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

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.,	)	
Plaintiff,	)	**Civil Action**
vs.	)	**No. 1:14-CV-02705-ARW**
AMERICAN BOARD OF MEDICAL SPECIALTIES,	)	
Defendant.	)	

BRIEF OF PLAINTIFF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, TO STRIKE PLAINTIFF'S CLASS ACTION ALLEGATIONS

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TO THE HONORABLE ANDREA R. WOOD:

Plaintiff Association of American Physicians & Surgeons, Inc. ("AAPS" or "Plaintiff"), by and through its counsel, hereby opposes the motion to dismiss and, in the alternative, to strike Plaintiff's class action allegations [Dkt. 51] filed by Defendant American Board of Medical Specialties ("ABMS" or "Defendant") against Plaintiff's Amended Complaint With Class Action ("Amended Complaint"):

INTRODUCTION

Plaintiff AAPS's Amended Complaint [Dkt. 49] fully satisfies the deficiencies in the original Complaint, by identifying multiple instances of collusion by Defendant ABMS with health insurance companies and hospitals in imposing its "maintenance of certification" (MOC) program. For example, Plaintiff's new allegations include:

> Defendant ABMS publicly admits that it encouraged and obtained a commitment by the Blue Cross and Blue Shield Association ("BCBSA") to require physicians to purchase and participate in ABMS MOC® as a condition of physicians being in-network with health insurance plans.

(Am. Compl. ¶ 19)[1] Plaintiff also alleges that Defendant ABMS conspires and colludes with hospitals (*id.* ¶¶ 16-17), and how 80% of hospitals and most insurance companies are excluding physicians based on this collusion. (*Id.* ¶¶ 24, 31)

Defendant ABMS, in moving to dismiss, asserts the same legal arguments through the same attorney that were rejected by the federal district court in New Jersey in a similar lawsuit relating to certification of osteopathic physicians (D.O.'s). *Talone v. Am. Osteopathic Ass'n*, No. 1:16-cv-04644-NLH-JS, 2017 U.S. Dist. LEXIS 89395 (D.N.J. June 12, 2017). Without citing that precedent in its brief, let alone distinguish it,

[1] References herein to Plaintiff's Amended Complaint with Class Action [Dkt. 49] are in the form "Am. Compl. __".

ABMS seeks a different result here, but its motion should be denied.

Reflecting the strong public policy against Defendant ABMS's conduct, numerous state legislatures have recently introduced or enacted laws to prohibit the imposition of ABMS's Maintenance of Certification® ("ABMS MOC®") by state medical boards, insurance companies, and/or hospitals. For example, in 2017 Texas enacted by overwhelming majorities a new law concerning insurance companies that:

> a managed care plan issuer may not differentiate between physicians based on a physician's maintenance of certification in regard to:
>
> > (1) paying the physician;
> > (2) reimbursing the physician; or
> > (3) directly or indirectly contracting with the physician to provide services to enrollees.

Tex. Ins. Code § 1461.003. Similarly, Texas has banned reliance on ABMS's maintenance of certification by hospitals:

> the following entities may not differentiate between physicians based on a physician's maintenance of certification:
>
> > (1) a health facility that is licensed under Subtitle B, Title 4, Health and Safety Code, or a mental hospital that is licensed under Chapter 577, Health and Safety Code, if the facility or hospital has an organized medical staff or a process for credentialing physicians; ….

Tex. Occ. Code § 151.0515 (the above statutory provisions were enacted by the Texas 85th Leg., ch. 1121 (S.B. 1148), §§ 1 and 3 respectively, effective January 1, 2018).

Additional States have also enacted legislation to combat the widely recognized harm caused by Defendant ABMS's MOC program. *See, e.g.*, 2016 OK. ALS 40, 2016 OK. Laws 40, 2016 OK. Ch. 40, 2015 OK. SB 1148 (amending 59 O.S. 2011, Section 492 to include the following: "Nothing in the Oklahoma Allopathic Medical and Surgical Licensure and Supervision Act shall be construed as to require a physician to secure a

Maintenance of Certification (MOC) as a condition of licensure, reimbursement, employment or admitting privileges at a hospital in this state."). A similar bill passed the Indiana Senate this year. *See* Indiana SB 208 (2018) (passed 39-9 in the Senate to prohibit certain uses of maintenance of certification). Medical leaders are in accord:

> 5. As summarized in a recent letter by Texas Medical Association President Carlos J. Cardenas, M.D., which was published in the prestigious *Journal of the American Medical Ass'n (JAMA)*:
>
> > [Board certifying societies] are … profit-driven organizations beholden to their own financial interests. The MOC process is too expensive, requires physicians to take too much time away from their patients and families, and, most importantly, lacks sufficient research to document the benefits to patient care. Many physicians say the information studied and tested has little applicability to their day-to-day practice.
>
> *JAMA*, 2018:319(1), 83-84 (multiple supporting references omitted). *See also id.* at 84 (Washington University School of Medicine Professor of Surgery Bradley D. Freeman, M.D., explaining that MOC is an impediment to "enhanc[ing] both quality of care and professional satisfaction").

(Am. Compl. ¶ 5)

Defendant ABMS is not allowed under the Sherman Act to boost its revenue by colluding with other entities to require its product, yet ABMS is doing that. The separate entity American Board of Internal Medicine ("ABIM") sent out an email on or about April 6, 2013, admitting how the "ABMS is requiring more frequent participation in MOC of all board certified physicians." (Am. Compl. ¶ 53) Such coercion by ABMS of other companies, which should be acting independently, is contrary to the Sherman Act.

In addition to the example quoted on the first page above, Defendant ABMS is further colluding with hospitals and insurance companies to require compliance with ABMS MOC®. (Am. Compl. ¶¶ 17-31) AAPS's new allegations include the following:

> 26. The American Hospital Association ("AHA"), a trade association representing nearly all hospitals in the United States, is an ***associate member of Defendant ABMS*** and agrees with it to impose ABMS MOC® on physicians.
>
> 27. In Defendant ABMS's "Portfolio Program™," ABMS explains its campaign to induce hospitals ***to impose the ABMS MOC® product*** as a condition of holding medical staff privileges.

(Am. Compl. ¶¶ 26-27, emphasis added) As a result of ABMS's collusion with hospitals, including ABMS's "combination" with the AHA under the Sherman Act, the vast majority of hospitals require physicians to purchase ABMS MOC® to be on staff:

> 31. Approximately 80% of hospitals now require certification by ABMS as a condition for physicians to be on the medical staff, and outside of Texas and Oklahoma nearly all of those hospitals now require that physicians purchase and spend enormous time on the proprietary product of ABMS MOC® in order to have medical staff privileges.

(Am. Compl. ¶ 31) This resolves the deficiencies in the original Complaint, about which the Court found that "AAPS has not alleged that the MOC program is required by all (or even a significant portion of) hospitals nationwide." [Dkt. 48 at 8] As quoted above, most hospitals require physicians to purchase ABMS MOC® to be on staff.

This Court added that "AAPS has alleged no facts showing that ABMS has the ability to control hospitals nationwide or coerce hospitals to force physicians to participate in the MOC program." *Id.* But price-fixers violate the Sherman Act if they merely collude, without one controlling or coercing the other, and ABMS has violated the Sherman Act by arranging for insurers and hospitals to force physicians to purchase ABMS MOC®. The American Hospital Association is a member of ABMS, which is a Sherman Act "combination" resulting in compelled purchase of ABMS's product.

PROCEDURAL BACKGROUND

On January 16, 2018, Plaintiff AAPS filed its Amended Complaint With Class

Action [Dkt. 49] in compliance with the memorandum opinion of this Court dated December 13, 2017 [Dkt. 48]. This Court had found deficiencies in AAPS's original Complaint with respect to a lack of allegations concerning restraint of trade by ABMS, such as collusion with insurance companies, to support AAPS's claim of a violation of the Sherman Act (Count I), and a lack of allegations of specific misrepresentations to support AAPS's claim for negligent misrepresentation (Count II).

ARGUMENT

Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court must "accept all well-pleaded facts as true and draw reasonable inferences in the plaintiffs' favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

I. AAPS's Antitrust Allegations State a Valid Cause of Action.

A. AAPS Properly Alleges a Restraint of Trade by ABMS.

Plaintiff AAPS properly alleges – and Defendant ABMS has publicly admitted – how ABMS has worked with health insurance companies and hospitals to compel physicians to purchase ABMS MOC®. It is not necessary that ABMS actually "control" health insurance companies or hospitals, just as it is not necessary for two participants to a price-fixing arrangement to have "control" over each other for the arrangement to violate the Sherman Act. It is a violation that ABMS has "colluded" with insurance companies or hospitals to compel physicians to purchase ABMS MOC®. AAPS does not allege that ABMS has forced insurance companies or hospitals to do anything, but rather that ABMS has conspired and colluded with insurance companies and hospitals to force physicians to purchase ABMS's MOC product.

Defendant ABMS restrains trade by its collusion with insurance companies and hospitals, because these arrangements reduce the "output" of physicians by excluding many of them from insurance networks and hospitals, and patients thereby lose access to their physicians. (Am. Compl. ¶¶ 1, 36, 41) As alleged in the Amended Complaint with specific examples, ABMS induces insurance companies and hospitals to require or "tie" ABMS MOC® as a condition of being in-network or on staff. Inducing insurance companies and hospitals to require ABMS MOC® is a restraint of trade because it reduces output. *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 539 n.40 ("restraint of trade … [is] a claim that output has been curtailed or prices enhanced"). In dismissing the original Complaint, the Court cited *Sanjuan v. Am. Bd. of Psychiatry & Neurology*, 40 F.3d 247 (7th Cir. 1994), but that did not involve exclusion of physicians by insurance companies and hospitals. The Amended Complaint, more so than the original Complaint, sets forth in detail the collusion by ABMS with insurers and hospitals. (Am. Compl. ¶¶ 16-32)

Roughly 80% of hospitals require ABMS MOC® outside of Texas and Oklahoma now. (Am. Compl. ¶ 31) In addition, "[m]ost health insurers, particularly in metropolitan areas, require that physicians purchase and comply with Defendant's ABMS MOC® product as a condition of being in-network with the insurer." (Am. Compl. ¶ 24) Limiting the availability of physicians in insurance networks and at hospitals plainly does restrain trade, as patients are deprived of their access to their preferred physicians.

B. AAPS Properly Alleges that ABMS's Restraint Is Unreasonable.

Many details about ABMS's collusion with insurance companies and hospitals are known only to ABMS at this pleading stage. The restraint of trade by ABMS can hardly

be doubted; the unreasonableness of that depends in part on the details of the arrangements between ABMS and other entities to compel purchase of its product. It is fanciful for ABMS to respond to allegations that 80% of hospitals and most insurers compel purchase of its product by denying that ABMS is colluding with them.

1. AAPS Has Alleged Facts Supporting a *Per Se* Violation of Section 1 of the Sherman Act.

"Tying" of one product to another, as Defendant ABMS does and AAPS fully alleges in the Amended Complaint, is a *per se* violation of the Sherman Act. (Am. Compl ¶ 87) In an analogous case concerning D.O.'s rather than M.D.'s, the federal district court denied a motion to dismiss brought by the same attorney as here, by holding that the tying of certification is a "per se" violation of the Sherman Act. "The U.S. Supreme Court long ago established a '*per se*' rule against tying arrangements in cases where it thought exploitation of leverage is 'probable.'" *Talone v. Am. Osteopathic Ass'n*, No. 1:16-cv-04644-NLH-JS, 2017 U.S. Dist. LEXIS 89395, at *12 (D.N.J. June 12, 2017) (quoting *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 476-77 (3d Cir. 1992), which cited *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15, (1984)). The *Talone* court rejected the same argument made by the same attorney that the tying of certification is somehow not a *per se* violation. It is.

2. AAPS Has Alleged Sufficient Facts to Establish that ABMS, Insurers and Hospitals Have Sufficient Market Power to Create an Unlawful Restraint of Trade Under the Rule of Reason.

This Court need not decide at this preliminary stage where the *per se* rule, or the rule of reason, should apply here. But if the Court decides to apply the rule of reason, then AAPS has fully alleged sufficient facts to overcome the motion to dismiss on that basis.

First, the public policy embodied in the State legislation cited above weighs strongly against ABMS's arguments that its restraints are reasonable under the rule of reason. Second, the *Talone* court considered the same arguments as raised by the same attorney who serves as counsel for Defendant ABMS here, and completely rejected them on his motion to dismiss there:

> The Court finds at this pleading stage that Plaintiffs have sufficiently stated claims for … "rule of reason" antitrust violations. Plaintiffs have pleaded that … [they] have no choice but to purchase" [Defendant's product]. … [W]hen accepted as true, these allegations show that the [Defendant's] tying arrangement substantially lessens the competition so that other professional association membership organizations are foreclosed from competing for [Defendant] board certified DOs' business.

Talone v. Am. Osteopathic Ass'n, 2017 U.S. Dist. LEXIS 89395, at *15-16.

Defendant ABMS rehashes here what was rejected by the *Talone* court. (Def. Br. 7-10) ABMS insists that AAPS does not allege any control by ABMS over pricing (Def. Br. 8), but this case is about ABMS's restrictions on output, not pricing.

Plaintiff AAPS expressly alleges that the insurance companies with which it colludes have market power: "Defendant ABMS has conspired with health insurers having market power, in order to compel physicians to purchase the ABMS MOC® product." (Am. Comp. ¶ 18) Likewise, Plaintiff alleges that the "Defendant ABMS has sought and obtained agreement by hospitals having market power, in order to enforce Defendant's ABMS MOC® product as a condition of holding medical staff privileges." (*Id.* ¶ 25) There is no lack of market power by any entity on Defendant's side of this case. The aggregate market power of the American Hospital Association and the Blue Cross and Blue Shield Association, through their members, cannot seriously be doubted. Each hospital almost always has market power in its community, as do insurance

companies within their respective States. Through their trade associations they have market power in the relevant market of medical services provided at hospitals or through insurance networks. (Am Compl. ¶¶ 19, 26)

Defendant ABMS misses the point when it argues that ABMS does not "ha[ve] market power in such market" because it lacks the "ability to raise prices [in the market] significantly without going out of business." (Def. Br. 8, quoting *Agnew v. National Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012)). The allegation is that ABMS is colluding with entities that do have market power in the relevant market, as insurance companies and hospitals obviously do. "Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason," and Plaintiff AAPS properly allege the existence of that market power among ABMS's co-conspirators. (Am. Comp. ¶¶ 18, 25; Def. Br. 7, quoting *Sanjuan v. Am. Bd. Of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)). It is the conspiracy and collusion that are prohibited by the Sherman Act, not the market power or lack of market power by ABMS alone in the relevant market.

C. Plaintiff AAPS Has Properly Alleged Antitrust Injury Proximately Caused by Defendant ABMS.

Imposing costly maintenance of certification requirements results "in the reduction in the output of medical care" (Opinion, Dkt. 48, at 11), because physicians who do not comply cannot provide medical care to patients in the relevant market of insurance networks and hospitals. The more costly and difficult the burden, the greater the reduction in output. If maintenance of certification were attainable by only 10% of physicians, then the reduction in output would be more than 50% in the relevant market. Defendant ABMS does not dispute this, nor could it. If physicians were not compelled to

purchase ABMS's product, then surveys suggest it is unlikely physicians would. (Am. Compl. ¶ 56) Instead, ABMS and its co-conspirator specialty boards are enriching their executives with million-dollar annual compensation through their scheme. (*Id.* ¶ 70)

Defendant ABMS concedes that Plaintiff AAPS alleges an injury, but argues that AAPS does not provide specific factual allegations that would support "a finding of reduced output." (Defs. Br. 11) But factual findings are not appropriate at this preliminary stage on a motion to dismiss, and antitrust injury need not be pled with particularity under FED. R. CIV. P. 9(b) as other causes of action, such as fraud, must be. *See Sanner v. Bd. of Trade*, 62 F.3d 918, 927 (7th Cir. 1995) (finding adequate allegation of antitrust injury to withstand a motion to dismiss, and emphasizing "the principle that a court must accept a plaintiff's allegations as true when considering the propriety of a motion to dismiss"). Nearly all of the Defendant's cited authorities were on summary judgment, where the standard does require findings of fact in contrast with ABMS's motion to dismiss here. *See, e.g.*, *Poindexter v. Am. Bd. of Surgery*, 911 F. Supp. 1510, 1515 (N.D. Ga. 1994) (summary judgment); *McDaniel v. Appraisal Inst.*, 117 F.3d 421, 422 (9th Cir. 1997) (summary judgment); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988) (summary judgment); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988) (summary judgment); *Mass. Sch. of Law at Andover v. ABA*, 107 F.3d 1026 (3d Cir. 1997) (summary judgment).[2]

"After [the Supreme Court ruling in] *Summit Health*, the adequacy of a physician's contentions regarding the effect on competition is typically resolved after discovery, either on summary judgment or after trial." *Brader v. Allegheny Gen. Hosp.*,

[2] ABMS also relies on – but cites incorrectly – a case concerning governmental immunity that has no relevance to this cause of action for an antitrust violation. (Defs. Br. 10, citing *Brooks v. Ross*, 578 [not "579" as cited by Defendant] F.3d 574 (7th Cir. 2009)).

64 F.3d 869, 876 (3d Cir. 1995). *See also Atlantic Richfield Co.*, 495 U.S. 328 at 346 (finding plaintiff had "failed to demonstrate that it has suffered any antitrust injury" at the summary judgment stage); *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992) (summary judgment); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1571 (10th Cir. 1991) (summary judgment); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc) (summary judgment).

Defendant ABMS then resorts to factual speculation lacking any support in the record. ABMS opines that its "MOC program actually *promotes* competition" because "it encourages physicians to compete to achieve recertification under the standards of MOC." (Defs. Br. 12, emphasis in original) Such speculation by a movant is both inappropriate on its motion to dismiss and lacking in support. Physicians' spending more time and money on ABMS MOC® is beneficial to Defendant ABMS and its executives, but it clearly takes time away from patients and reduces the overall output of physicians in the relevant market. The more onerous the recertification requirements, the greater the reduction in output and the competition that matters: providing medical care to patients.

Defendant further speculates – again without any support in the record – that hospitals and insurers would "have to invest more time and money in confirming that each physician they work with is and continues to be qualified," in the absence of ABMS MOC®. (Defs. Br. 12) But that argument is for summary judgment, not now, and is dubious anyway. MOC does not result in lower malpractice awards, for example.

Defendant ABMS argues that "ABMS is not the proximate cause of any asserted harm to physicians," but "consumer choice" is. (Def. Br. 13, quotation omitted) But nothing in the Amended Complaint or anywhere else supports ABMS's theory that

patients – the consumer – are demanding exclusion of physicians who fail to spend vast amounts of time and money on ABMS's product. Precisely the opposite is true: patients are frustrated by how their own physician cannot see them when hospitalized, and how they cannot obtain insurance coverage when seen by their own physician after he is excluded from the insurance network due to ABMS MOC®.

Reducing access by patients to the physicians of their choice, by excluding such physicians from hospitals and insurance plans, is certainly the type of injury that antitrust laws were designed to prevent. Hospitalized patients cannot be seen by their own physicians, when those physicians did not purchase ABMS's product, and insured patients cannot have their services covered by their insurance plans when their physicians have not done likewise. Output is reduced with respect to insurance networks and hospitals due to Defendant ABMS's conduct, as set forth in the Amended Complaint.

ABMS concludes by denying what Plaintiff has expressly alleged. ABMS argues that it "is not alleged to have done anything more than provide information used by the insurer." (Def. Br. 13) To the contrary, Plaintiff AAPS alleges that ABMS has conspired and colluded with insurers and hospitals, which entails more than merely providing information. (Am. Compl. ¶¶ 1, 17-18, 25) Discovery is necessary to prove those allegations, and AAPS need not present that proof at the pleading stage. The Federal Rules of Civil Procedure do not require pleading antitrust injury with particularity.

II. Plaintiff AAPS Has Properly Alleged Deceptive Trade Practices by Defendant ABMS.

AAPS's Amended Complaint asserts a new claim based on deceptive trade practices by ABMS, 815 Ill. Comp. Stat. 510/2(8), replacing the negligent misrepresentation claim in the original Complaint. This new claim has two grounds.

First, Defendant ABMS publicly disparages physicians based on their declining to purchase Defendant's ABMS MOC® program. (Am. Compl. ¶ 98) Defendant does not deny its practice of disparaging physicians, nor could it. Imagine if LEXIS or Westlaw publicly disparaged attorneys who declined to use their database services. That would certainly be actionable as an unfair business practice, even if the disparaging statement were true in some formalistic sense. The disparagement need not be false for the practice to be unfair under 815 Ill. Comp. Stat. 510/2(8). ABMS cites no example of any other entity engaging in such disparagement of persons who decline purchasing its product.

Second, ABMS cleverly uses a combination of terms that have strong connotations of legal authority in order to create a misperception that the ABMS MOC® program itself is a legal mandate. If a company were to name itself "the Bar," and then publicly list attorneys who are "Not Meeting the Bar's Requirements," this Court would surely find merit in a legal challenge to stop such an unfair business practice. The statement would not be a misrepresentation, as required on a claim for negligent misrepresentation, but it is misleading, which is all that the Illinois Deceptive Practices Act requires. 815 Ill. Comp. Stat. 510/2(8) ("disparages the goods, services, or business of another by false or misleading representation of fact"). ABMS calling itself a "Board" while referring to its arbitrary conditions as "requirements" is misleading and unfair (Am. Compl. ¶¶ 98-121), and designed to increase ABMS revenues. (*Id.* ¶¶ 70-71)

Defendant ABMS parses its practices so as to obscure the totality of the impression it creates with patients and others. ABMS calls itself a "Board" and, yes, that is technically not a falsehood. As to "requirements", ABMS says those are its requirements, not legal requirements, but course that is not how most people would

understand that term in a phrase like "Not Meeting the Board's requirements" or "Not Meeting MOC Requirements."

Defendant ABMS does ***not*** deny that it systematically and publicly disparages physicians who decline to purchase its product. Such unfair disparagement is precisely what the Illinois Deceptive Trade Practices Act prohibits. "[C]ourts should liberally construe and broadly apply the Act ***to eradicate all forms of deceptive and unfair business practices***." *Kirkruff v. Wisegarver*, 297 Ill. App. 3d 826, 838, 231 Ill. Dec. 852, 697 N.E.2d 406, 415-16 (1998) (quoting *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, 805, 612 N.E.2d 984, 987, 184 Ill. Dec. 108 (1993), emphasis added).

Defendant ABMS relies on *ATC Healthcare Services, Inc. v. RCM Technologies, Inc.*, 192 F. Supp. 3d 943, 952 (N.D. Ill. 2016). But that court focused on the pivotal issue of disparagement, and found nothing by the defendant that "disparaged [plaintiff]'s services." 192 F. Supp. 3d at 952. The opposite is true here. Defendant ABMS publicly disparages physicians who decline to purchase its product. ABMS ***does*** disparage the services of physicians who decline to participate in MOC, and ABMS ***does*** imply that those services are somehow of inferior quality, as AAPS expressly alleged. (Am. Compl. ¶¶ 98-99). ABMS's use of the official sounding term "Board" (*id.* ¶ 110), along with referring to its product as a "requirement", unfairly disparages physicians for "Not Meeting MOC Requirements." (*Id.* ¶ 100)

III. The Court Should Not Strike AAPS's Class Allegations.

Plaintiff AAPS also identifies by initials a specific physician, J.E., who could represent a class action. But in light of the substantial risk of retaliation against any physician who challenged in court ABMS's recertification program, it is prudent to await

resolution of ABMS's motion to dismiss before identifying a specific physician to represent the class. After denial of ABMS's motion to dismiss, a motion to deny class certification by ABMS would then be met by Plaintiff's identification of one or more physicians to represent the class, and that would resolve ABMS's objection.

Elevating form over substance, ABMS insists prematurely on striking AAPS's allegations of a class action before there is a ruling on the validity of the underlying claims. But ABMS's own cited authority explains:

> If … the dispute concerning class certification is factual in nature and discovery is needed to determine whether a class should be certified, ***a motion to strike the class allegations at the pleading stage is premature***.

Brunner v. Liautaud, No. 14-C-5509, 2015 U.S. Dist. LEXIS 46018, at *19 (N.D. Ill. Apr. 8, 2015) (multiple inner quotations and citations omitted, emphasis added).

If the Court finds that AAPS states a valid cause of action, then AAPS respectfully requests that the Court allow "individual Plaintiffs to be substituted as named Plaintiffs and the class allegations amended to note that individual [plaintiffs] are the putative class members, not associations," as other courts do. *Waterfall Homeowners Ass'n v. Viega, Inc.*, 283 F.R.D. 571, 580 (D. Nev. 2012). *See also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390 (1977) (allowing intervention by a new representative of the class after class certification was denied).

CONCLUSION

For the foregoing reasons, Defendant ABMS's motion to dismiss and, in the alternative, to strike Plaintiff's class action allegations should be denied in its entirety.

Dated: April 5, 2018

Respectfully submitted,

s/ Andrew L. Schlafly

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2018, I electronically filed the foregoing document with the Clerk of this Court by using the CM/ECF system, and understand that service on counsel for all parties will be accomplished through the CM/ECF system.

/s/ Andrew L. Schlafly
Andrew L. Schlafly