No. 21-2334

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Sadhish K. Siva, *et al.*,

Plaintiff-Appellant,

v.

American Board of Radiology,

Defendant-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
Case No. 1:19-cv-01407
The Honorable Judge Jorge L. Alonso

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT

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Oral Argument Requested

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2334

Short Caption: Sadhish K. Siva, individually and on behalf of all others similarly situated v. American Board of Radiology

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Sadhish K. Siva, individually and on behalf of all others similarly situated

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Robinson Curley PC; Carlson Lynch LLP; Freed Kanner London & Millen LLC

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i) Identify all its parent corporations, if any; and

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ C. Philip Curley Date: 8/11/21

Attorney's Printed Name: C. Philip Curley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: s/ Robert L. Margolis Date: 8/11/21

Attorney's Printed Name: Robert L. Margolis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 16, and 28 U.S.C. §§ 1331, 1337, and 1367.

Appellate jurisdiction exists pursuant to 28 U.S.C. § 1291, because this is an appeal from a final order dismissing all claims against the only defendant in the case. While not labeled "final judgment," the Docket Entry issued June 25, 2021, states "Civil case terminated." (Dkt. 81, "Case Termination Order"). [1] Plaintiff has elected to stand on the First Amended Class Action Complaint.

This appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), as the Notice of Appeal was filed on July 20, 2021 (Dkt. 82), within 30 days of the Case Termination Order entered on June 25, 2021.

[1] The Case Termination Order is attached to this Brief as part of the Required Short Appendix at A-1. It is based on the District Court's Memorandum Opinion & Order, Dkt. 76, which is attached to this Brief as part of the Required Short Appendix at A-2-16.

STATEMENT OF THE ISSUE

Whether the District Court erred in finding Plaintiff did not plausibly allege the "separate products" element of his claims for unlawful tying under Section 1 of the Sherman Act.

STATEMENT OF THE CASE

I. Statement of Facts.

A. Defendant American Board of Radiology ("ABR").

ABR is incorporated under the laws of the District of Columbia, files with the IRS as a Section 501(c)(6) not-for-profit organization, and maintains facilities in Rosemont, Illinois. (¶ 21).[2] It began selling certifications to radiologists in 1934. (¶ 40). Beginning in or around 2006, ABR required radiologists to purchase its Maintenance of Certification ("MOC") product or forfeit their certifications. (¶¶ 4, 5, 7, 140-41, 144, 201, 264, 267, 278, 287, 301, 360). From 1934 until ABR began requiring MOC, it sold lifetime certifications. (¶¶ 48-51, 134, 142-143, 292).

ABR is a member of the American Board of Medical Specialties ("ABMS"), an organization of twenty-four specialty boards ("Member Boards") that sell certifications to physicians in forty specialties and eighty-seven subspecialties. (¶ 21). ABMS Member Boards, including

[2] References to "¶ __" are to paragraphs of the First Amended Class Action Complaint ("FAC"), Dkt. 55, included in the Supplemental Appendix at SA-19-96.

ABR, have authority over approximately 900,000 doctors nationwide, about ninety percent of all physicians in the United States. (¶ 30).

ABMS is governed by a 35-person Board of Directors, including one Director each from ABR and the other Member Boards. (¶ 32). ABR and the other Member Boards control ABMS. (¶ 33). The ABMS Bylaws state that its policies are "established collectively by the Member Boards." (¶ 34). Like ABR, all ABMS Member Boards now mandate the purchase of MOC, and doctors who do not purchase the product have their certifications revoked. (¶¶ 50, 135). The ABR website is linked to the ABMS website, and through the ABMS website to the websites of other Member Boards, demonstrating the unity of interest of ABR, ABMS, and the other Member Boards on matters pertinent to this litigation. (¶ 39).

B. Plaintiff Sadhish K. Siva, MD ("Dr. Siva").

Dr. Siva is a graduate of Temple University School of Medicine, where he also completed a cardiac rehabilitation internship. (¶ 20). He completed both his radiology residency (2003) and his fellowship in interventional radiology (2004) at MetroHealth Medical Center in

Cleveland, Ohio, and held the position of Assistant Professor at Case Western Medical School from 2004 to 2006. (*Id.*).

Dr. Siva relocated to Tennessee in 2006 and has practiced since then at the Murfreesboro Medical Clinic. (¶ 247). His areas of expertise include digital and 3D mammography, ultrasound, Doppler ultrasound, breast MRI, GI studies, MRI breast biopsies, CT scans, and nuclear medicine. (*Id.*). Dr. Siva is a member of the American Roentgen Ray Society. (*Id.*).

When Dr. Siva began his radiology residency on July 1, 1999, ABR sold only a certification product. (¶ 249). Dr. Siva sent his certification application and fee to ABR on September 14, 2000. (¶ 250). The ABR application did not refer to or mention MOC. (*Id.*). Dr. Siva believes he was later automatically enrolled in MOC by ABR, after which he began paying the required MOC fees. (¶ 255).

Dr. Siva has made a substantial investment of time, money, and effort in ABR's certification product. (¶ 261). This includes his residency, the certification fee paid to ABR, the time studying for the certification examination, the time and expense of traveling to take written and oral examinations, and the cost of study aids. (*Id.*).

ABR reports Dr. Siva's certification as "contingent upon participation in Maintenance of Certification." (¶ 260). He is forced to purchase MOC because of this qualification on his certification. (*Id.*) Since buying his certification, ABR has also forced him to increase his investment in its certification product by charging thousands of dollars in MOC-related fees and the other costs of satisfying MOC requirements. (¶ 262). Given the substantial sunk costs in ABR's certification product, MOC has never been "voluntary" for Dr. Siva. (¶ 263).

C. ABR's Certification Product.

ABR's certification is the tying product in Plaintiff's claims. (¶ 3). Because no other vendor sells certifications, ABR is the monopoly supplier. (¶¶ 3, 289, 331, 333, 344, 357). Certifications assess education and training obtained through successful completion of residency programs. (¶¶ 3, 7, 48). To buy certifications, residency graduates go through an ABR examination process shortly after graduation. (¶¶ 7, 41, 52-54, 56). ABR does not allow older doctors to buy certifications, as it requires they be bought within a limited period after completion of a residency program. (¶ 56). ABMS refers to certification as an "early career event," and an ABMS CEO has confirmed certifications are "a

one time, snapshot assessment" of candidates for entry into a specialized practice of medicine. (¶¶ 48, 52; *see also* ¶¶ 25-28, 48-56 (history of medical specialty boards, ABMS, and certifications)).

D. Certifications Are an Economic Necessity.

Certifications are an economic necessity, without which a successful medical career for a radiologist is impossible. (¶ 90). Hospitals and other medical organizations and insurance companies require radiologists to be certified. (¶¶ 60-75 (detailing how hospitals, practice groups, medical corporations, and other medical organizations require certifications); ¶¶ 76-86 (detailing how insurance companies require radiologists to be certified to be included in their networks and health insurance plans)). Certifications are anything but "voluntary." (¶¶ 74, 86, 90-93).

As long ago as 1991, the first President of the largest ABMS Member Board wrote in the Annals of Internal Medicine that certification "is no longer an option for the physician entering the marketplace." (¶ 91). A later ABMS President agreed, writing in a medical journal article in 2008 that "many physicians really feel that board certification is not optional," specifically noting its "significant impact in the marketplace."

(*Id.*). Other medical industry sources confirm that certification is necessary to the pursuit of a successful medical career. (*Id.*).

E. ABR's MOC Product.

MOC is the tied product in Plaintiff's claims. (¶ 4). ABR forces radiologists to buy MOC or it revokes their certifications. (¶¶ 5, 7, 140-41, 144, 201, 264, 267, 278, 287, 301, 360). [3] Unlike certifications, MOC does not assess a radiologist's residency training. (¶ 136). As ABMS employees wrote in a medical journal, MOC's focus is not on "elimination of candidates" for entry into a specialized practice of medicine. (¶¶ 136-37, 204). Instead, as the former President and CEO of ABMS has written, MOC focuses on a doctor's own "self-directed learning." (¶ 138). ABR refuses to sell MOC to radiologists unless they have purchased certifications (¶ 291).

Once ABR began selling MOC it stopped selling lifetime certifications and sold only time-limited certifications. (¶¶ 48-51, 134, 142-43, 292). Because certifications are an economic necessity, the threat of revoking certifications forces radiologists to purchase MOC

[3] The single exception to the MOC requirement is for radiologists "grandfathered" by ABR, addressed further below.

even though they would prefer to obtain Continuing Professional Development products, of which MOC is one (*see* below), from others. (¶¶ 147, 201, 286-87, 312, 330). An extensive study published in the *American Journal of Roentgenology* in December 2019 concluded that radiologists do not purchase MOC voluntarily, as shown by the low rates of purchase by "grandfathers." (¶¶ 156-160).

F. MOC is a Continuing Professional Development ("CPD") Product.

CPD products promote medical and non-medical competencies of doctors, encompassing educational activities that reinforce knowledge, skills, performance, and relationships in the provision of medical care. (¶ 94). The goal of CPD products is to uphold the quality and safety of patient care and to enhance health outcomes. (*Id.*). Because MOC, as described by ABR, promotes "individual lifelong learning" it is not different or unique from other CPD products that do the same thing. (¶¶ 7, 95-96).

While ABR only began selling MOC in 2006 (¶ 4), CPD products have been sold to doctors by others since the early part of the twentieth century, including by Continuing Medical Education ("CME") vendors, medical schools, hospitals, clinics, and other organizations. (¶¶ 94-129).

Unlike MOC, however, the purchase of CPD products sold by others is voluntary. (¶¶ 232, 289, 293, 329).

ABR's MOC offerings, like those sold by other CPD vendors, include products addressing value-based delivery and cost reduction, clinical knowledge and skills, practice improvement, doctor wellness and burnout, patient safety, working in teams, health care disparities, and population health. (¶ 99). Methods and tools used by other CPD vendors include, lectures, panel discussions, audience response systems, team-based learning, video or digital presentations, small group or paired interactions, online learning, self-reflection and self-assessment, peer observation and feedback, and simulations; many of these formats are also utilized by ABR in connection with its MOC product. (¶ 100).

G. The History of MOC's Development as a Distinct Product Separate from Certifications.

ABR considered selling its own CPD product separately from certifications as early as the 1970's (¶ 292). In 1973, and again in 1978, ABR and other Member Boards through ABMS adopted a policy referred to as "recertification." (¶ 130). This "recertification" CPD product was voluntary, meaning that radiologists who did not purchase it did not have their certifications revoked. (*Id.*).

In or about 1974, another Member Board as part of the ABMS "recertification" policy offered a similar voluntary CPD product named "Continuous Professional Development." (¶ 131). This voluntary CPD product was greeted with minimal interest over the nine years it was offered, showing the medical community's failure to embrace the product. (¶ 132). It was abandoned in or around 1986, though the Member Board sold its separate certification product throughout the nine-year period it offered the voluntary CPD product and continued doing so after it abandoned the product. (¶ 133).

In 1993, ABR and the other Member Boards through ABMS reaffirmed a policy requiring all Member Boards to establish a plan for implementing a recertification CPD product. (¶ 134). ABR told radiologists that it could not rescind certifications "by recertification procedures unless a date of expiration" was a condition of certification, which was not then the case. (*Id.*).

In March 1998, ABR and the other Member Boards through ABMS formed a task force to develop a CPD product. (¶ 135). For the entire twenty-five-year period (1973-1998) during which ABR and the other Member Boards conceived of and sold their own voluntary CPD

products, they continued to sell certifications separately. (¶¶ 133-35, 292).

By 2006, ABR (along with the other Member Boards) offered yet another CPD product, but named it "Maintenance of Certification" instead of "Continuous Professional Development." (¶ 135). That MOC is the same CPD product floated previously by ABR on a voluntary basis, however, is demonstrated by the fact that the ABMS website refers to MOC using the same "Continuous Professional Development" terminology. (¶ 139).

The only differences between the current MOC product and the prior voluntary CPD products are (1) the product is called "Maintenance of Certification" instead of "Continuous Professional Development"; and (2) MOC is now mandatory, meaning doctors must buy it or have their certifications revoked. (¶¶ 139-40). [4] Learning from the failures of the

[4] If radiologists do not pay the annual MOC fee or have not met ABR's other MOC requirements, ABR reports them as "Not Meeting" MOC requirements, noting specifically that: "Validity of certification is contingent upon participation in Maintenance of Certification." (¶ 198). After a grace period, ABR reports the certifications of these radiologists as "Lapsed," even though they previously purchased certifications. (¶ 199).

prior voluntary CPD products, ABR understood MOC would not be successful on its own merits but could succeed only if radiologists were forced to buy MOC by using certifications as leverage. (¶¶ 59, 144, 323-25).

H. ABR Does Not Require "Grandfathered" Radiologists to Buy MOC.

Radiologists who bought certifications before the advent of MOC are not required to purchase MOC. (¶ 152). Thus, unlike younger doctors, certifications of "grandfathered" radiologists are not revoked if they do not buy MOC. (*Id.*). ABR holds "grandfathered" radiologists to a different standard, despite the fact they are many more years removed from their residency than younger radiologists who are forced to purchase MOC. (¶ 154).

Tens of thousands of radiologists are "grandfathered" and reported by ABR as owning "Valid" certifications even though they have not purchased MOC. (¶¶ 153, 162). Allowing "grandfathers" to hold themselves out as ABR-certified without buying MOC shows ABR does not consider MOC essential to protect its brand. (¶¶ 159-160, 310-12).

Though not required to do so by ABR, "grandfathers" are allowed to buy MOC, and ABR sells MOC to those "grandfathers" separately from

certifications. (¶¶ 158-60). The fact that some "grandfathers" buy MOC even though ABR does not revoke their certifications if they do not, also demonstrates a separate demand for the two products. (¶¶ 158-60, 310-12). Similarly, that "grandfathers" are not forced to buy MOC, shows certifications and MOC are separate and not inextricably intertwined, and that MOC is not a component of certification. (¶ 310-12). Upon information and belief, "grandfathers" who voluntarily buy MOC but fail to meet its requirements are still reported by ABR as having "Valid" certifications. (¶¶ 153, 200).

I. MOC is a Pure Money-Making Venture, for Which Monopoly Prices Are Charged, and Which Has Enriched ABR's Coffers by More than $90 Million.

Since it has mandated MOC, ABR has required radiologists to pay annual MOC fees of up to $340 or more per year, as well as other MOC-related fees. (¶ 202). These are supra-competitive monopoly prices. (¶ 234). ABR has collected to date approximately $90 million in MOC-related fees from radiologists forced to buy MOC. (¶ 203). MOC is a lucrative revenue source for ABR. (¶¶ 235-238). Its "Program service revenue" almost tripled between 2004 and 2017 after it began selling MOC; and ABR's "Net assets or fund balances" more than tripled

during the same time, to almost $39 million. (¶ 235). ABR is "not-for profit" in name only. Rather than helping the radiologist community, these increased revenues fund lavish salaries and benefits for ABR's Executive Directors and other ABR "key employees." (¶¶ 239-243).

J. There Is No Evidence of Any Benefit from MOC.

The author of a 2019 article in the *American Journal of Medicine* concluded "there is a paucity of high-quality data" supporting the "assertion that maintenance of certification [MOC] improves quality of care." (¶ 214). An extensive series of studies and surveys also contradict the unsupported public assertions by ABR and ABMS that MOC has resulted in better physician care and improved patient outcomes. These analyses make clear that (1) MOC has not been found to result in improved medical care; and (2) the overwhelming majority of doctors find MOC's purported benefits are not worth the cost in time, money, and effort. (¶¶ 215-233).

II. Course of Proceedings.

Dr. Siva filed the initial Class Action Complaint against Defendant-Appellee ABR on February 26, 2019, in the Northern District of Illinois, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.

§§ 1 and 2, as well as unjust enrichment. Dkt. 1. On November 19, 2019, the District Court granted ABR's motion to dismiss all of Dr. Siva's claims, with leave to amend. Dkt. 48.[5]

Dr. Siva filed his First Amended Class Action Complaint ("FAC") on January 24, 2020, asserting claims under Section 1 of the Sherman Act (*per se* and rule-of-reason tying), and unjust enrichment. Dkt. 55. ABR again moved to dismiss all claims, and on January 8, 2021, the District Court issued a Memorandum Opinion & Order granting ABR's motion. Dkt. 76. Dr. Siva has elected to stand on the FAC. On June 25, 2021, the District Court issued a Notification of Docket Entry, terminating the case, based on the January 8, 2021 Memorandum Opinion & Order. Dkt. 81. Dr. Siva timely filed his Notice of Appeal on July 20, 2021. Dkt. 2.

[5] The November 19, 2019 Memorandum Opinion & Order is attached to the Separate Appendix at SA-1-18.

SUMMARY OF ARGUMENT

On a Rule 12(b)(6) motion to dismiss, a district court may not "question or otherwise disregard nonconclusory factual allegations," *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015), and "must not make findings of fact at the pleading stage." *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012). The District Court here did exactly that when it disregarded Plaintiff's well-pled, nonconclusory allegations and based on unwarranted conclusions and inferences made findings of fact to hold as a matter of law that certifications and MOC are two "components" of a single product. Based on that improper finding, the District Court dismissed Plaintiff's Sherman Act Section 1 tying claims for failing to plead a requisite element of tying claims – that the alleged tie involved two separate products. This was reversible error for several reasons.

The Supreme Court has held that "whether one or two products are involved turns … on the character of the demand for the two items." *Jefferson Parish Hosp. Corp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984). This Court in *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020), recently addressed many of the factors that inform the analysis

of whether separate products exist under *Jefferson Parish*, all of which are supported by Plaintiff's allegations here. These include:

- Whether buyers "viewed the services as separate." *Viamedia*, 951 F.3d at 469. *See also Jefferson Parish*, 466 U.S. at 22-23.
- Whether market structure and practices indicate efficiencies to offering the products separately, supporting separate demand. *Viamedia*, 951 F.3d at 474.
- Whether the defendant's sale of the tying product alone shows there "are indeed separate products." *Viamedia*, 951 F.3d at 474.
- Whether a finding of separate demand for the products is precluded simply because the tie has been successful. *Viamedia*, 951 F.3d at 436-44, 469 (analyzing history of products, focusing on the market structure and product demand in the time period before the tie was successfully implemented and rejecting single product premised on assessment after tie already was in place).

Based on these and other principles this Court described in *Viamedia*, Plaintiff pled sufficient facts to establish each and every factor *Jefferson Parish* and its progeny have identified as indicia of separate demand for certifications and MOC:

- Radiologists differentiate between certifications and MOC;
- Market structure and practices show separate demand for certifications and MOC;
- Certifications and MOC have always been sold separately;

- ABR bills and accounts for certifications and MOC separately; and
- ABR and ABMS distinguish between certifications and MOC.

The District Court erred by disregarding the above-listed *Jefferson Parish* and *Viamedia* factors. Instead, it substituted unwarranted conclusions and inferences and made improper factual findings about the marketplace after ABR imposed its tie, to conclude as a matter of law that certifications and MOC are "components" of a single product that ABR has "integrated" together to be "useful" to radiologists. In doing so, the District Court improperly ignored well-pled factual allegations that contradict its "findings," employed a functional relation analysis that *Jefferson Parish* expressly rejects, and improperly adopted as fact ABR's business justification affirmative defenses.

STANDARD OF REVIEW

This Court's review of a district court's dismissal of a complaint under Rule 12(b)(6) for failure to state a claim is *de novo*. *Blanchard & Assocs. v. Lupin Pharm., Inc.*, 900 F.3d 917, 921 (7th Cir. 2018).

ARGUMENT

I. Standard on Motion to Dismiss.

"To survive a motion to dismiss under Rule 12(b)(6), 'a complaint must allege sufficient factual matter to state a claim to relief that is plausible on its face.'" *Firestone*, 796 F.3d at 826 (quoting *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Applying [the *Iqbal*] standard, [this Court] first accept[s] all well-pleaded facts in the complaint as true and then ask[s] whether those facts state a plausible claim for relief." *Firestone*, 796 F.3d at 826. *See also Reed v. Palmer*, 906 F.3d 540, 549 (7th Cir. 2018) (on Rule 12(b)(6) motion, well-pled factual allegations are to be "taken as true and considered in the light most favorable" to plaintiff). A district court must also draw "all possible inferences in [plaintiff's] favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

"[T]he plausibility standard does not allow a court to question or otherwise disregard nonconclusory factual allegations simply because they seem unlikely." *Firestone*, 796 F.3d at 827 (reversing dismissal where plaintiff's "allegations are neither legal assertions nor conclusory

statements reciting the elements of a cause of action. As such, they are entitled to a presumption of truth"). Similarly, "neither [*Bell Atl. Corp. v.*] *Twombly* [,550 U.S. 544 (2007)] nor *Iqbal* has changed the rule that judges must not make findings of fact at the pleading stage." *Richards*, 696 F.3d at 638. As explained below, the District Court committed reversible error by failing to adhere to these fundamental principles.

II. Plaintiff Plausibly Pled All Elements of His Tying Claims.

To state a *per se* tying claim, a plaintiff must allege: (1) two distinct products or services, (2) the defendant has sufficient market power in the tying market, (3) that a not insubstantial amount of interstate commerce is affected, and (4) the tying seller has an economic interest in the tied product. *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316-17 (7th Cir. 2006). Plaintiff also brings an alternative rule-of-reason tying claim by pleading the above elements, and an unreasonable harm to competition that is not outweighed by procompetitive justifications. (¶¶ 348-366). It is plausible if not likely that a monopolist such as ABR would leverage its market power in a tying product (certifications) to gain an advantage in the market for a tied product (MOC). *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 478 (1992)

(use of monopoly power in tying product to gain advantage in tied product "facially anticompetitive").

In moving to dismiss, ABR disputed only the first element above, whether the FAC contains fact allegations plausibly stating that certifications and MOC are separate products**.** The District Court's dismissal order addressed only that element as well. That the second through fourth elements have been plausibly alleged is not disputed, nor could it be given the well-pled allegations of each. *See* FAC ¶¶ 3, 331, 333 (alleging ABR a monopolist with market power in the certifications market, satisfying second element); ¶¶ 334-36 (alleging ABR reaped approximately $90 million in MOC fees between 2006 and 2017, satisfying third and fourth elements). For the reasons set out below, Plaintiff plausibly alleges the separate products element, and the District Court erred in concluding otherwise.

A. The District Court Erred by Resolving Issues of Fact Raised by Plaintiff's Well-Pled Allegations that Certifications and MOC Are Separate Products, and by Disregarding Those Allegations.

1. *Jefferson Parish* and This Court's Recent *Viamedia* Decision Warrant Reversal.

This Court in *Viamedia*, relying on *Jefferson Parish* and citing overriding factual issues, reversed summary judgment and allowed

plaintiff to advance to trial on its Sherman Act § 2 claims alleging, among other things, unlawful tying. A principal tying-related factual issue in *Viamedia* was whether sufficient evidence existed that would support a finding at trial that separate products existed. [6] This same factual issue exists here, should have precluded dismissal at the pleading stage, and now warrants reversal. [7]

Applying *Jefferson Parish* and other settled antitrust precedent and relying on well-respected treatises and scholarship, *Viamedia* addresses

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[6] The *Viamedia* district court had "assumed" there were separate products, the defendant disputed the ruling on appeal, and this Court found "based on th[e] record" that the assumption of separate products "was correct." 951 F.3d at 436-444, 469-74.

[7] The District Court paid scant attention to *Viamedia*, devoting just two sentences in a footnote to the opinion. A-11, n.3. It noted *Viamedia* was a "section 2 monopolization case" but did not acknowledge that the anti-competitive conduct asserted by plaintiff there included unlawful tying, and that fifteen pages of the *Viamedia* opinion are devoted to an analysis of the facts and law related to the issues of separate demand and distinct products. The District Court then concluded *Viamedia* was distinguishable "for a number of reasons" but identified only one reason: that the defendant there sold the products in question separately in certain markets. (*Id*.) But ABR also sells MOC separately from certifications to "grandfathers." (¶¶ 152-43, 159). And, of course, CPD products are sold by many other vendors separate from certifications. (¶¶ 101-129). In any event, the question is not simply whether *Viamedia* is "distinguishable" but whether its extended analysis of tying claims is instructive. Plaintiff believes it is.

many of the factors that inform the analysis of whether separate products exist, all of which are supported by Plaintiff's factual allegations here:

1. Whether buyers "viewed the services as separate." 951 F.3d at 469. *See also Jefferson Parish*, 466 U.S. at 22-23 ("anesthesiological and other hospital services "could be provided separately" and "patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia"); [8]

2. Whether market structure and practices indicate efficiencies to offering the products separately, supporting separate demand. 951 F.3d at 474. *See also Eastman Kodak*, 504 U.S. at 451, 462 ("service and parts have been sold separately in the past [by others] and still are sold separately");

3. Whether separate demand is precluded simply because the tie has been successful. 951 F.3d at 436-44, 469 (analyzing history of the two products, focusing on time period before the tie was successfully implemented and rejecting single product premised on an assessment after the tie was already in place) (citing Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶1802d6, at 89 (4th Ed. 2018) ("Areeda & Hovenkamp"));

4. Whether because the seller is "dominant" in the tying product, the District Court's "great effort" to "parse whether [the seller's] conduct satisfies some platonic ideal of tying conduct" should be rejected. 951 F.3d at 468-69 (quoting Areeda & Hovenkamp, ¶ 777, at 324);

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[8] Plaintiff here specifically alleges he views certifications and MOC separately, and that other radiologists do as well. *See*, *infra* pp. 28-30**.**

5. Whether the defendant's sale of the tying product alone shows there "are indeed separate products." 951 F.3d at 474; *see also, id*. at 469 (defendant sold only the tied product "for almost two decades"); [9]

6. Whether the fact that buyers may wish to purchase and use two complementary products "in and of itself, convert[s] the two separate products into a single product." 951 F.3d at 469. *See also* Areeda & Hovenkamp, ¶ 1751a2, at 280, 281 (asking whether buyer "needs both items to produce the system result the buyer really values" is misguided and "departs greatly from precedent … [t]he more accurate question is not whether the buyer 'needs both' products, but rather whether it 'needs both' from the same seller"); and

7. Whether the tie actually promotes quality and protects good will. 951 F.3d at 460 ("[B]alancing anticompetitive effects against [ ] hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings."). *See also Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.,* 935 F.2d 1469, 1482 (7th Cir. 1991) ("Whether valid business reasons motivated a monopolist's conduct is a question of fact."); Areeda & Hovenkamp, ¶ 1716a3, at 196 ("asserting a quality-protection defense does not itself establish it, for the challenged tie may in fact serve a different function.").

Plaintiff alleges with ample factual support that ABR sells two products: certifications that demonstrate successful completion of a

[9] ABR sold only the tying product (certifications) for many decades, and has never required the tens of thousands of "grandfathered" radiologists who purchased certifications to buy MOC. (¶¶ 152-54, 296).

radiologist's residency, and a separate CPD product called MOC that ABR requires radiologists to buy throughout their careers. The District Court, however, found as a matter of law that only a single product exists: ABR certification. A proper reading of the FAC taking all well-pled allegations as true and construing all possible inferences in Plaintiff's favor, establishes that Plaintiff has alleged facts that, if proved, will support a finding that certifications and MOC are separate products. [10]

2. Plaintiff Plausibly Alleges All of the *Jefferson Parish* Indicia of Separate Demand for the Certification and MOC Products, for Both the *Per Se* and Rule of Reason Claims.

"Whether one or two products are involved turns … on the character of the demand for the two items." *Jefferson Parish,* 466 U.S. at 19. In assessing whether separate demand exists, courts look at whether the products are "distinguishable in the eyes of buyers" and "separately priced and purchased from the buyer's perspective." *Id.* at 19-20. Courts

[10] Of course, Plaintiff need not *prove* separate products at the pleadings stage. The *Viamedia* district court had earlier denied a motion to dismiss that argued for a finding as a matter of law based solely on the pleadings that a single product existed. *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 692-94 (N.D. Ill. 2016).

have identified several factors to consider when examining consumer demand, including "more readily observed facts [such] as actual consumer requests and market practices." Areeda & Hovenkamp, ¶ 1745c, at 202. Plaintiff has pled facts supporting all of those indicia.

a. Radiologists differentiate between certifications and MOC.

Separate demand exists when consumers "differentiate between" the tying and tied products. *Jefferson Parish*, 466 U.S. at 22-23 ("patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia"); *see also Viamedia,* 951 F.3d at 469 (buyers "viewed the services as separate"). The FAC alleges numerous facts showing consumers (radiologists) differentiate between certifications and CPD products such as MOC:

> ¶¶ 3, 52, 58, 141, 301 – Certification is a "onetime, snapshot assessment" of whether a new residency graduate has acquired the training necessary to enter a specialized practice of medicine.
>
> ¶¶ 2, 4, 6-7, 95, 96, 135, 141 – MOC is a CPD product designed to provide "individual lifelong learning" after residency and certification.
>
> ¶¶ 11, 111, 113, 164-166, 285, 288-289 – Radiologists bought CPD products from other vendors for decades before ABR began requiring MOC.

¶¶ 201, 264, 286-287, 330 – Radiologists prefer to buy CPD products for lifelong learning from others rather than being forced to buy MOC.

¶¶ 130-34 – ABR, ABMS, and other Member Boards working together for over twenty-five years conceived of and sold voluntary CPD products separate from certifications. *See also* ¶ 292 ("ABR considered selling CPD products separately from its certification product as early as the 1970s.").

¶¶ 11, 39, 43-44, 161, 285, 288, 292 – ABR, governed by radiologists, sold certifications for decades without selling its own CPD product.

¶¶ 152-54, 296, 310-12 – ABR has exempted tens of thousands of "grandfathers" from the requirement to buy MOC, demonstrating that ABR does not consider MOC to be inextricably intertwined with or merely a component of certifications.

¶¶ 23, 160, 312 – Since ABR began selling MOC, "grandfathers" and other radiologists have continued to buy CPD products separate from certifications from others.

¶¶ 156-60, 310-12 – Most "grandfathered" radiologists choose not to buy MOC, proof that as consumers they do not consider MOC to be a component of certifications or that MOC and certifications together form a single product.

¶¶ 158-60, 311 – "Grandfathers" who do voluntarily purchase MOC even though ABR does not revoke their certifications, demonstrate demand for MOC separate from certifications.

¶¶ 250, 255-56, 264, 313 – Dr. Siva differentiates between certifications and MOC and purchases MOC separately from his certification.

The District Court did not address these well-pled allegations, effectively disregarding them in finding that certifications and MOC are but a single product.

As the foregoing allegations makes clear, the FAC fully addresses consumer differentiation. For example, allegations concerning "grandfathers" specifically set out both that ABR considers certifications and MOC to be separate products, and that the very existence of "grandfathers" confirms MOC and certifications are not a single product for the tens of thousands of doctors who are "grandfathered." The FAC also alleges a wide range of ABR competitors for CPD products, and details how radiologists have historically distinguished between certification and CPD products and still do. These well-pled and plausible allegations that consumers (and ABR itself) have always considered the two products separate must be taken as true and establish this *Jefferson Parish* factor.

b. Market structure and practices show separate demand.

Courts examine market structure and practices as an indication of whether there are efficiencies to offering the tied and tying products separately, thus supporting separate demand. *See Eastman Kodak*, 504

U.S. at 462 ("service and parts have been sold separately in the past [by others] and are still sold separately"); *Jefferson Parish*, 466 U.S. at 23 n.39 ("other hospitals often permit anesthesiological services to be purchased separately"); *Viamedia*, 951 F.3d at 469 (competitor offered only the tied product "for almost two decades"). The FAC contains many fact allegations of market structure and practices demonstrating separate demand for certifications and CPD products:

> ¶¶ 94-129 – History of other vendors selling CPD products separate from certifications.
>
> ¶¶ 130-34 – History of ABR, ABMS, and other Member Boards developing and selling voluntary CPD products separate from certifications before MOC.
>
> ¶¶ 11, 288, 292 – ABR and other Member Boards sold certifications for decades without selling their own CPD products.
>
> ¶ 316 – ABR's decades-long monopoly in certifications before it sold MOC demonstrates that MOC is separate and not essential to ABR's certification product.
>
> ¶¶ 11, 111, 113, 164-66, 285, 288-89 – Radiologists bought CPD products from others for decades before MOC.
>
> ¶¶ 201, 264, 286-87, 330 – Radiologists prefer to buy CPD products from others rather than being forced to buy MOC.
>
> ¶ 284 – It is efficient for certifications and MOC to be sold separately because there is separate and sufficient demand.

Once again, the District Court did not address these well-pled allegations, effectively disregarding them to find that certifications and MOC are a single product.

c. Certifications and MOC have always been sold separately by ABR and the Other Member Boards.

Separateness is also demonstrated by evidence that the two products "have been sold separately in the past and still are sold separately." *Eastman Kodak* 504 U.S. at 462. *See also Viamedia*, 951 F.3d at 470; *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ., Inc.*, 63 F.3d 1540, 1547 (10th Cir. 1995) (products marketed separately "for over a decade" and still sold separately). The FAC alleges certifications and MOC have always been sold separately:

> ¶¶ 3, 4, 11, 288, 292 – ABR sold certifications alone for decades without selling its own CPD product and only introduced MOC in 2006.
>
> ¶¶ 152, 158-60, 290 – ABR has continued selling certifications separately since it began selling MOC.
>
> ¶¶ 6, 7, 56, 249-59, 299, 301, 305, 313, 363 – ABR sells certifications and MOC to radiologists at different times in their careers.
>
> ¶¶ 56, 299 – Certifications can only be purchased from ABR within a limited time after completion of residency.

¶¶ 7, 95 – MOC can be bought from ABR only after certifications are purchased.

¶ 291 – ABR refuses to sell MOC to radiologists unless they have previously purchased a certification.

¶¶ 250-55, 314 – New residency graduates pay a one-time certification fee after graduation, after which ABR begins charging them for MOC for the rest of their careers.

¶¶ 158-59, 311 – "Grandfathers" purchase MOC separately from certifications.

¶ 316 – ABR's decades-long monopoly in certifications before it began to sell MOC demonstrates MOC is separate and not essential to ABR's certification product.

¶¶ 34-36, 48-50, 130-35 – Other Member Boards sold certifications alone for decades without selling their own CPD products, and have continued to sell certifications separately since they began selling their own CPD products.

¶¶ 130-34 – Between 1973 and 1998, ABR, ABMS, and other Member Boards worked together to conceive of and sell voluntary CPD products separate from certifications. *See also* ¶ 292 ("ABR considered selling CPD products separately from its certification product as early as the 1970s.").

The District Court did not address these allegations. Instead, it focused on a single CPD product sold by another Member Board prior to MOC. It deemed this "most critical[]" (A-8), in the apparent belief that it only matters if ABR itself had sold a CPD product separately. No authority was cited, however, for the proposition that a history of

separate sales by the defendant itself is needed to find separate products and Plaintiff is unaware of any such authority.

Indeed, the analysis of "market structures" that *Jefferson Parish* deems critical necessarily includes market conduct by entities other than the defendant. *See*, *e.g.*, *Jefferson Parish*, 460 U.S. at 23, n.39 ("the record here shows that other hospitals often permit anesthesiological services to be purchased separately"). Here, even putting ABR aside, other Member Boards sold certifications alone for decades without selling their own CPD products and they continue to sell certifications separately since they began selling their own MOC products.

Moreover, the District Court ignored the well-pled facts that ABR more than once adopted or reaffirmed policies to offer its own voluntary CPD product separate from certifications, referred to as "recertification." (¶¶ 130, 134). While discovery will reveal the full extent to which ABR implemented these CPD products, the forerunners to MOC, the fact that ABR adopted and reaffirmed these policies is evidence that certifications and MOC are separate. (S*ee also* ¶ 292, "ABR considered selling CPD products separately from its certification product as early as the 1970s.").

ABR confirmed to radiologists in connection with these earlier CPD products that those who did not successfully participate in "recertification" would not have their certifications "withdrawn, rescinded, or revoked." (¶ 130). In other words, ABR acknowledged the CPD product was distinct from certifications. The District Court erred by failing to acknowledge these well-pled facts, along with the other allegations detailed above that certifications and MOC have always been sold separately.

d. ABR and ABMS distinguish between certifications and MOC.

ABR recognizes that certifications and MOC are different, demonstrating that radiologists, including those in charge of ABR, differentiate between the two products. According to ABR, certifications are sold to new residency graduates to "determine if candidates have acquired [the] requisite standard of knowledge, skill and understanding essential to the practice of diagnostic radiology, radiation oncology and medical physics." (¶ 168). MOC, on the other hand, is described by ABR in a white paper as an effort to "reinforce the process of individual lifelong learning." (¶ 169). ABR's exemption of "grandfathers" from MOC and its sale of MOC separate from certifications to those

"grandfathers" who choose to buy MOC also show that ABR recognizes the two products are separate.

ABMS, whose policies, practices and procedures related to certifications and MOC are established by ABR and the other Member Boards (¶¶ 32-34), also recognizes certifications and MOC as separate. For example, while the ABMS website describes certifications as an "early career event," MOC is described as "Continuous Professional Development." (¶¶ 48, 139). Other fact allegations demonstrating ABR and ABMS recognize the two products' separateness include:

> ¶ 170 – ABR has identified certification and MOC as separate programs on Forms 990 filed with the IRS.
>
> ¶¶ 46, 309 – ABR's Bylaws recite different objectives for certifications and MOC.
>
> ¶ 308 – The ABR website has separate sections for certifications and MOC, describing the different processes, schedules, and requirements for each.
>
> ¶¶ 130-46 – History of MOC as a CPD product separate from certifications.
>
> ¶ 52 – A former ABMS CEO in a 2006 medical journal article describes certifications as a "one time, snapshot assessment."
>
> ¶¶ 35-36 – ABMS has separate oversight committees for certifications and MOC.

These well-pled facts reinforce that both ABR and ABMS consider certifications and MOC to be separate products. The District Court held that the recognition of separateness by ABMS and the other Member Boards was irrelevant because they are not defendants (A-8), but that was error because ABR and the other Member Boards control ABMS and establish ABMS policies (¶¶ 32-34).

e. ABR bills and accounts for certifications and MOC separately.

Courts also consider whether the consumer is billed or charged separately for the tied product. *Jefferson Parish*, 466 U.S. at 22 ("anesthesiological services are billed separately"); *Multistate Legal Studies,* 63 F.3d at 1547 (separate fees); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1575 (11th Cir. 1991) (same). ABR has always charged radiologists separately for certifications and MOC. (¶¶ 177, 305-06). ABR also accounts for them separately. (¶¶ 236, 306). The District Court found no fault with these well-pled facts about separate billing and accounting, nor could it.

Instead, it distinguished *Jefferson Parish* and *Thompson* as supposedly involving "stronger historical evidence of the allegedly tied products being sold separately." A-10. First, as discussed above there *is*

very strong historical evidence here that certifications and CPD products such as MOC have been sold separately for decades. Second, the District Court did not explain what "evidence" in the other cases tipped the balance, or why weighing the relative strength of "evidence" in cases involving full evidentiary records is even proper on a Rule 12(b)(6) motion to dismiss. [11] *Jefferson Parish* and *Thompson* identify billing practices as an indicator of separateness regardless of other historical evidence, and there is no question Plaintiff has pled that ABR employs separate billing and accounting practices.

The District Court relied heavily on *Klamath-Lake Pharmacy Association v. Klamath Medical Services Bureau*, 701 F.2d 1276, 1279, 1290 (9th Cir. 1983), where on summary judgment after "extensive discovery," the court held that a health insurance plan (the tying product) and its requirement that plan members purchase their prescription drugs from certain designated pharmacies (the tied product) were not separate products. The court found that the plan's decision to enter into contracts with preferred providers to keep costs

[11] The District Court simply asserted that *Multistate Legal Studies* is "similarly distinguishable" without further explanation.

down, was "not an unwarranted and unnecessary product tied to the desired product." *Id*. at 1290. [12]

Klamath was driven by the economics necessary to make prescription drugs available at a lower cost to plan members – a situation having no analogue whatsoever with the ABR's tie resulting in the supra-competitive prices ABR charges for MOC. Without addressing that significant, foundational difference, the District Court found a "similarity" between the health plan in *Klamath* requiring "the buyer to pay a portion of the costs of a single product [the pharmacy co-payments]… as he goes," and ABR "requir[ing] certified radiologists to pay for the maintenance portion of the certification product as they go." (A-11). The analogy, however, is misguided.

First, the District Court assumed the outcome of the very factual question at issue here – finding that MOC is a "portion of the certification product." This factual conclusion skips over the many indicia of separate demand that *Jefferson Parish* and *Viamedia* require be addressed. Further, it accepts the contrivance put forward by ABR

[12] Areeda and Hovenkamp have criticized *Klamath*: "[L]iterally applied, the court['s] logic suggests that all ties involve single products." Areeda & Hovenkamp, ¶ 1745g4, at 218.

that certification, a one-time assessment after completion of residency, must or even can be "maintained." As Plaintiff clearly alleges, MOC does not "maintain" certifications, but rather provides an excuse for ABR to charge inflated prices for its own CPD product. After all, ABR sold certifications for decades without any need for "maintenance."

Second, the District Court failed to consider at least two other crucial factual differences between *Klamath* and this case. In *Klamath* the plan members were free to move their business elsewhere and join a different health insurance plan without forfeiting their access to prescription drugs in the future. Here, because certifications are an economic necessity, radiologists do not have the same option and are forced to continue buying MOC. And in *Klamath* the co-payments at issue were paid to the pharmacies, not to the health insurance plan, hence the plan received no benefit from the tie, while here ABR receives the benefit of the supra-competitive price it requires radiologists to pay for MOC.

The District Court also found compelling *Klamath*'s analogy to a "gardener offer[ing] to maintain a customer's garden but requir[ing] the customer to supply the fertilizer." A-11. But radiologists are not

required by ABR "to supply" anything, and the only equivalent to "fertilizer" here is the millions of dollars in MOC-related fees radiologists must pay for an ineffective product with no benefit. (¶¶ 209-233). A more apt analogy would be to the only gardener in town with monopoly power who refuses to continue offering the summer-time gardening services it has provided for many years unless customers also buy its new winter-time snow removal services.

3. The District Court Erred by Making Unwarranted Inferences, Conclusions, and Factual Findings About Certifications and MOC Irreconcilable with the FAC's Well-Pled Facts.

In the foregoing section, Plaintiff laid out the FAC's well-pled allegations of fact supporting the indicators of separate demand identified in *Jefferson Parish* and *Viamedia*. The District Court chose not to address the bulk of these allegations and instead based dismissal on unwarranted conclusions and inferences about certifications and MOC. In doing so, it improperly adopted ABR's self-serving characterizations and its business justification affirmative defenses to find that MOC is a "component" of certification "integrated" with it in a manner (deemed by ABR) to be "useful" to consumers. *See* A-10, A-12.

Courts should not ignore "readily observed facts" in favor of self-serving defense arguments about the "nature" of the products. Areeda & Hovenkamp, ¶ 1741a, at 170 ("Courts often decide whether two allegedly tied items 'really' constitute a single product as if the question involved natural law, intuition, or some other inquiry divorced from the aims of tying law ... Such metaphysical or intuitive inquiries are inherently uncertain and are typically useless for analyzing ties."). This is particularly true on a motion to dismiss, since a district court "must not make findings of fact at the pleadings stage," *Richards*, 696 F.3d at 638, and must accord well-pled factual allegations "a presumption of truth." *Firestone*, 796 F.3d at 827.

a. The District Court improperly inferred from the fact ABR forces radiologists through economic necessity to purchase MOC, that the demand for the two products is one and the same.

Radiologists for decades chose for themselves which CPD products to buy from what vendors to keep their knowledge and skills current, and while they prefer to still have that choice they are forced to purchase MOC or have their certifications revoked. (¶¶ 10, 113, 147, 201, 264, 286-87, 312, 330). As Plaintiff alleges, certification is an economic necessity for radiologists because, among other things, it is required for

hospital privileges, employment, and participation in insurance networks. (¶¶ 57-93).

These allegations are more than plausible. Courts have found certification to be an economic necessity when hospital privileges or insurance hang in the balance. *Busse v. Am. Bd. of Anest., Inc.*, No. 92 C 5613, 1992 U.S. Dist. LEXIS 18948, *8 (N.D. Ill. Dec. 11, 1992) (certification an economic necessity when necessary to access area hospitals); *Liberman v. Am. Ost. Ass'n*, No. 13-15225, 2014 U.S. Dist. LEXIS 153012, *16-17 (E.D. Mich. Oct. 29, 2014) (same for insurance coverage). ABR uses its (undisputed) monopoly power over certifications as leverage to force radiologists to buy MOC to "maintain" their certifications. (¶¶ 144, 323).

Because ABR revokes certifications of practitioners who do not purchase MOC, the economic reality of the need to remain certified forces them to purchase MOC even though they would prefer to buy other CPD products. (¶¶ 147, 201, 264, 286-87, 312, 330). This is the dictionary definition of a tie. *See* Areeda & Hovenkamp, ¶ 1752e, at 295 (tying present when defendant uses a consumer's desire (here, the desire not to have certifications revoked) to "constrain improperly their

choice" between products); *Viamedia*, 951 F.3d at 471 n.17, 473 (reversing grant of summary judgment on tying claim where, *inter alia*, "evidence about the realities of the parties' dealings and the economic realities of the market" made not purchasing the tied product from defendant "not a practical option").

The District Court, however, used the fact that ABR implemented the tie by successfully forcing radiologists to buy MOC, to "suggest" that "the character of the demand for the initial certification and MOC is the same: certification from [ABR]." A-9. *See*, *also*, A-9-10 (the demand for MOC "is 'generated wholly' by the demand for certification generally"). This inference was clear error. First, it confuses the effect of forcing with demand. The very reason ABR's tie succeeds is that certifications are an economic necessity. As with any successful tie, the desire for the tying product is leveraged to force consumers to buy a tied product they would prefer to purchase elsewhere. The desire for the tying product (and here, the undisputed overriding economic need for the tying product) is not evidence of a lack of separate demand for the tied product, as the District Court erroneously inferred.

Second, the District Court's analysis of separate demand is contrary to the law in this Circuit, confirmed in *Viamedia*, that whether the products are separate must be assessed before the tie is imposed and not after. 951 F.3d at 469 ("the market must 'be assessed at the pre-contract rather than post-contract stage'") (quoting Areeda & Hovenkamp, ¶ 1802d6, at 89). The District Court only looked at demand after ABR had already required radiologists to buy MOC or forfeit their certifications, skewing its entire analysis.

Viamedia teaches that just because ABR's tie has succeeded does not disprove separate demand. Radiologists buy MOC not because they conflate certifications and MOC or see only one "integrated" product, but because ABR forces them to buy MOC by revoking certifications if they do not. Under *Viamedia*, demand must be assessed before MOC was imposed, when certifications and CPD products were unquestionably and for many decades sold separately. 951 F.3d at 469 (consumers "viewed the services as separate prior to entering into their present [tying] contracts with Comcast").

The *Viamedia* imperative to assess demand *before* the tie makes sense because focusing on demand *after* the tie is forced on consumers

inevitably rewards the defendant whose tie has already successfully reduced competition, the very goal of the tie. If a tying claim can be dismissed as a matter of law simply by pointing to the fact that the tie has succeeded in forcing consumers to buy the tied product, then no tying claim will ever succeed.

Finally, and perhaps most fundamentally, the District Court's inference from ABR's successful forcing runs contrary to the well-established requirement that on a Rule 12(b)(6) motion to dismiss a district court must draw "all possible inferences in [plaintiff's] favor." *Tamayo*, 526 F.3d at 1081. Rather than the District Court straining to "suggest" a lack of separate demand, the import of Plaintiff's well-pled facts is straightforward. The economic necessity of certifications was used by ABR to put in place a successful tie after the marketplace results of earlier voluntary CPD products proved unsatisfactory. The successful tie, as designed, suppressed the well-pled separate demand for certifications and CPD products before ABR's tie. At bottom, the District Court resolved factual issues about why radiologists purchase MOC rather than accept Plaintiff's well-pled factual allegations

demonstrating existence of the *Jefferson Parish* and *Viamedia* separate demand factors.

b. The District Court's conclusion that certifications and MOC are "components" that ABR "integrated" into a single certification product to be "useful" for radiologists was error for several reasons.

The District Court concluded that MOC and certifications are "components" of a single product that have been "integrated" to be "useful" to radiologists. A-8-9, A-12. These conclusions are reversible error for several reasons: (1) they are improper conclusions of fact that contradict rather than accept as true the FAC's well-pled allegations; (2) they impose the very type of functional relation analysis that *Jefferson Parish* expressly rejects; (3) they adopt ABR's business justification affirmative defenses, which should not have been considered, let alone resolved, on a pleading motion; and (4) a finding that two products are "components" does not preclude them from being separate products.

1. The District Court's conclusions contradict express FAC allegations.

The District Court made fact-findings contrary to the FAC's well-pled allegations, thus committing reversible error, when it made its

"component," "integration" and "useful" findings and dismissed the FAC based on those conclusions. Indeed, the FAC's well-pled factual allegations could not more clearly contradict these conclusions of the District Court. [13]

Plaintiff alleges that certifications and MOC are functionally distinct and have different purposes. (¶¶ 3-4, 6-7, 48, 56, 168-70, 297-301). ABR has identified them as separate programs on Forms 990 filed with the IRS. (¶¶ 170, 315). ABR's Bylaws acknowledge the different objectives of certifications and MOC. (¶¶ 46, 309). An ABR white paper confirms MOC is not, as the name implies, "maintenance" of certification but a CPD product: "The intent of the [MOC] examinations is to reinforce the process of individual lifelong learning, rather than to serve as recertification examinations." (¶ 169; s*ee also*, ¶¶ 52, 294 (rather than MOC being a modification or improvement, certifications and MOC are

[13] The District Court characterized the issue of whether "MOC is a component of certification" as presenting a "legal conclusion." A-9, n.2. The District Court, however, cited no authority supporting its characterization of the issue, and Plaintiff is unaware of any case law holding that whether two products are components is a pure question of law that can be resolved on a motion to dismiss.

functionally different and "not interchangeable or a component of one another")).

Further, ABR exempts tens of thousands of "grandfathers" from MOC, which is wholly inconsistent with the conclusion that certification and MOC are a single product. That "grandfathers" are reported by ABR as certified without having to purchase MOC proves certifications can exist without MOC, and that MOC is not necessary to "maintain" certification. These allegations are in addition to the other above-described well-pled factual allegations supporting the *Jefferson Parish* and *Viamedia* indicators of separate demand, all of which contradict the District Court's "component" and "integration" findings.

Further, there is absolutely no basis in the FAC for the District Court's findings that ABR integrated MOC into certification "in order to be useful to consumers [radiologists] in maintaining an ABR certification." A-12. That certifications, which demonstrate successful completion of radiologists' residency, need to or even can be "maintained" is illogical, as such an accomplishment cannot later be undone or revoked. The FAC is replete with allegations that ABR has contrived the fiction that MOC "maintains" certification as part of an

unlawful tie implemented to extract millions of dollars in fees from radiologists required to purchase MOC.

As further alleged, MOC is the successor to the failed "recertification" and other voluntary CPD products conceived by and sold by ABR, ABMS, and the other ABMS Member Boards. (¶¶ 130-46). The reason for MOC's success is not that it is "useful" to radiologists but that radiologists who do not buy MOC have their certifications revoked. (¶¶ 201, 264, 280-87, 330). Moreover, the FAC alleges that study after study has concluded that, far from being "useful" or "desirable" to radiologists, MOC is a waste of time, money, and effort, and that there is no evidence that MOC provides any benefit to doctors or patients. (¶¶ 209-33).

The District Court cited to *Kaufman v. Time Warner,* 836 F.3d 137 (2d Cir. 2016), where the Second Circuit affirmed dismissal of a complaint for failing to allege facts supporting separate demand for cable programming (tying product) and cable boxes (tied product). *Kaufman*, however, is inapposite. The plaintiff there had relied on unhelpful allegations of "supply-side considerations" rather than the demand indicators that *Jefferson Parish* and *Viamedia* call for and

Plaintiff has alleged here. In reaching its conclusion, the Second Circuit also placed great emphasis on the regulatory role played by the FCC in cable pricing, noting that price controls on the tied product made the tying claim "implausible as a whole." *Id.* at 145-47. No comparable "implausible" circumstances were cited by the District Court here and none exist.

The "provider-specific" analogy the District Court made to certification and cable programming fails as well. A-12. The cable programming and cable boxes in *Kaufman* were technologically interdependent, with the boxes being necessary to unscramble the cable signal to deliver the programming. There is no interdependence here, technological or otherwise, between certifications and MOC as shown by, among things, the exemption of "grandfathers" from the requirement to buy MOC. [14]

[14] In a footnote, the District Court noted that separate availability of components only suggests a tie "if buyers were already 'putting the items together to operate in the same manner as the defendants' bundle.'" A-13, n.5 (quoting Areeda & Hovenkamp, ¶ 1746a). It then concluded "that was not the case" because *ABR* had bundled the two products together. But as Areeda & Hovenkamp make clear, when considering separate demand the focus must be on the buyers (radiologists) and not the seller (ABR). Of course, ABR tied the two products together. The District Court then went on to speculate about

2. The District Court's conclusions are a paradigm functional relation analysis rejected by *Jefferson Parish*.

The conclusions below that MOC and certification are "components" that have been "integrated" to be "useful" to doctors rest not on the indicators of separate demand, but on the Court's unfounded assumptions about how the products function together. *See*, *e.g.*, A-10 (demand analysis rests on Court's finding that radiologists "use it solely as an integral part of the ABR-certification method") (internal quotations omitted); A-13, n.5 ("by redesigning its certification product to include an initial examination component and subsequent MOC component, ABR bundled initial certification and MOC to operate together in a previously unattempted fashion") (internal quotation omitted). By basing its separate products analysis on how it assumed radiologists "use" certifications and MOC and how they "operate

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the intent of radiologists, finding that in the past they were "not purchasing the components to operate together as they do now." Untrue. As alleged, radiologists for decades bought certifications to demonstrate successful completion of residency and later separately purchased CPD products to keep their knowledge and skills current. (¶¶ 3, 11, 111, 113, 164-66, 288-89). That is precisely how certifications and MOC operate together today, the only difference being that ABR forces radiologists to purchase its own CPD product or forfeit their certifications.

together," the District Court engaged in a functional relation analysis, rejected by *Jefferson Parish* and its progeny. 466 U.S. at 19 n.30 (whether products "are functionally linked … is not in itself sufficient" to determine if they are separate); *Viamedia,* 951 F.3d at 469 ("[t]he fact that buyers may wish to purchase and use two complementary products together does not, in and of itself, convert the two separate products into a single product"). [15]

That the District Court's functional relation analysis is an improper basis for finding the absence of separate products is exemplified by several analogous court decisions. In one such case, involving electric motors and repair parts necessary to maintain those motors, this Court found the products to be separate. "Even functionally related products, one of which is useless without the other, have been held to be the

[15] The District Court acknowledged that looking at how products function together "does not comport" with *Jefferson Parish* when it disregarded Plaintiff's allegations that MOC adds no value to certifications and serves a different purpose. A-13-14. That reasoning stands functional relation analysis on its head when, as here, there is no functional relation at all between certifications and MOC. Nor did the District Court explain how rejecting allegations that the products *do not* function together as an improper inquiry into function can be reconciled with its own conclusion that the products are not separate because they *do* function together in an allegedly "useful" way.

subject of illegal tying arrangements." *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 720 (7th Cir. 1987) (citing *Jefferson Parish*, 466 U.S. at 19-21). *See also*, *Parts and Elec.*, *id.* ("Repair parts and finished goods have been expressly held to be separate products capable of being tied.").

This is consistent with other cases rejecting similar arguments about "maintenance" products when the *Jefferson Parish* and *Viamedia* indicia of separate demand were present. In *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992), plaintiff alleged Data General tied a diagnostic product to computer maintenance services. The district court concluded that the diagnostic product was "merely one feature" of the unified "computer servicing" product, which it decided was the product consumers truly desired (analogous to the District Court's finding that combining certification and MOC makes the products "desirable"). *Id.* at 684. It also found that the "only … legitimate *purpose*" for the tied product was to "maintain and repair computer systems," and that since the two products "are inextricably bound together," they cannot be considered separate. *Id.* (emphasis in original). The Fourth Circuit reversed, calling "[t]his inquiry into

purpose and use" by the district court "indistinguishable from the inquiry into the 'functional relationship' between products that was rejected in *Jefferson Parish*." *Id.*

In *Multistate Legal Studies*, summary judgment in favor of defendants on a tying claim was reversed because a fact question existed whether a new workshop (the tied product) added by defendants to their bar review course (the tying product) was a separate product. Like ABR does here, defendants argued the workshop was "nothing more than the improvement of a single product." 63 F.3d at 1547. The district court agreed with defendants, finding that adding an improvement "could not possibly" constitute tying of a second product to the first product. *Id.* The Tenth Circuit, however, found "a material factual dispute" over whether there was sufficient demand for the course without the workshop "to make it efficient to sell the two separately." *Id.* at 1548.

The FAC here contains factual allegations similar to those cited in *Multistate Legal Studies* as supporting the existence of separate demand and distinct products, notwithstanding ABR's "component" and "improvement" defenses. These include: (1) ABR does not require

"grandfathers" to buy MOC, just as defendants there did not require all purchasers of the bar review course to buy the new workshop; (2) the two products had historically been sold separately; (3) separate fees; (4) almost all "grandfathers" choose not to buy MOC, just as purchasers of the bar review course there chose not to buy the workshop; and (5) other industry participants viewed the products as separate. *Id*. at 1547-48. *See also*, Areeda & Hovenkamp, ¶ 1751a2, at 280, 281 (asking whether buyer "needs both items to produce the system result the buyer really values" is misguided and "departs greatly from precedent … [t]he more accurate question is not whether the buyer 'needs both' products, but rather whether it 'needs both' from the same seller").

3. The District Court improperly adopted as fact ABR's business justification affirmative defenses.

The Court made several factual findings that unabashedly adopted ABR's arguments that MOC is vindicated by claimed business justifications for tying the two products, including:

- "it is precisely the fact that the two components come from the same seller (ABR) that makes them desirable" (A-13);
- "the certification bundle only works, to the extent it works at all, when bundled by ABR" (A-13, n.5);

- ABR-certified radiologists "use [MOC] solely as an integral part of the ABR-certification method" (A-10) (internal quotation omitted);

- "the CPD program that makes up MOC is 'provider-specific,' *i.e.*, specific to ABR, in order to be useful to consumers in maintaining an ABR certification" (A-12);

- "a maintenance-of-certification program that lacks the imprimatur of the certifying entity has no value to any physician seeking to demonstrate that he has obtained and maintained certification" (A-12); and

- "no one *can* provide certification in ABR's name but ABR" A-15) (emphasis in original);

While there is no basis in the FAC for these findings by the District Court, each was advocated by ABR below. *See*, *e.g.*, Dkt. 56-1 at 2, 3, 8. There are no allegations in the FAC that MOC is "desirable" or "useful"; that only ABR can "bundle" a certification product and a CPD product in a way that confirms radiologists both are qualified to enter the specialized practice of radiology and later keep their knowledge and skills current; that MOC is "integral" to ABR's "certification method"; [16] or that a CPD product that does not have ABR's "imprimatur" would

[16] The fact that ABR does not revoke certifications of "grandfathers" even though they do not buy MOC belies the suggestion that MOC is integral to certifications.

"have no value." [17] As explained above, the FAC alleges the exact opposite of all of these findings of the District Court.

Further, ABR's business justifications are affirmative defenses not properly considered on a motion to dismiss. *Jefferson Parish*, 466 U.S. at 25 n.42 ("goodwill" justification for tie and similar arguments are "defenses"); *Viamedia*, 951 F.3d at 460 ("business justifications" are a "defense"); *Mozart v. Mercedez-Benz of N.A., Inc.*, 833 F.2d 1342, 1349 (9th Cir. 1987) (argument that "tying arrangement is necessary to assure quality control and to protect its goodwill" an "affirmative defense") (internal quotation omitted). *See also* Areeda & Hovenkamp, ¶ 1741, at 175 ("Justifications can be considered as a defense to a tying claim, and normally are now so considered by courts."). Because a plaintiff is not required to anticipate and plead around affirmative defenses, the District Court erred when it not only considered ABR's affirmative defenses, but relied on them to justify its dismissal of the FAC. *McDonald v. Adamson*, 840 F.3d 343, 347 (7th Cir. 2016). [18]

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[17] This, of course, is disproved by the fact that radiologists purchased other CPD products from others for decades before MOC.

[18] In a footnote, the District Court, adhering to other ABR business justification affirmative defenses, seems to have found deference to ABR

At best, ABR's defenses raise fact questions that cannot be resolved at this early stage. *Viamedia*, 951 F.3d at 460 ("balancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings"); *Illinois ex rel. Burris*, 935 F.2d at 1482 ("Whether valid business reasons motivated a monopolist's conduct is a question of fact.").

Finally, even assuming contrary to Plaintiff's allegations a benign intent on the part of ABR, *Jefferson Parish* has "reject[ed] the view … that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care." 466 U.S. at 25, n.41.

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warranted because the Court believed it lacked "the technical expertise to judge product design" and its concern that interfering with ABR "would deter socially desirable innovations and variations in product design." A. 14, n.6 (quoting Areeda & Hovenkamp, ¶ 1746b). In fact, as the cases cited by Areeda & Hovenkamp make clear, these considerations are relevant, if at all, only in cases involving specialized and complex high-tech industries, such as computers and telecommunications. No technical expertise is required here to comprehend the difference between certifications and CPD products, that radiologists have long had separate demand for certifications and CPD products, and that CPD products can be sold (and have been sold for decades) separate from certifications. No new "product design" is alleged or at issue. As for deference to ABR, the Supreme Court has recently looked askance at another claim for an "abbreviated deferential standard" or a simple "quick look" regarding alleged antitrust law violations. *See National Collegiate Athletic Assoc v. Alston*, 141 S. Ct. 2141, 2155-2157 (2021).

See also Areeda & Hovenkamp, ¶ 1741b, at 174 ("The separate-products requirement is not an invitation to examine the general reasonableness of the bundle.").

4. A finding that two products are "components" or "integrated" does not preclude them from being separate products.

Even if despite the arguments above the District Court could properly find on the pleadings that certifications and MOC are "components" that have been "integrated" by ABR, that does not preclude a finding of separate demand. This is why courts turn to the *Jefferson Parish* and *Viamedia* indicia in the first instance to determine, among other things, if the products have been sold separately in the past by market participants (not just by the defendant), if they are sold separately currently, and whether consumers view them as separate.

Moreover, multiple courts, including the Supreme Court, have recognized that "components" of a package can still be separate products. *Jefferson Parish*, 466 U.S. at 22 ("Unquestionably, the anesthesiological component of the package offered by the hospital could be provided separately."); *see also*, *id.* at 40 n.10 ("[t]hese cases

indicate that consideration of whether a buyer might prefer to purchase one component without the other is one of the factors in tying analysis and, more generally, that economic analysis rather than mere conventional separability into different markets should determine whether one or two products are involved in the alleged tie"); *PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811, 816-17 (6th Cir. 1997) ("What does aid our analysis in this case is the evidence in the record suggesting that it would be efficient for a firm to provide some component parts separate from circuit-board repair services"; whether there is sufficient demand for "component parts" "such that it would be efficient for a firm to provide them separately" deemed a question of fact that the district court erroneously resolved on summary judgment).

Similarly, products that have been "integrated" can still be separate products. Indeed, the very concept of "integration" presumes joining two separate products, as courts have recognized. *See e.g. Jefferson Parish*, 466 U.S. at 19 (rejecting defendant's argument that it was "merely providing a functionally integrated package of services"); *United States v. Microsoft Corp.*, 253 F.3d 34, 89 (D.C. Cir. 2001) ("[W]e do not find that Microsoft's integration [of computer operating systems and

internet browsers] is welfare-enhancing or that it should be absolved of tying liability"); *Service & Training*, 963 F.2d at 684-85 (reversing district court and rejecting its reasoning that since customers' only legitimate purpose for using defendant's diagnostic software was to repair computers, defendant was providing only a single "integrated and unified product -- computer servicing" rather than a package of service and diagnostic software); *United States v. Microsoft Corp.*, 147 F.3d 935, 949 (D.C. Cir. 1998) ("[t]he concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together").

In sum, that ABR has manipulated its own CPD product to function in a complementary way with certifications, even if considered innovative, "does not, in and of itself," convert certifications and MOC into a single product. Areeda & Hovenkamp,¶ 1746, at 231 ("[I]nnovation need not always take the form of building a better mousetrap. Instead, the "innovation" may be an anticompetitive tie that no one has tried before.").

The District Court's "components" and "integration" conclusions only beg the separate demand and distinct product questions, rather than answer them.

B. The District Court's "Phantom Product" Conclusion Contradicts FAC Allegations and Misapplies the Concept.

The District Court reasoned that even if certifications and MOC are separate products, Plaintiff has not alleged "a risk of foreclosure of competition in the tied product market" because (1) no one *can* provide certification in ABR's name but ABR and nobody but ABR can "maintain" ABR certification; and (2) it interpreted the FAC as alleging "that no radiologists would purchase MOC at all if it were not tied to certification,"[19] and thus found MOC to be a "phantom product." Both conclusions are erroneous.

First, as already discussed, the concept that MOC "maintains" certification is a contrivance. *See supra* 10-13, 13-14, 49-50, 55-56 (discussing prior "recertification" products and "grandfathers"). Second, the District Court misapplied the concept of "phantom products," which

[19] Plaintiff, of course, alleged no such thing. For example, some "grandfathers" purchase MOC even though it is not tied to certifications. (¶¶ 158-60).

it derived from Areeda & Hovenkamp, ¶ 1750a. According to Areeda and Hovenkamp, "[t]he second product is a phantom product when no buyer of the first item would want the second because it adds no value to the first." *Id.*, p. 274. *See also* Areeda & Hovenkamp, ¶ 1724b, p. 330 (discussing "completely unwanted product," which the plaintiff "would not have purchased from anyone"). This is not at all what Plaintiff alleges.

CPD products clearly have value on their own (separate from certifications), in that they keep current the knowledge and skill of radiologists. (¶¶ 4, 94-100, 106, 300). MOC is a CPD product (albeit an inferior one). (¶¶ 4, 147, 264, 286-87, 330). The long history of CPD products proves they are not in any sense "phantom." (¶¶ 94-129). These facts that must be taken as true and preclude a finding that MOC is a "phantom product." *See Thompson*, 934 F.2d at 1575-76 (rejecting defendant's "phantom product" argument where at least one competitor sold the tied product separately from the tied product).

The District Court also relied on *Reifert* in finding MOC to be a "phantom product." A-15 (citing *Reifert*, 450 F.3d at 315-18). *Reifert* is a summary judgment case where the evidence showed there were no

other sellers of the tied product and that the plaintiff did not seek to buy the tied product from any other seller. Here, others offer CPD products and radiologists prefer to purchase their products. [20]

C. The District Court's Reliance on Summary Judgment and Other Member Board Cases Was Misplaced.

The District Court relied almost entirely on cases decided on summary judgment and a full factual record to support its inferences, conclusions, and factual findings about certifications and MOC. This alone shows that the issues encompassing separate demand and distinct products are factual in nature and that discovery and adducing

[20] Related to its discussion of MOC as a "phantom product," the District Court also queried in a single, short paragraph at the end of its opinion whether ABR's tie could be of any consequence if it did not give ABR a "second monopoly." A-15. The District Court's question misses the point for several reasons. First, "second monopoly" is an affirmative defense not properly considered on a Rule 12(b)(6) motion to dismiss. Second, even assuming the argument could have merit, whether forcing radiologists to buy MOC will result in a "second monopoly" for ABR is a question of fact not susceptible of resolution on the pleadings; at best, the District Court's reasoning is based on a series of unwarranted inferences. And third, the District Court's inquiry appears to presume that only a competitor is injured by, and can assert, a tying claim. But it is clear 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).

evidence, much of which is in the possession of ABR and related third parties, is essential to a fair and credible outcome.

In addition to *Klamath*, discussed *infra*, the District Court also relied on *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir. 1984); *SubSolutions, Inc. v. Doctor's Assocs.*, 436 F. Supp. 2d 348 (D. Conn. 2006); and *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561 (N.D. Cal. 1984). Tellingly, an earlier ruling in *SubSolutions* denied a motion to dismiss a tying claim based on allegations similar to those made here, which were deemed to raise issues of fact; the decision also criticized *Casey*'s reasoning that "demand [for the tied product] is generated wholly by" the tying product, as a prohibited functional relation analysis approach. *SubSolutions, Inc. v. Doctor's Associates, Inc.*, 62 F. Supp. 2d 616, 622-27, and n.8 (D. Conn. 1999).

The District Court also relied on Rule 12(b)(6) dismissal rulings in two other cases involving different Member Boards that similarly improperly relied on summary judgment cases in support of those courts' own inferences, conclusions, and factual findings about certifications and MOC. In doing so, the District Court simply added another story to the house of cards denying doctors their day in court.

See, *Lazarou v. Am. Bd. of Psychiatry & Neuorology,* No. 19-cv-01614, 2020 U.S. Dist. LEXIS 167054 (N.D. Ill. Sept. 11, 2020; *Kenney v. Am. Bd. of Internal Med.*, 412 F. Supp. 3d 530 (E.D. Pa. 2019). [21]

The reliance on *Lazarou* is especially problematic, as the District Court adopted that court's rationale that, "the circumstances taken as a whole point toward one product rather than two." A-14. Respectfully, a district court's role on a Rule 12(b)(6) motion is not to weigh "circumstances" and decide where they may or may not "point." Here, it is undisputed that several of the *Jefferson Parish* and *Viamedia* indicia of separate demand and distinct products are well-pled. Even assuming shortcomings in the pleadings related to one or more of the other factors, which Plaintiff rejects, not every indicia must be proved to establish separate products.

The District Court acknowledged its heavy reliance on cases decided on summary judgment. A-14. It excused itself, however, by citing to a

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[21] Plaintiff in *Lazarou* has filed an amended complaint and defendant's Rule 12(b)(6) motion is pending. *Kenney* was affirmed by the Third Circuit in an opinion designated "Not Precedential." *Kenney v. Am. Bd. of Internal Med.*, No. 20-1007, 2021 U.S. App. LEXIS 5595 (3d Cir. Feb. 25, 2021). The Third Circuit did not even acknowledge this Court's *Viamedia* decision, with which it is in conflict regarding the separate demand and distinct products analysis.

single supposed gap in Plaintiff's allegations: the lack of "any genuine history of separate sales of the allegedly separate products." *Id*. But as pointed out repeatedly however, Plaintiff has made highly detailed and well-pled factual allegations about the long history of the separate sales of certifications and CPD products, including the voluntary CPD products conceived by and sold by ABR and other Member Boards before MOC, allegations the District Court repeatedly skipped over.

III. Upon Reinstatement of the Sherman Act Claims, Plaintiff's Unjust Enrichment Claim Also Should Be Reinstated.

After dismissing the Sherman Act claims, the only federal claims alleged, the District Court declined to exercise supplemental jurisdiction over Plaintiff's claim for unjust enrichment. A-16. Upon reinstatement of the Sherman Act claims, the unjust enrichment claim should be reinstated as well.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully asks this Court to reverse the dismissal of his First Amended Class Action Complaint.

Respectfully submitted,

Sadhish K. Siva, *et al.*,

Dated: October 29, 2021 By: /s/ C. Philip Curley
One of His Attorneys

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

I, C. Philip Curley, counsel for Plaintiff-Appellant, certifies that this brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared in Century Schoolbook font in Microsoft Word for Microsoft 365 MSO (Version 2110 Build 16.0.14527.20008) software and has 13,167 words, including footnotes, according to the Microsoft Word count.

Dated: October 29, 2021

/s/ C. Philip Curley
C. Philip Curley

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

I, C. Philip Curley, counsel for Plaintiff-Appellant, certifies that the Required Short Appendix and Separate Appendix of Plaintiff-Appellant contain and include all materials required by Cir. R. 30(a) and (b) of the United States Court of Appeals for the Seventh Circuit. Dated: October 29, 2021

/s/ C. Philip Curley
C. Philip Curley

CERTIFICATE OF SERVICE

C. Philip Curley, counsel for Plaintiff-Appellant, certifies that on October 29, 2021, he caused to be electronically filed with the Clerk of the United States Court of Appeals for the Seventh Circuit **Brief and Required Short Appendix of Plaintiff-Appellant**, using the Court's CM/ECF system, which shall send notification of this filing to all counsel of record.

/s/ C. Philip Curley
C. Philip Curley

No. 21-2334

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Sadhish K. Siva, *et al.*

Plaintiff-Appellant,

v.

American Board of Radiology,

Defendant-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
Case No. 1:19-cv-01407
The Honorable Judge Jorge L. Alonso

REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT

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Oral Argument Requested

Index to Short Appendix

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.3
Eastern Division

Sadhish K. Siva

Plaintiff,

v.

Case No.: 1:19−cv−01407
Honorable Jorge L. Alonso

American Board of Radiology

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, June 25, 2021:

MINUTE entry before the Honorable Jorge L. Alonso: On 1/8/21, this Court dismissed plaintiff's First Amended Complaint, with leave to file an amended complaint by 2/5/21. That deadline has long since passed, and plaintiff never filed any amended complaint. Accordingly, this case is dismissed without prejudice, on the understanding that plaintiff no longer wishes to pursue the matter in this Court. Civil case terminated. Notice mailed by Judge's staff (lf,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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

SADHISH K. SIVA,	)	
	)	
Plaintiff,	)	**Case No. 19 C 1407**
	)	
v.	)	
	)	**Judge Jorge L. Alonso**
AMERICAN BOARD OF RADIOLOGY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION & ORDER

Plaintiff, Sadhish K. Siva, brings this antitrust action against defendant, the American Board of Radiology ("ABR"), contending that the maintenance of certification ("MOC") requirements that ABR imposes on certified radiologists violate the Sherman Antitrust Act, 15 U.S.C. § 1. The Court granted ABR's motion to dismiss plaintiff's original complaint for failure to state a claim. (*See* Nov. 19, 2019 Mem. Op. & Order, ECF No. 48.) Plaintiff has filed an amended complaint, and defendant again moves to dismiss. For the following reasons, the motion is granted.

BACKGROUND

The Court summarizes plaintiff's allegations below, but it also assumes familiarity with its earlier opinion in this case, *see Siva v. Am. Bd. of Radiology*, 418 F. Supp. 3d 264, 269 (N.D. Ill. 2019). Plaintiff has expanded his allegations, but the core of his complaint is the same.

ABR is one of twenty-four member boards making up the American Board of Medical Specialties ("ABMS"). The ABMS member boards certify physicians in thirty-nine specialties and

eighty-six subspecialties. Plaintiff is a physician who is licensed to practice medicine and has been certified by ABR in diagnostic radiology since 2003.

Licensure is different from certification. Physicians are licensed by medical boards of the individual states, generally after they receive a medical degree and pass a three-step licensing examination. Most states require physicians to complete continuing medical education ("CME") courses periodically in order to maintain their license. Licensure is legally mandatory for any practicing physician.

Physicians are certified, in contrast, not by a state licensing authority but by nonprofit specialty boards such as ABR. More than a hundred years ago, at a time when medical education was not yet regulated or standardized, physicians began to form specialty boards to "define and differentiate between the subject matters of medical specialties, ensure adequate postgraduate medical education and training in their areas of specialty, and then test those candidates who wished to practice in the relevant specialized area of medical practice." (1st Am. Compl. ¶ 27, ECF No. 55.) ABR formed and began selling certifications in radiology specialties and subspecialties in 1934. Unlike licensure, board certification is technically voluntary, but, as a practical matter, according to plaintiff, it is all but mandatory. This is because hospitals, medical employers, insurers, and third-party payors require physicians to be certified before they will affiliate with, employ, insure, or reimburse physicians for providing medical services.

To obtain certification, a radiologist must pay for the opportunity to take and pass a uniform ABR-administered examination. For most of ABR's history, the certification ABR awarded following this examination was lifelong. This was the case when plaintiff began his residency in radiology in 1999.

In the second year of plaintiff's residency, ABR announced that it would eliminate lifetime certificates and issue its examinees only time-limited ten-year certificates, which it now calls "initial certification." In 2002, in conjunction with the new ten-year certificates, ABR imposed a "maintenance of certification" ("MOC") program, which requires ABR-certified radiologists to maintain their certification by completing continuing professional development ("CPD") activities. The MOC program has taken various forms, but in its current form, it consists of CME and "self-assessment" CME ("SA-CME") credits, ABR-administered testing known as "Online Longitudinal Assessment," and practice improvement projects. Plaintiff alleges that MOC has generated millions of dollars in revenue for ABR over the years, but in none of its various incarnations has it been demonstrably useful or effective in evaluating, training, or educating physicians, nor does it effectively serve its stated purpose of "reinforc[ing] the process of lifelong learning," particularly to the extent that MOC overlaps with—and is redundant of—state CME requirements. (*Id.* ¶ 169; *see id.* at ¶ 164.) Under a grandfather rule, radiologists who initially became certified prior to the imposition of the MOC program are not required to participate in MOC. For all other radiologists, MOC is mandatory, or ABR will revoke their certification.

In Count I of his amended complaint, plaintiff claims that ABR has tied its initial certification product to its newer maintenance of certification product and that the tying arrangement is *per se* illegal under section 1 of the Sherman Antitrust Act. According to plaintiff, ABR forces radiologists to purchase MOC to their detriment and the detriment of competing CPD providers such as the National Board of Physicians and Surgeons ("NBPAS"). In Count II, plaintiff asserts the same claim under the rule of reason, alleging that tying MOC to initial certification causes anticompetitive harm without providing procompetitive benefits.[1] Finally, in

[1] Plaintiff has not reasserted the monopolization claim under section 2 of the Sherman Act that he asserted in Count II of his original complaint.

Count III, plaintiff asserts a state-law claim of unjust enrichment, alleging that ABR has wrongfully retained the benefit of funds paid for MOC services that served no useful purpose to the physicians who purchased them. Plaintiff seeks damages and to enjoin ABR from revoking the certification of radiologists who do not complete MOC requirements.

LEGAL STANDARDS

"A motion under Federal Rule of Civil Procedure 12(b)(6) tests whether the complaint states a claim on which relief may be granted." *Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir. 2012). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must "'give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Under federal notice-pleading standards, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. Stated differently, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). Allegations that are as consistent with lawful conduct as they are with unlawful conduct are not sufficient; rather, plaintiffs must include allegations that "nudg[e] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "In reviewing the sufficiency of a complaint under the plausibility standard, [courts must] accept the well-pleaded facts in the complaint as true, but [they] 'need[ ] not accept as true legal conclusions, or threadbare

recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665-66 (7th Cir. 2013) (quoting *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009)).

Plaintiff seeks relief via the Clayton Act, 15 U.S.C. §§ 15, 26, which provides a private right of action for treble damages to any person "injured in his business or property by reason of anything forbidden in the antitrust laws[.]" 15 U.S.C. § 15. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . " 15 U.S.C. § 1. This language has long been interpreted to "outlaw only *unreasonable* restraints" of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62 (1992) (quoting *N. Pac. R. Co. v. United States*, 356 U.S. 1, 5-6 (1958)). An alleged tying arrangement is *per se* unlawful under the Sherman Act if "(1) a tie exists between two separate products; (2) the tying seller [ABR] has sufficient economic power in the tying product market to restrain free competition in the tied product market [the MOC or CPD market]; (3) the tie affects a not-insubstantial amount of interstate commerce in the tied product [MOC or CPD services]; and (4) the tying seller [ABR] has some economic interest in the sales of the tied product [MOC or CPD services]." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316-17 (7th Cir. 2006). The Seventh Circuit has suggested that "a plaintiff's failure to state a *per se* illegal antitrust claim does not necessarily prove fatal to his case if he can state a claim under the rule of reason." *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985) (citing *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 499-500 (1969)); *see DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1337 (Fed. Cir. 2014)

(applying Seventh Circuit law and citing *Reifert* and *Carl Sandburg*). However, under either the *per se* rule or the rule of reason, the plaintiff must establish that a tie exists between two separate products. *See* Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1742 (4th and 5th Editions) (hereafter, "Areeda & Hovenkamp") (suggesting that the same standard for the separate-products determination should generally apply under the *per se* rule and the rule of reason); *see also L.A.P.D., Inc. v. Gen. Elec. Corp.*, No. 94 C 664, 1994 WL 424120, at *3-4 (N.D. Ill. Aug. 11, 1994) (including separate products element in both *per se* and rule of reason analysis) (citing *Kodak*, 504 U.S. at 462 (applying *per se* rule), and *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 39 (1984) (O'Connor, J., concurring) (discussing rule of reason alternative), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006)), *aff'd on non-antitrust grounds*, 132 F.3d 402 (7th Cir. 1997).

"Almost every product can be viewed as a package of component products[,] . . . 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). Whether two components are separate products "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. 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. *Kodak*, 504 U.S. at 462. "Relevant evidence of separate and distinct consumer demand for the tying product and the tied product is, *inter alia*, the history of the products being, or not being, sold separately, or the sale of the products separately in similar markets." *Kaufman v. Time Warner*, 836 F.3d 137, 142 (2d Cir. 2016) (citing *Kodak*, 504 U.S. at 462, and *United States v. Microsoft Corp.*, 253 F.3d 34, 87-88 (D.C. Cir. 2001)).

ANALYSIS

This Court dismissed plaintiff's original complaint for failure to state a claim. In support of its present motion to dismiss, ABR argues that plaintiff again fails to state a tying claim because he does not plausibly allege that initial certification and MOC are two separate products, among other deficiencies.

In response, plaintiff relies on some of the same indicia of separateness that he cited in the last round of briefing, which include factors such as ABR's history of selling initial certification without MOC; charging separately for each item, *see Jefferson Parish*, 466 U.S. at 22 (anesthesia services billed separately from hospital services, supporting conclusion that they are separate products); a would-be competitor, NBPAS, selling MOC without selling initial certification; and the grandfather rule under which ABR does not require physicians certified before 2002 to purchase MOC. He also responds by pointing to certain new allegations suggesting that initial certification and MOC have different purposes and are therefore separate products. Specifically, plaintiff asserts that MOC is a kind of CPD product and that CPD products, which have existed since long before MOC came into existence, focus on encouraging lifelong learning, not assessing or evaluating a radiologist's competency. Certification, on the other hand, has been considered nothing more than an early-career event, designed to ensure that radiologists were adequately trained; that is, it was always meant to be only a "one-time, snapshot assessment" of a radiologist's education and training following medical school and residency.

Much of the Court's reasoning in its previous opinion still applies to the amended complaint. Most critically, notwithstanding certain vague allegations that another ABMS member board (not ABR) sold an unsuccessful CPD product for a period of time in the 1970s and 1980s, plaintiff has still not alleged that ABR ever actually sold initial certification and MOC separately. Rather, as before, the substance of plaintiff's allegations is that ABR used to sell one-time, lifelong

certification without any MOC component, and now it has altered its certification product to consist of two components: (1) initial, time-limited certification, and (2) MOC.[2] The Court previously rejected the argument that these allegations amount to a history of separate sales from which an inference of separate demand could be drawn, *Siva*, 418 F. Supp. 3d at 272, and it sees the issue no differently now. To allege that radiologists began to buy MOC alongside initial certification after ABR imposed the MOC requirement, but they bought certification without MOC while ABR imposed no MOC requirement, suggests not that there is somehow separate demand for certification and MOC but, to the contrary, that "'the character of the demand for the initial certification and the MOC is the same: certification from'" ABR. *Id.* at 273 (quoting *Kenney v. Am. Bd. of Internal Med.*, 412 F. Supp. 3d 530, 545 (E.D. Pa. 2019)); *see Lazarou v. Am. Bd. of Psychiatry & Neurology*, No. 19-CV-01614, 2020 WL 5518476, at *7 (N.D. Ill. Sept. 11, 2020) (explaining that another ABMS member board with a similar sales history "never sold initial certifications and MOC separately" while its certifications remained lifelong because "neither initial certifications (in the sense of time-limited certifications) nor MOC existed" then).

As this Court previously explained, "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." *Siva*, 418 F. Supp. 3d at 273 (quoting *Jack Walters*, 737 F.2d at 703). But the demand for maintenance of certification is "'generated wholly'" by the demand for certification generally,

[2] Plaintiff insists in his briefs that he has not alleged that MOC is a "component" of certification; rather, plaintiff argues, he has specifically alleged that MOC is a separate product, and any suggestion that it is a component is a denial of his allegations, which is inappropriate at the pleading stage. The Court disagrees. Whether MOC is a component of certification or a separate product from certification is a legal conclusion, and the Court is not required to assume that the legal conclusions a plaintiff articulates in a complaint are correct. *See Alam*, 709 F.3d at 665-66 (citing *Brooks*, 578 F.3d at 581). The Court's task is to determine, setting aside legal conclusions, whether plaintiff has pleaded sufficient factual matter, assumed true, to permit a court to draw a plausible inference that MOC and initial certification are separate products. As the Court explains in this Opinion, given the substance of plaintiff's own factual allegations of the nature of ABR's certification product, no such inference is plausible.

given that MOC "'may be purchased only by'" ABR-certified radiologists who "'use it solely as an integral part of'" the ABR-certification "'method.'" *Siva*, 418 F. Supp. 3d at 275 (quoting *Casey v. Diet Ctr., Inc.*, 590 F. Supp. 1561, 1564 (N.D. Cal. 1984)). Thus, "'[t]he competitive purposes of the rule against tying are not served by fractionating' ABR's method into 'separate components'" of initial certification and MOC, "as there is no 'market distinct from that of [certification] itself' for those unbundled components." *Siva*, 418 F. Supp. 3d at 274 (quoting *Casey*, 590 F. Supp. at 1566); *see also Subsolutions, Inc. v. Doctor's Assocs., Inc.*, 436 F. Supp. 2d 348, 354 (D. Conn. 2006) (relying on *Casey* to conclude that the Subway restaurant franchise and Subway's required point-of-sale system are not separate products). Characterizing MOC as a CPD product does not change any of this reasoning.

This Court previously relied heavily on *Kenney v. American Board of Internal Medicine*, 412 F. Supp. 3d at 544-47, a virtually identical case to this one. Despite plaintiff's expanded allegations, *Kenney* is no less persuasive now. Further, since then, another court in this district has issued a similar decision in yet another virtually identical case, *Lazarou v. American Board of Psychiatry & Neurology*, 2020 WL 5518476, at *8-11. *Lazarou* is equally persuasive.

Plaintiff argues that the fact that ABR bills separately for MOC and initial certification demonstrates that they are separate products. The Court did not address this issue head-on in its prior opinion, but the courts in *Kenney*, 412 F. Supp. 3d at 547, and *Lazarou*, 2020 WL 55184762020, at *8, did, and they specifically rejected the plaintiffs' argument. These courts found the plaintiffs' cases—*Jefferson Parish*, 466 U.S. at 22, and *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1575 (11th Cir. 1991)—to be distinguishable, as they involved stronger historical evidence of the allegedly tied products being sold separately. Plaintiff cites the same cases here, and this Court agrees with *Kenney* and *Lazarou* that they are inapposite. The same is

true of *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1547 (10th Cir. 1995), and *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 684 (4th Cir. 1992), which are similarly distinguishable.[3]

While separate billing may, in some circumstances, indicate separate products, it need not always do so. For example, defendant cites *Klamath-Lake Pharmacy Association v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1290 (9th Cir. 1983), in which a defendant allegedly tied a pharmacy benefit plan and the plan's drug purchase restrictions. The plan's purchasers paid for the plan and then separately made copayments with each drug purchase. The court explained that this fact did not establish that the plan and the drug purchase restrictions were separate products any more than it would if a gardener offered to maintain a customer's garden but required the customer to supply the fertilizer. *Id.*[4] In either case, the seller is not tying products together but instead requiring the buyer to pay a portion of the costs of a single product—whether a pharmacy benefit plan or garden maintenance—as he goes. The separate billing for MOC is similar: ABR requires certified radiologists to pay for the maintenance portion of the certification product as they go, but in the totality of the circumstances, that does not suffice to make the maintenance component a separate product. Rather, "the circumstances taken as a whole point toward one product rather than two." *Lazarou*, 2020 WL 5518476, at *8.

[3] In a similar vein, plaintiff relies on the Seventh Circuit's recent decision in *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 470 (7th Cir. 2020), but that section 2 monopolization case is distinguishable for a number of reasons, including that there was evidence that the defendant sold the products in question separately in certain markets. *See id.* (citing evidence of "other [regions] where [the defendant] sells Interconnect services separately."). Here, plaintiff has not made plausible allegations to the same effect.

[4] Plaintiff argues in sur-reply that Areeda and Hovenkamp criticized the reasoning of *Klamath*, *see* Areeda & Hovenkamp ¶ 1745g4, but plaintiff overreads this criticism, which was not directed at the court's approach to the issue of separate billing, specifically, but at the court's approach to the bundling of health insurance and medical goods more generally. That aspect of the decision is not relevant here.

The main difference between the original complaint and the amended complaint is that plaintiff alleges that MOC and initial certification are separate products because MOC is a kind of CPD product, and a separate market for CPD products has existed since long before ABR began to impose an MOC requirement. But alleging that MOC falls under the broad umbrella of CPD products does not separate it from ABR's core certification product because it does not account for the fact that MOC has been essentially integrated into the certification product in a way that no other CPD product has. *See Subsolutions*, 436 F. Supp. 2d at 354; *see also Casey*, 590 F. Supp. at 1564. Plaintiff ignores that the CPD program that makes up MOC is "provider-specific," *i.e.*, specific to ABR, in order to be useful to consumers in maintaining an ABR certification. *Kaufman*, 836 F.3d at 144-45 (cable television boxes are not a separate product from cable television services because, unlike cable modems, which "transmit all available content," cable television boxes must be "designed to receive the signal from a particular provider, which requires the provider's cooperation"); *see Kenney*, 412 F. Supp. 3d at 544-45 (relying on *Kaufman*), *Subsolutions*, 436 F. Supp. 2d at 354 (unlike "largely fungible supplies," point-of-sale system tailored to franchisor's business was not a separate product from the franchise). Just as a cable box that cannot interpret a particular cable provider's signals has no value to a purchaser of that cable provider's cable television services, a maintenance-of-certification program that lacks the imprimatur of the certifying entity has no value to any physician seeking to demonstrate that he has obtained and maintained certification. *See Kaufman*, 836 F.3d at 144-45; *see also Siva*, 418 F. Supp. 3d at 273-75; *cf. Torres v. Illinois Bell Tel. Co.*, No. 86 C 1718, 1987 WL 15389, at *2 (N.D. Ill. Aug. 3, 1987) (maintenance of switchboard equipment was not a separate product from lease of switchboard equipment but a condition of the agreement to use the leased equipment). Plaintiff has not plausibly alleged that that there is separate demand for MOC and initial certification, *i.e.*,

that a physician would want MOC separately from initial certification; to the contrary, it appears from his allegations that it is precisely the fact that the two components come from the same seller (ABR) that makes them desirable. Plaintiff may characterize MOC as a kind of CPD product, but the fact remains that plaintiff alleges that radiologists buy it to maintain ABR certification, and therefore it is not "fungible" with CPD products that do not serve that purpose. *Subsolutions*, 436 F. Supp. 2d at 354; *see Lazarou*, 2020 WL 5518476, at *8 (explaining that NBPAS's purportedly competing MOC product does not qualify as "the tied product" because it does not "'maintain' the same certification"). Thus, a "fundamental misconception about the nature of the entire certification product offered by [ABR] undercuts [plaintiff's] arguments" again. *See Kenney*, 412 F. Supp. 3d at 545.[5]

Plaintiff alleges that there is no evidence that MOC adds any value to the initial certification *i.e.*, it does not aid in signaling that a radiologist is well-trained and well-qualified, and he argues that because MOC does not effectively serve the purposes of initial certification, it must be a separate product. But this argument seems to derive from the function of the components rather

[5] Even if the Court indulges plaintiff by assuming that the MOC component should be considered a CPD product like any other that was "separately available on the market before the innovation" of bundling it with initial certification, that does not, by itself, make it a separate product now. "[J]ust about every new product" is made up of components that were previously available separately. Areeda & Hovenkamp ¶ 1746a. The separate availability of the components only suggests a tie if buyers were already "putting the items together to operate in the same manner as the defendant's bundle." *Id.* That is not this case because, by redesigning its certification product to include an initial examination component and subsequent MOC component, ABR bundled initial certification and MOC to "operate together in a previously unattempted fashion." *Id.* While it may be true that physicians have always purchased CPD products, plaintiff himself alleges that CPD products serve a different purpose from certification and had nothing to do with it until the maintenance of certification component was added, so consumers were not purchasing the components to operate together as they do now. This makes the new bundle not a tie but a single, new product composed of separate, previously available components. While the bundle is no longer new, having existed in some form since 2002, this rationale "would seem to last as long as the basic requirement can be met that the bundle works better when bundled by the defendant than by intermediaries or end users." *Id.* ¶ 1746d. As the Court has explained above, the certification bundle only works, to the extent it works at all, when bundled by ABR.

than the character of the demand for them, and it therefore does not comport with the *Jefferson Parish* test.[6]

It is true, as plaintiff argues, that many of the cases on which both parties rely throughout their briefs were decided, unlike this case, at the summary judgment stage or later, after the parties had the opportunity to develop evidence in discovery. *See, e.g.*, *Multistate Legal Studies*, 63 F.3d at 1547. But despite the difference in procedural posture, these cases help to illustrate what a Sherman Act plaintiff must prove to prevail. Plaintiff's detailed allegations in a complaint of over seventy pages do not contain or adumbrate facts that, if developed and proven, would establish certain indicia of separateness, such as any genuine history of separate sales of the allegedly separate products. Without such evidence, the other indicia of separateness that plaintiff has cited do not suffice to establish the existence of separate products. Again, based on plaintiff's own allegations, "the circumstances taken as a whole point toward one product rather than two," *Lazarou*, 2020 WL 5518476, at *8, and plaintiff has not plausibly alleged facts that, assumed true, would permit a reasonable factfinder to determine otherwise.

On top of all of this, even if the Court assumes that initial certification and MOC are separate products, the Court still fails to see in what sense the tying arrangement alleged here poses a risk of foreclosure of competition in the tied market. "The traditional antitrust concern with [a tying arrangement] is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the

[6] Additionally, Areeda and Hovenkamp warn that antitrust scrutiny of new bundles by courts, which "lack the technical expertise to judge product design," would likely "result in errors that would deter socially desirable innovations and variations in product design," so courts in such circumstances "should find a single product." *Id.* ¶ 1746b; *see Info. Res., Inc. v. A.C. Nielsen Co.*, 615 F. Supp. 125, 129-30 (N.D. Ill. 1984) (finding a single product where the alleged tie was the result of a "new technique" added to the defendant's existing data-gathering product in an "attempt to improve" it and reasoning that the product "cannot be broken down into each miniscule type of analysis but rather must be looked at as an overall service").

result will be a second monopoly." *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 592 (7th Cir. 2008); *see also Kaufman*, 836 F.3d at 142, *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 795 (1st Cir. 1988) (Breyer, J.). The Court has already rejected the theory that NBPAS is a would-be competitor foreclosed from offering MOC because "no one *can* provide certification in ABR's name but ABR," *see Siva*, 418 F. Supp. 3d at 276. This Court continues to believe, as the court in *Lazarou* put it, that NBPAS's certification and MOC "do not 'maintain' the same certification and thus NBPAS does not actually offer the tied product," so there is no foreclosure. *Lazarou*, 2020 WL 5518476, at *8 (citing *Kenney*, 412 F. Supp. 3d at 546-47). Plaintiff has also alleged that no radiologists would purchase MOC at all if it were not tied to initial certification; but if so, that makes MOC a "phantom product" for purposes of the tying claim, which therefore "can . . . be dismissed on the ground that the case involves no relevant foreclosure: because the second product is unwanted and has no value, the forced purchase of it cannot foreclose other suppliers of the second product." Areeda & Hovenkamp ¶ 1750a & n.1; *see id.* ¶ 1724 (citing *Reifert*, 450 F.3d at 315-18); *Siva*, 418 F. Supp. 3d at 275, *Lazarou*, 2020 WL 5518476, at *9-10.

To the extent that plaintiff's theory is that MOC is a CPD product that has value as such, the Court still fails to see any relevant foreclosure because plaintiff has alleged that ABR incorporates CME products provided by other CPD providers into its MOC program. In fact, according to plaintiff, certain MOC requirements are redundant of CME requirements for state licensing and can be fulfilled by the same CPD products provided by third parties. If so, there is no danger that the tie alleged here will give ABR a "second monopoly" in CPD products; to the contrary, plaintiff suggests that radiologists can continue using some of the same CPD products they have always used for MOC credit.

There is little else to say that would not belabor the point or reiterate the reasoning of the Court's earlier opinion, most of which is equally applicable to the present motion to dismiss. The above suffices to demonstrate that plaintiff fails to state a tying claim under section 1 of the Sherman Act. As for the unjust enrichment claim, it arises under Illinois law, and, having concluded that plaintiff fails to state a federal claim, the Court declines to exercise supplemental jurisdiction over his state claim, just as it did in its prior decision in this case. *See Siva*, 418 F. Supp. 3d at 279.

For these reasons, plaintiff's amended complaint is dismissed. Although the Court doubts at this point that plaintiff will be able amend the complaint to state a claim, it cannot say so with certainty, so the dismissal is without prejudice and with leave to amend. Alternatively, plaintiff may elect to stand on the amended complaint and ask the Court to enter a final and appealable judgment. *See Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc); *see generally N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1271-72 (D.C. Cir. 2020) (Millett, J., dissenting) (citing *Otis* and other cases addressing circumstances under which dismissal with leave to amend becomes appealable).

CONCLUSION

Defendant's motion to dismiss [56] is granted. Plaintiff's First Amended Complaint [55] is dismissed without prejudice. Plaintiff shall file any amended complaint by 2/5/21.

SO ORDERED. **ENTERED: January 8, 2021**

HON. JORGE ALONSO
United States District Judge