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

SADHISH K. SIVA, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**No. 1:19-cv-01407**
AMERICAN BOARD OF RADIOLOGY,	)	**Honorable Jorge L. Alonso**
Defendant.	)	

PLAINTIFF'S SURREPLY TO AMERICAN BOARD OF RADIOLOGY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

This Surreply corrects misrepresentations of Plaintiff's allegations contained in Defendant American Board of Radiology's Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint ("ABR Reply"). Dkt. #68. It is structured in a bullet point format, quoting excerpts from the ABR Reply (in italics) followed by Plaintiff's corrective responses (no italics).[1]

- *"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 Reply at 1.

ABR's selective citations to the Complaint skip over related ¶¶ 250 and 252-253 that allege the opposite, and misrepresent ¶¶ 254-255 that allege Plaintiff's certification did **not** refer to an "initial" certification and that he was automatically enrolled **by ABR** in MOC **after** he purchased his certification.

[1] References to "¶ ___" are to paragraphs of the First Amended Class Action Complaint ("Complaint") at Dkt. #55.

• *"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.")."* ABR Reply at 3.

Paragraphs 9 and 176 do not "acknowledge[ ] certification is a single product." Separate products are explicitly alleged by Plaintiff. (*E.g.*, ¶¶ 11, 35-36, 46, 54, 135-146, 152, 159, 170, 177, 236, 281-316, 361). Plaintiff is at a loss to understand why ABR continually and egregiously misrepresents his allegations. Plaintiff alleges, and ABR does not dispute, that certifications assess postgraduate medical education of new residency graduates, while MOC, on the other hand, in ABR's own words, promotes "individual lifelong learning." (¶¶ 3, 56, 169, 301).

• *"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."* ABR Reply at 4-5.

ABR neglects to inform that the reason non-certified radiologists "have no reason to participate in MOC" is because, as Plaintiff alleges, ABR stifles demand by refusing to sell them MOC. (¶ 291 (ABR "will not sell MOC to a radiologist who has not previously bought its certification product.").) That refusal bespeaks ABR's monopoly power over certifications and the effectiveness of its illegal tie, not lack of separate demand. MOC is a CPD product, an allegation ABR habitually ignores. (*E.g.*, ¶¶ 2, 4-7). But for ABR's refusal to sell MOC unless certifications are bought first, there is every reason to believe that radiologists who have not previously bought certifications would consider buying MOC, the purpose of which, according to ABR, is to promote "individual lifelong learning"(¶ 7), if permitted to do so. *See PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811, 817 (6th Cir. 1997) (defendant's "own restrictive policy [ ] assured the absence of a component market").

- *"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")."* ABR Reply at 5.

Again, MOC is a CPD product. There are abundant allegations demonstrating a separate market for CPD products. (*E.g.*, ¶¶ 94-129, 283).

- *"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."* ABR Reply at 6.

- *Here, by contrast, Plaintiff has not alleged that ABR has offered MOC without initial certification in any market.* ABR Br. at 7.

As noted above, ABR suppresses demand of radiologists who have not previously bought certifications by refusing to sell them MOC. (¶ 291). Concluding that products are not separate simply because one is "useless without" the other "is unacceptable" and "approves the most dangerous ties." Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1751a, at 279 (4th Ed. 2018) ("Areeda & Hovenkamp"). ABR wrongly considers the demand only of radiologists who have already bought certifications and are forced to "maintain" them by purchasing MOC, in other words, those already victimized by ABR's tie, excluding other radiologists and other CPD products available for "individual lifelong learning."

Plaintiff *does* allege that ABR promised to sell a voluntary CPD product separate from certifications (¶¶ 130, 292), that CPD products have been sold by another Member Board separate from certifications (¶¶ 131-134), that other CPD products have long been sold separate from certifications (¶¶ 23-24, 97, 282-284, 289), that MOC is sold by ABR today to "grandfathers" separate from their certifications (¶¶ 153, 158, 161), and that certifications are bought by new residency graduates separate from MOC (¶¶ 290-291, 305). These allegations

also defeat ABR's attempt to distinguish *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020). *See* ABR Reply at 4-5.

• *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."* ABR Reply at 7-8.

Paragraphs 168 and 169 are not argument, but factual allegations setting forth ABR's admissions of the separateness of certifications and MOC. ABR assumes its desired conclusion, characterizing MOC and certifications as "components," without any supporting facts or analysis, and contrary to Plaintiffs' express allegation that MOC is not a component. (¶ 294). The very existence of "grandfathers," whose certifications are not revoked if they do not buy MOC, confirms MOC is not a "component" of certifications.

• *"ABR's decision to prospectively change its certification product to adapt to the continually evolving field of medicine is not an antitrust violation."* ABR Reply at 9.

The Complaint contains no allegation that ABR's "change" to certifications mandating the purchase of MOC has anything to do with "the continually evolving field of medicine." Nor does ABR offer any supporting facts or analysis for this business justification affirmative defense. *See* Areeda & Hovenkamp, ¶ 1716a3, at 196 (merely "asserting a quality-protection defense does not itself establish it, for the challenged tie may in fact serve a different function."). ABR sold certifications for 70 years of "the continually evolving field of medicine" before it mandated MOC. (¶¶ 3, 171).

Realizing that only so much in certification fees can be extracted from new residency graduates, MOC allows ABR not only to charge radiologists a one-time certification fee at the outset of their practice, but to force them to purchase MOC by revoking their "initial" certifications if they do not, requiring them to pay inflated MOC fees throughout their entire decades-long careers. (¶¶ 237-238). Whether ABR decided to "change" certifications for some

outside-the-record justification as ABR claims, or made MOC mandatory to generate new revenue as Plaintiff alleges, is a fact question.

- *"Plaintiff knew when he sought certification that there would be ongoing costs and fees related to his certification, including the MOC component."* ABR Reply at 10.

Plaintiff alleges the opposite. (¶¶ 248-255). In any event, awareness that a tie exists does not make the tie any less coercive. ABR reads too much into *Klamath-Lake Pharmacy Association v. Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir. 1983). *See* Areeda & Hovenkamp, ¶ 1745g4, at 218 ("[L]iterally applied, [Klamath's] logic suggests that all ties involve single products."). *Klamath* was also decided on summary judgment. Separate fees and payments are just one of the several indicia of separate products alleged by Plaintiff, all of which must be considered together on a full factual record, not on a motion to dismiss.

- *"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."* ABR Reply at 11.

As Plaintiff alleges, ABR manipulated its "individual lifelong learning" product, requiring that MOC be bought to "maintain" certifications, an economic necessity for a successful medical practice. (¶¶ 5, 144). That only MOC "maintains" certifications is simply the converse of ABR's argument above that radiologists must first buy certifications before ABR will allow them to buy MOC, and again reflects the effectiveness of ABR's tie and not lack of separate demand. There are plentiful allegations demonstrating the relevance of other competing CPD products, that serve the same purpose as MOC to promote "individual lifelong learning." (¶¶ 94-129). Whether the cognizable market is CPD products as Plaintiff alleges, or MOC alone as ABR apparently contends, is a question of fact. *Fineman v. Armstrong World Industries, Inc.*,

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

• *"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."* ABR Reply at 12.

ABR ignores that Plaintiff asks that all radiologists no longer be forced to buy MOC or have their certifications revoked. (¶14). At one time, ABR told radiologists its CPD product would be voluntary. (¶¶130, 292). Once the tie is severed and MOC becomes voluntary as promised, some radiologists will buy MOC and others will not, based on each radiologist's own individual needs and MOC's merits.[2]

•*"Plaintiff has plead [sic] 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."* ABR Reply at 12.

ABR misrepresents ¶ 248, which alleges in full:

> "When he graduated medical school, Dr. Siva understood ABR certification was required to pursue a successful medical career as a radiologist, and enrolled in a residency program to pursue the goal of certification. He does not consider certification to be any more "voluntary" today than it was then."

ABR nowhere disputes the well-pleaded allegations that certification and MOC are an economic necessity for a successful medical practice. (¶¶ 87-93, 147).

• *"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."* ABR Reply at 13.

As alleged, ABR forces radiologists to buy MOC or revokes (denies) their certifications. (¶¶ 5, 144). Foreclosing access to a tying product for failure to later purchase a tied product is

[2] ABR also speculates that other CPD products could be "possibly inferior." ABR Reply at 12. The merits of MOC and competing CPD products should be decided by the radiologists themselves, however, and not ABR.

paradigm "forcing" supporting an illegal tie. Areeda & Hovenkamp, ¶ 1700i, at 13 (illegal tie is "clearly present" when "the seller … continues to supply the tying product only to those who also purchase its tied product"). ABR's violation of the antitrust laws by tying certifications and MOC is several degrees more culpable than acting "arbitrarily or capriciously," making economic necessity extremely relevant.

- *"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))."* ABR Reply at 14.

Franchise cases like *Queen City Pizza* are not relevant to a monopolist who uses monopoly power over a tying product to force the purchase of an economically necessary tied product. (¶¶ 331, 333). Because franchise opportunities are plentiful, no franchisee is compelled by economic necessity to enter a particular franchise; thus, the relationship between franchisors and franchisees is contractual, and not market-based as is the case here. ABR does not address this fundamental disconnect between franchises and its tying of certifications and MOC. Unlike a diner who walks into a McDonald's franchise to buy a Big Mac, patients do not walk into an ABR store to buy individualized radiologist care.

- *"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. 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."* ABR Reply at 15.

There is nothing in ¶¶ 60-86 about "substandard CPD products," "bargain prices," or "the integrity of [ABR's] certifications." While ABR may assert its illegal tying is a justified attempt to preserve the undefined "integrity of its certifications," that inherently fact-driven affirmative defense relies on facts outside the pleadings, is inappropriate on a motion to dismiss, and is contradicted by Plaintiffs' well-pleaded allegations that MOC does not benefit physicians,

patients, or the public, or improve patient outcomes. For example, ABR does not contend ABR-certified radiologists failed to satisfy the "integrity" of certifications before MOC; that the "integrity" of certifications was in decline before MOC; that making MOC mandatory protects the "integrity" of certifications; or that hospitals, patients, and insurance companies had less "trust" in certifications before MOC was made mandatory.

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Plaintiff seeks only to break up the captive market ABR has created for MOC by tying it to certifications. Eliminating the illegal tie and making MOC voluntary as promised previously by ABR will allow the marketplace to decide the merits of MOC, as the antitrust laws require.

Respectfully submitted,

Plaintiff Sadhish K. Siva, individually and on behalf of all others similarly situated

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