in *Viamedia*, "there is a fact issue whether certifications and CPD products such as MOC are separate," and that the court should assess demand for certification *before* MOC was introduced. Pl.'s Br. at 8 (citing *Viamedia*, 951 F.3d at 469). This makes no sense. In, *Viamedia*, the Court had to consider whether, given the allegations that at various points the defendant offered two independent products—the interconnect services and the advertising representation services—sufficient *factual allegations* existed to consider pre-tying demand for the tying product. 951 F.3d at 469–70. Those circumstances are not present in this case. Here there is no demand to examine prior to the inclusion of MOC in ABR's certification. There never was, and never has been, a separate market for MOC. *See, e.g.*, FAC ¶ 144 (Plaintiff himself alleges MOC "would never be successful on its own merits"). As this Court has already acknowledged in dismissing Plaintiff's original complaint, in the absence of plausible factual allegations of *two distinct products*, tying cannot exist as a matter of law and Plaintiff's tying claims must be dismissed. *See* ECF No. 48, at 7 ("ABR sold certification without any MOC component, and now ABR sells certification with an MOC component"). Plaintiff offers no plausible factual allegations to remedy that flaw.

B. Plaintiff's Other Purported Factors Supporting Separate "Demand" Are Meritless, Misleading, or Inapplicable

Plaintiff further contends several "important factors" are relevant in "exploring separate demand." Pl.'s Br. 12–18. Plaintiff distorts the tying analysis in an effort to distract from the fundamental problem at the core of his case—certification is a single product. None of Plaintiff's additional arguments has merit.

1. Any Demand by Radiologists for MOC is Dependent on ABR Certification

Plaintiff first argues that radiologists "differentiate between certifications and CPD products such as MOC," and thus Plaintiff posits there is separate demand for certification and MOC sufficient to recognize them as separate products. Pl.'s Br. 12. But differentiation does not equal demand sufficient to establish two products under a tying analysis.

This Court has already considered and rejected Plaintiff's argument in this regard. "[T]here can 'be no foreclosure of competitive access' to any market for certification from ABR, whether at the initial or MOC stage, because no one *can* provide certification in ABR's name but ABR." ECF No. 48 at 12 (emphasis in original) (quoting *Ohio- Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir. 1978)). In order to allege the existence of two separate products capable of being tied under a Section I tying analysis, Plaintiff must allege that there is demand among radiologists to purchase ABR MOC *without* initial ABR certification—which he has not done and cannot do. "Two items will be considered separate products only when there is 'sufficient consumer demand so that it is efficient for a firm' to provide them separately." ECF No. 48, at 6 (quoting *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 462 (1992)). Plaintiff has not plead that there is demand for MOC from ABR by radiologists who were not certified by ABR in the first instance. And the Court has already rejected Plaintiff's argument that he can plausibly state a claim where it would effectively require ABR to acknowledge those MOC services from other competitors for certification to continue. *See* ECF No. 48, at 10. This argument has no merit.

2. No Plausible Allegations Exist that ABR Separately Sold Initial Certification and MOC

Plaintiff rehashes an argument already rejected by this Court in contending that he has sufficiently alleged that that ABR has always sold initial certification and MOC separately. Plaintiff's principal argument remains that because ABR offered certification without any MOC

requirement prior to 1994, once ABR offered certification with an MOC component thereafter, they are necessarily means two separate products—initial certification and MOC—existed thereafter. Pl.'s Br. 13. But this Court already concluded that "[P]laintiff is not quite correct to the extent that he suggests that initial certification and MOC have been sold separately in the past. In fact, there never was a time when they were sold separately. . . . ABR sold certification without any MOC component, and now ABR sells certification with an MOC component. But ultimately ABR sells only one product . . . ." *Id*. Plaintiff has not and cannot plead his way around that conclusion. To the contrary, his own allegations confirm it. *See, e.g.*, FAC ¶ 40, 171.

Plaintiff now claims *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995) supports his position in his attempt to relitigate this point. It does not change the result. In that case, the defendants allegedly forced consumers of full-service bar review courses in Colorado to purchase supplemental Multistate Bar Exam ("MBE") workshops. *Id*. at 1545–48. But in that case, the Tenth Circuit found there were sufficient factual disputes regarding whether two separate product markets existed because there was evidence the products subject to the alleged tie had been sold separately at various points. *Id.* at 1547–48; *see also Viamedia*, 951 F.3d at 469–70 (finding two products where defendant continued to offer the allegedly tied products separately in some geographic markets). Here, by contrast, Plaintiff has not alleged that ABR has offered MOC without initial certification in any market. Indeed, that would be nonsensical because MOC exists only for those physicians who are certified by ABR in the first place.

3. ABR and ABMS Do Not Recognize Initial Certification and MOC As Separate Products

Plaintiff next argues that ABR and ABMS recognize initial certification and MOC as separate products in public facing documents. Pl.'s Br. 14–15. Not so. Plaintiff conflates the

difference between "products" and "components." For example, Plaintiff argues that initial certification and MOC are different products because they have different purposes. FAC ¶¶ 168–69. But the Court already recognized when dismissing Plaintiff's original Complaint:

> [a]lmost every product can be viewed as a package of component products: a pair of shoes, for example, as a package consisting of a left shoe and a right shoe; a man's three-piece suit as a package consisting of a jacket, vest, and pants; a belt as a package consisting of a buckle and a strap. As shown by the last of these examples, it is possible to describe a product as a package of components even if the components are physically integrated at the point of sale to the consumer." *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 703 (7th Cir. 1984). But under *Jefferson Parish*, a product's aggregation of separate components into a whole is only a tie-in "if there are separate markets for each product." *Id.* at 703. Thus, a prefabricated building is likely "a single product and not a tie-in of the walls, floors, roof, windows, and so forth; for most of these components are not sold in separate markets, though some are." *Id.* at 704. . . . Similarly, a "method of doing business ([a] franchise) is not sold separately from the ingredients that go into the method of business," *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 670 n.1 (7th Cir. 1985) (citing, inter alia, *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980)), particularly where the "ingredients" may include a franchisor's training of franchisees in certain essential skills and inspecting their performance periodically to ensure their adherence to the method, *Principe*, 631 F.2d at 309.

ECF No. 48, at 8–9. The fact that ABR recognizes initial certification and MOC as separate components constituting its certification program does not mean that ABR views the two components as separate products. "Plaintiff attempts to isolate components of what is essentially a business method—in this case, for assessing whether a physician has 'acquired the requisite standard of knowledge, skill, and understanding essential' in her particular specialty or subspecialty—and declare them to be a tie-in." *Id.* at 9–10. "[A]dding a new component to the product that will cause customers to incur ongoing costs does not make the component a new product." *Id.* at 10.

Moreover, when ABR modified its certification program to require MOC, it ceased offering lifetime certification. As Plaintiff himself acknowledges, all ABR certifications offered since 2006 have required participation in MOC. FAC ¶¶ 171, 176. The suggestion that ABR's

grandfathering of physicians certified before 2006 somehow demonstrates the existence of separate products, *see* Pl.'s Br. 14, is of no consequence. In 2006, ABR changed the certification requirements for all radiologists *going forward*. FAC ¶ 171. ABR did not retroactively impose the MOC component on those radiologists certified before then because they, unlike Plaintiff, had been offered and granted lifetime certifications. That was the product that radiologists certified prior to 2006 received. ABR's decision to prospectively change its certification product to adapt to the continually evolving field of medicine is not an antitrust violation. *See Am. Bd. of Internal Med.*, 412 F. Supp. 3d at 547 ("We see no problem that at some point ABIM realized there was a need to have its certified internists undergo an MOC program, whether because the internists could not keep up with the advances in their particular field, saw their skills diminish, or any other reason."); *see also Cal. Comput. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) (rejecting plaintiff's theory that defendant's product design change was anticompetitive "technological manipulation," and finding instead that defendant had "the right to redesign" its product).

4. That ABR Bills and Accounts for MOC Separately Is Not Relevant to the Inquiry of Whether Plaintiffs Plausibly Allege Two Distinct Products

Plaintiff also argues that because ABR charges physicians for and accounts for initial certifications and MOC separately, that means they are separate products. Pl.'s Br. 15. This argument has no support in the antitrust laws. Ongoing fees or costs related to a product—all of which were fully disclosed and part of the product when Plaintiff chose to seek ABR certification—are not sufficient to "create" distinct products and product markets. *See Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 87 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (dismissing tying claim because "Yale's housing policies were fully disclosed long before plaintiffs applied for admission").

Plaintiff *knew* when he sought certification that there would be ongoing costs and fees related to his certification, including the MOC component. *See* ECF No. 56-3. In analogous circumstances, such arguments have been squarely rejected. For example, in *Klamath-Lake Pharmacy Association v. Klamath Medical Service Bureau*, the court rejected an alleged tie between a pharmacy benefit and drug purchase restrictions despite the fact that consumers made separate payments for the initial plan and the copayments with each drug purchase. 701 F.2d 1276, 1290 (9th Cir. 1983). The court found separate payments function "no differently than would a provision in the offer to perform garden maintenance that required the owner of the garden to supply the fertilizer." *Id*. This logic applies equally here. Just like the recurring copayments incurred from an initial drug purchase plan, separate and recurring MOC fees related to certification do not illustrate that MOC is a distinct product. Rather, it is entirely consistent with MOC as a continuing requirement of ABR certification over time.

5. Market Structures and Practices Do Not Demonstrate Separate Demand for Two Products

Plaintiff also claims that he has plausibly alleged sufficient factual allegations that but for ABR's alleged tie-in of MOC, there would be a market for other CPD products that could compete with MOC. Pl.'s Br. 15–16. But courts routinely dismiss tying claims where, as here, consumer demand for the allegedly tied product is inextricably connected to that of the tying product. In *Kaufman v. Time Warner*, for example, the Second Circuit affirmed dismissal of a tying claim where the plaintiffs alleged that a cable company unlawfully required purchasers of their cable services also to lease their cable boxes necessary to transmit their cable programming. 836 F.3d 137, 140 (2d Cir. 2016). Despite the plaintiffs' contention in *Kaufman* that there would be a "thriving market" for cable boxes but for the cable company's alleged tying arrangement, the court found that the plaintiffs failed to allege the existence of demand for cable boxes separate and apart

from the demand for the cable services. *Id.* at 144-45. Rather, the demand for the two products was intertwined, because "to be useful to a consumer, a cable box must be cable-provider specific, like the keys to a padlock." *Id.* at 142, 144 ("[I]f there is no separate market for the allegedly tied product, there can be no fear of leveraging a monopoly in one market to harm competition in a second market. The second market simply does not exist."). Similarly, ABR's MOC is only useful to radiologists certified by ABR. Put another way, physicians who were not board certified would not realistically seek to take the tests that are a required element of MOC.

Equally flawed is Plaintiff's contention that there are separate markets for MOC and initial certification because competitors sell "other CPD products" without certification. Specifically, Plaintiff alleges that entities such the National Board of Physicians and Surgeons ("NBPAS") are "innovative competitor[s] in the market for CPD products" who do not sell initial certification. *See* FAC ¶¶ 101, 113, 115, 119, 124–25, 284; *see also* Pl.'s Br. 15–16. But the fact that other vendors sell CPD products is completely irrelevant; these other vendors do not offer MOC. NBPAS's product does not compete with ABR's MOC program because only ABR provides a program to maintain its own certification. *See* ECF No. 48, at 12 ("[N]o one *can* provide certification in ABR's name but ABR.") (citation omitted; emphasis in original)). "When the product is endorsement of a physician's professional knowledge and skill, holding that the Sherman Act requires ABR to permit competitors to supply a component of that product by performing part of the physician's training or assessment would be no wiser than holding that it requires an ice cream franchisor to permit its franchisees to sell ice cream they obtain from other suppliers, or a weight-loss franchisor to permit franchisees to sell independently obtained diet pills." *Id.*

Further, the fact that NBPAS offers a product of its own is not relevant to whether ABR certification and MOC are separate products. *See SubSolutions*, 436 F. Supp. 2d at 355 (finding "the fact that a number of other vendors wanted to sell POS-systems to Subway franchisees … is irrelevant to the determination of whether a Subway franchise and a POS-system are separate products").

It would be patently unfair to ABR, and the thousands of radiologists that participate in ABR's MOC program, to allow radiologists to remain ABR-certified through "an outside, and possibly inferior, third-party process." *Am. Bd. of Internal Med.*, 412 F. Supp. 3d at 547. In its decision in *Jack Walters*, the Seventh Circuit put it succinctly: "maybe [plaintiff] is capable, as it alleges, of building from parts it gets elsewhere a farm building identical to [defendant's] building; but it does not follow that it can put [defendant's] name on it." 737 F.2d at 705 ("[I]f you happen to be in the business of selling faucets, a dealer cannot force you to let him sell, under your name, faucets he gets elsewhere."). Antitrust laws do not require ABR to allow Plaintiff to continue holding himself out to employers and patients as board certified by using other products to maintain his ABR certification.

6. ABR Certification Is Not an Economic Necessity

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

The cases cited by Plaintiff in support of his argument that medical certification is an "economic necessity" do not even remotely relate to antitrust allegations; rather, they discuss the

economic necessity of certification in instances where physicians seek court review of a voluntary association's acceptance or non-acceptance of a member. *See Busse v. Am. Bd. of Anest., Inc.*, No. 92 C 5613, 1992 WL 372996, at *3 (N.D. Ill. Dec. 11, 1992) ("Since being certified by defendant or being board eligible is an economic necessity, this is a situation where a court can review the actions of a voluntary association."); *Liberman v. Am. Osteopathic Ass'n*, No. 13-15225, 2014 WL 5480802, at *7 (E.D. Mich. Oct. 29, 2014), *aff'd sub nom.* 620 F. App'x 470 (6th Cir. 2015) ("Turning now to whether Plaintiff's due process rights were somehow infringed by Defendants, the Court notes that a showing of economic necessity only permits the Court to review the [contested] application procedures[.] This review is limited to whether the procedures are arbitrary." (citations and quotations omitted; alterations in original)). Notably, while the courts in both *Busse* and *Liberman* found that certification was a necessity, the courts dismissed both plaintiffs' complaints seeking review of the relevant boards' decisions. Plaintiff does not allege that ABR acted arbitrarily or capriciously in denying him certification, in which case economic necessity would be relevant; rather, ABR certified Plaintiff. Thus, this argument is irrelevant.

C. ABR's Arguments Regarding Plaintiff's Failure To Plead the Existence of Two Separate Tied Products Are Properly Asserted

Plaintiff also claims ABR's use of certain facts embraced by the FAC and on-point legal authority defeat ABR's motion to dismiss because ABR is relying on "facts" outside the FAC. Not so.

Specifically, Plaintiff argues that ABR inappropriately asserted "facts" not contained within the FAC, including the following: (1) facts related to the existence of a contract (either implied or express) between Plaintiff and ABR; (2) facts related to the benefits of MOC; (3) "facts" related to the repercussions of ABR endorsing CPD provided by other entities; and (4) "facts"

relating to ABR's analogy of certification to a franchise relationship.[1] But factual allegations embraced by the FAC and legal analogies that expose the deficiencies in Plaintiff's FAC are exactly the information that can and should be considered by the Court in dismissing the FAC.

First, as discussed above in Section I.B.4, the FAC incorporates and references Plaintiff's forms, applications, and agreements with ABR. *See* FAC ¶¶ 250–52, 254–55; *see also Griswold v. E.F. Hutton*, 622 F. Supp. 1397, 1402 (N.D. Ill. 1985). Plaintiff *knew* when he sought certification that MOC was part of the package deal, and nonetheless agreed to it. *See* 56-3, at 14 ("This is a ten-year time-limited certificate. Information relative to Maintenance of Certification will be sent to you in the near future."). That Plaintiff desires certification (and all that comes with it, including MOC) in order to take advantage of opportunities with independent third parties, like hospitals, insurers or other health care entities—does not mean that ABR coercively "forces" it upon him. "To the extent ABR exercises 'control' over plaintiff's certification status, it is not the result of an illegal tie-in but 'a function of . . . contractual powers' that plaintiff was aware of from the beginning, even if he was unaware of exactly what form MOC would take." ECF No. 48, at 13 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 443 (3d Cir. 1997)).

Second, whether Plaintiff take issue with ABR over the "benefits" of MOC has no bearing on the merits of this motion. Plaintiff's dislike for MOC does not make it an independent product for which there is separate and independent demand; indeed, it tends to undercut any such conclusion. ECF No. 48, at 11. Furthermore, the Court may "draw on its judicial experience and common sense," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), when evaluating Plaintiff's claim

[1] Plaintiff also claims ABR introduces "facts" about the lack of demand for MOC. That's not true. As already addressed herein, ABR pointed to Plaintiff's own allegations—and the lack of plausible factual allegations regarding separate demand for MOC, in its opening brief. ECF No. 56-1, at 8, 11; *see also supra* Sections I.A and B.

that "MOC does not benefit physicians, patients, or the public," Pl.'s Br. 19, particularly in light of other allegations in Plaintiff's FAC. If Plaintiff's conclusion were true, hospitals and other medical organizations would not require certification (which includes MOC) to the degree alleged by Plaintiff. *See* FAC ¶¶ 60–86. While courts "accept the allegations as true," they "are not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007) (citations omitted). ABR is permitted to point out Plaintiffs' unsupported conclusions disguised as factual allegations.

Third, Plaintiff's characterization of ABR's motion to include "endorsement facts" is nonsensical. No, Plaintiff's FAC does not explicitly request that ABR endorse or allow other entities to provide certifications in ABR's name. *See* Pl.'s Br. 20. But that is not the point. By demanding that ABR be "enjoined from revoking certifications of radiologists who do not buy MOC," Plaintiff seeks a judgment that would, in essence, require ABR to stand behind the certification it originally gave to radiologists only to have no control over the maintenance of that certification. Such a result is forced and silent endorsement of other alleged CPD products. Competing entities would be permitted to offer substandard CPD products at bargain prices, and ABR would be powerless to control the integrity of its certification. The antitrust laws do not countenance such a result, and in similar circumstances, courts have declined to impune one.

Fourth, Plaintiff claims ABR's use of analogous franchise cases involving tying claims is an introduction of "new facts" that are inappropriate on a motion to dismiss. Plaintiffs point to no authority for this position. That's because it makes no sense. Making hypothetical arguments or analogies does not introduce extraneous facts; instead, it permits a party to persuasively apply controlling law to the factual allegations in the case before it. That's precisely what ABR did.

Furthermore, the Court has already recognized the importance of the underlying *legal* principles in those analogous cases, because it cite to them in dismissing Plaintiff's original Complaint, alleging the same actions on the part of ABR. *See* ECF No. 48, at 8–9, 12.

In short, the "faults" pointed out by Plaintiff in response to ABR's motion to dismiss are not faults at all. Instead, they are appropriate factual allegations embraced by Plaintiffs own allegations or analogous legal principles that confirm dismissal of Plaintiffs' FAC is appropriate.

D. Plaintiff Fails to Allege a Valid Antitrust Injury

In his opposition, Plaintiff muddies the waters of antitrust injury, arguing several types of supposed harm. But none flow from ABR's supposed anticompetitive conduct and none meet the standards required for a plaintiff to allege antitrust injury. To have antitrust standing, Plaintiff must allege an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Antitrust injury must involve "loss [that] comes from acts that reduce output or raise prices to consumers." *Chi. Prof. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992).

Plaintiff cites several portions of the FAC that he believes sufficiently allege antitrust injury. But these allegations are nothing more than conclusory statements and labels that fail the applicable pleading standards. *See* Pl.'s Br. 25; *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1067 (N.D. Ill. 2013). Plaintiff, for example, alleges ABR's anticompetitive conduct constrains the supply of radiologists, thwarts competition in CPD products, and "entrench[es] ABR's monopoly in certifications." *Id.* These are text-book conclusory allegations which must be dismissed. *Fisher v. Aurora Health Care, Inc.*, No. 13-C-152, 2013 WL 12099866, at *4 (E.D. Wis. July 16, 2013) (dismissing the complaint because it "does not sufficiently allege that patients are suffering any antitrust injury due to Aurora's alleged exclusion of independent

physicians from its hospital").

Likewise, Plaintiff alleges an antitrust injury because ABR allegedly raises "the cost of the practice of medicine for radiologists." Pl.'s Br. 25 (citing FAC ¶¶ 167, 204–05, 268, 345). But Plaintiff alleges that most states require physicians to "periodically complete continuing medical education" courses, and that NBPAS requires 50 hours of CME every couple years. FAC ¶¶ 23, 120. Plaintiff therefore concedes that his alleged antitrust injury does not "flow[] from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489.

E. The Statute of Limitations Applies to Plaintiff's Antitrust Claims as Plead

Plaintiff does not dispute that he had to file his antitrust claims "within four years after the cause of action accrued." 15 U.S.C. § 15b. Given this concession, Plaintiff's claims should be narrowed to the extent they are connected to an alleged harm—Plaintiff's purchase of the certification in 2003 or the alleged exam pursuant to MOC in 2012, *see* FAC ¶¶ 251, 26—that did not occur during the limitations period. Plaintiff makes two arguments to salvage his antitrust claims. Neither has merit.

First, Plaintiff argues that a statutes of limitations defense is not ripe for consideration on a motion to dismiss. Pl.'s Br. 26. Not true here. "[T]he statute of limitations may be raised in a motion to dismiss if the allegations of the complaint *itself* set forth everything necessary to satisfy the affirmative defense." *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009) (emphasis added) (quotation omitted). The Court can consider a statute of limitations defense on a motion to dismiss if "the relevant dates are set forth unambiguously in the complaint." *Id.* Such is the case here.

Plaintiff alleges the years in which he purchased his initial certification (2003) and relevant MOC (2012). *See* FAC ¶¶ 251, 26. Plaintiff filed the original Complaint on February 26, 2019, and to the extent that his claim is premised on any MOC he participated in since 2003 (including the 2012 exam), the statute of limitations ran on February 26, 2015, and Plaintiff's claims based

on those allegations are nearly three years late. *See* ECF No. 1.

Second, Plaintiff argues the antitrust harm alleged constitute a continuing violation sufficient to toll any applicable statute of limitations. Pl.'s Br. 26–27. Again, not so. In order for a plaintiff to avail him or herself of the continuing violations doctrine to avoid the applicable four-year statute of limitations, there "must be a new and independent act that is not merely a reaffirmation of a previous act," and "it must inflict new and accumulating injury on the plaintiff." *Pace Indus., Inc. v. Three Phoenix Co*., 813 F.2d 234, 238 (9th Cir. 1987). Furthermore, "when a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed; thus, the limitations period typically is not tolled by the requirements placed on the parties under the agreement." *See Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004).

Here, the time-barred allegations include Plaintiff's ABR certification in 2003 and participation in an MOC exam in 2012. Plaintiff does not allege any "new and independent act" such that the continuing violations doctrine applies. Plaintiff was "fully aware of the terms" under which he could maintain his ABR certification. *See, e.g.*, FAC ¶¶ 249, 254. To the extent Plaintiff's claim premised on his certification in 2003 or participating in an MOC exam in 2012, the Court should dismiss his antitrust claims based on those acts as untimely. *See Varner*, 371 F.3d at 1020 (affirming Rule 12 dismissal because plaintiff "failed to allege any new overt acts, other than enforcement of the initial contracts, that would toll the four-year statutes of limitations"); *see also Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir.1989) (statute of limitations barred tying claim when lease contract containing alleged tying provision was entered into outside the limitations period); *Witt Co. v. RISO, Inc.*, 948 F. Supp. 2d 1227, 1236 (D. Or. 2013) (any allegedly illegal tying begins when put in place, not on subsequent enforcement of

requirements).

II. PLAINTIFF'S UNJUST ENRICHMENT FAILS AS A MATTER OF LAW

Plaintiff's allegations firmly establish that a valid and binding agreement exists between himself and ABR. Plaintiff argues that ABR has not "allege[d] the existence of a contract, much less assert[ed] a breach of contract claim," and thus Plaintiff's unjust enrichment claim must succeed. Pl.'s Br. 27. However, there is no need for ABR to plead the existence of a contract, because Plaintiff has already done so. Plaintiff alleges that ABR "sells" certification covering initial certification and MOC. *See, e.g.*, FAC ¶¶ 48, 171, 249. Plaintiff also alleges that physicians, including himself, "purchase" certification from ABR. S*ee, e.g.*, *id.* ¶¶ 171, 176, 255. This is all that is necessary to establish the existence of a contractual relationship. *See Chi. Faucet Shoppe, Inc. v. Nestle Waters N. Am., Inc*., 24 F. Supp. 3d 750, 764 (N.D. Ill. 2014) ("[I]t is still clear from the parties' conduct as described in the complaint alone that there was a contractual relationship. . . .").

Curiously, Plaintiff then contends that the exhibits attached to ABR's Motion to Dismiss do not evidence the existence of a contract between Plaintiff and ABR. Pl.'s Br. 27. But one of the documents ABR submitted is an "Agreement of Applicant for ABR Maintenance of Certification Program" that Plaintiff *signed*. *See* ECF No. 56-3, at 8. Both the language of the FAC and the language of the documents encompassed by and referred to in the FAC evidence a contractual relationship between Plaintiff and ABR.

Indeed, Plaintiff's entire FAC hinges on a contractual relationship between the parties—ABR sold, and Plaintiff purchased, certification. The money Plaintiff paid, pursuant to his agreement with ABR, is the money Plaintiff now hopes to recoup through his unjust enrichment claim. Because Plaintiff and ABR agreed to a valid contract, Plaintiff's unjust enrichment claim is barred as a matter of law. *Jasper v. Abbott Labs., Inc.*, 834 F. Supp. 2d 766, 774 (N.D. Ill. 2011).

Plaintiff next argues the subject matter of his lawsuit is outside the subject matter of any agreement between the parties, even if a contract existed. Pl.'s Br. 28. Yet in support of this argument, Plaintiff argues that he and other radiologists were forced to buy MOC. *Id.* at 27; *see also* FAC ¶¶ 260, 262, 267, 269. Thus, the crux of Plaintiff's unjust enrichment claim is the payment of "MOC-related fees," which are unequivocally governed by the parties' agreements. *Compare* FAC ¶ 368, *with* ECF No. 56-3, at 8. This sinks Plaintiff's unjust enrichment claim.

Finally, Plaintiff links his unjust enrichment claim to his antitrust claims. Pl.'s Br. 28. Thus Plaintiff concedes that to the extent his unjust enrichment claim is tied to his antitrust claims, dismissal is appropriate for the same reasons ABR has identified in its opening motion and further explained herein. *See, e.g., Maxwell v. Sanofi-Aventis U.S. LLC*, No. 15-cv-10095, 2016 WL 3633321, at *4 (N.D. Ill. July 6, 2016).

CONCLUSION

For the reasons stated herein, the reasons stated in ABR's opening memorandum (ECF No. 56-1), and the reason's stated in the Court's Order dismissing Plaintiff's original Complaint (ECF No. 48), ABR respectfully requests the Court grant its Motion to Dismiss Plaintiff's First Amended Complaint with prejudice.

Dated: July 21, 2020

By: *s/ Jaime Stilson*

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CERTIFICATE OF SERVICE

I certify that I have on this 21st day of July, 2020, filed the foregoing **DEFENDANT AMERICAN BOARD OF RADIOLOGY'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** using the Court's ECF system, which will give electronic notification to the following parties of record:

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