

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

ASSOCIATION OF AMERICAN)
PHYSICIANS AND SURGEONS)
EDUCATIONAL FOUNDATION,)
PIERRE KORY, M.D., PAUL MARIK, M.D.,)
and KARL N. HANSON, M.D.,)

Plaintiffs,)

v.)

AMERICAN BOARD OF INTERNAL)
MEDICINE, AMERICAN BOARD OF)
OBSTETRICS & GYNECOLOGY,)
AMERICAN BOARD OF FAMILY)
MEDICINE, and KRISTI NOEM, in her)
official capacity as the Secretary of the U.S.)
Department of Homeland Security,)

Defendants.)

Case No. 3:22-cv-240

**PLAINTIFFS ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS
EDUCATIONAL FOUNDATION AND KARL N. HANSON’S OPPOSITION TO
THE AMERICAN BOARD OF FAMILY MEDICINE’S MOTIONS TO DISMISS
BASED ON PERSONAL JURISDICTION AND RULES 12(b)(1) AND 12(b)6)**

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Plaintiffs Association of American Physicians and Surgeons Educational Foundation (“AAPS”) and Karl N. Hanson, M.D. (“Hanson”) hereby file their opposition to both Motions to Dismiss by the American Board of Family Medicine (“ABFM”), which are based on personal jurisdiction (Dkt. 72) and on FED. R. CIV. P. 12(b)(1) and 12(b)(6) (Dkt. 73).

NATURE AND STAGE OF PROCEEDING

In 2021, Defendant ABFM publicly joined with co-Defendant American Board of Internal Medicine (ABIM) and others to embark on their unprecedented program of retaliation against outspoken physicians, by threatening to revoke their board certifications. Along with ABIM, ABFM has acted in furtherance of that agreement or conspiracy by “purposefully target[ing] their actions against physicians who reside and practice in Texas.” (Dkt. 66, Am. Compl. ¶ 29) In 2024, an attendee at a conference by Plaintiff AAPS in Texas, Plaintiff Hanson, was being “subjected to retaliation by Defendant ABFM against his board certification, and this pending retaliation chilled this physician’s participation in the videoed conference.” (*Id.* ¶ 114) Also in 2024, ABIM acted in furtherance of its agreement or understanding with ABFM by revoking the board certifications of Plaintiffs Kory, Marik, and others.

To its credit, ABFM does not publicly post its revocations in a manner that unnecessarily aggravates the harm to the reputations of physicians, as ABIM does (see ABIM’s publicly accessible postings that it submitted here as Dkt. 71-1 & 71-2). Also in

contrast with ABIM, ABFM has apparently pulled back on some of its planned revocations and decided not to impose them after all.

On the pending motions to dismiss based on the Amended Complaint, many of the arguments related to ABFM are identical to those relating to ABIM, and Plaintiffs avoid repetition with their extensive brief filed contemporaneously in opposition to Defendant ABIM's motion to dismiss. Plaintiffs' state action arguments are presented at length both in their brief against ABIM and in their separate brief against Defendant American Board of Obstetrics & Gynecology (ABOG). Here, Plaintiffs AAPS and Hanson focus their arguments on issues related to ABFM which are not addressed in Plaintiffs' other briefs.

SUMMARY OF ARGUMENT

ABFM publicly announced a joint campaign with ABIM and others to revoke board certifications, and this amounts to an agreement or conspiracy both under antitrust laws and for jurisdictional purposes.

Taking ABFM's motion to dismiss for lack of personal jurisdiction first (Dkt. 72), co-conspirators are subject to jurisdiction not merely where they reside or do business, but also in jurisdictions to which their conspiracy or acts of co-conspirators extend. Otherwise justice would be frustrated. ABFM's announced joint program of retaliation by revoking board certification has co-conspirators or participants in Texas, and targets physicians in Texas. (Dkt. 66, Am. Compl. ¶¶ 29-36) Inferable from the Amended Complaint and known to ABFM is how it revoked the board certification of a Texas physician on April 27, 2023,

after this lawsuit was filed. ABFM cannot credibly evade personal jurisdiction here in Texas by feigning surprise or unfairness now.

That said, hopefully ABFM has recently pulled back or withdrawn from this revocation program such that it no longer threatens to or actually revokes board certifications based on, for example, mere testimony by a physician to a legislative committee. But ABFM did not represent any such withdrawal in its solitary declaration to this Court (Dkt. 72-1), and did not confer with counsel for Plaintiffs about its pending motions to dismiss. So that factual question must be left for another day, and ABFM's motion to dismiss based on personal jurisdiction must be denied.

As to subject matter jurisdiction (Dkt. 73), Plaintiffs AAPS and Hanson clearly have standing under the Fifth Circuit ruling in this case and the allegations in the Amended Complaint, as discussed further below.

ABFM's own announced joint program with ABIM to revoke board certifications requires denial of ABFM's FED. R. CIV. P. 12(b)(6) motion to dismiss. (Dkt. 73). Just as *Pinkerton* liability for acts of co-conspirators is blackletter criminal law, in the civil context "[o]ne can be liable for conspiracy even if he himself did not commit the underlying bad acts; civil conspiracy extends liability in tort ... beyond the active wrongdoer to those who have merely planned, assisted, or encouraged his acts." *Bates Energy Oil & Gas, LLC v. Complete Oil Field Servs.*, No. 20-50952, 2021 U.S. App. LEXIS 30972, at *8 (5th Cir. Oct. 15, 2021) (cleaned up). This prevents ABFM from exiting this case on a motion to

dismiss the pleading, which includes a claim for violation of Sherman Act Section 1 based on ABFM's collusion or conspiracy with ABIM and others.

ARGUMENT

I. Personal Jurisdiction Exists over ABFM Here.

ABFM admits that "ABFM certifies physicians who live in all fifty states, including those who live or practice in Texas." (Dkt. 72, at 14) But then ABFM fails to acknowledge that it has also revoked the board certification of a physician in Austin, Texas, consistent with and reasonably inferable from Plaintiffs' allegations. (Dkt. 66, Am. Compl. ¶ 29)

Moreover, ABFM has conspired with co-Defendants and the Federation of State Medical Boards (FSMB), all of which are subject to jurisdiction here in Texas, and that conspiracy is the subject of this lawsuit. A plaintiff does not need to bifurcate its lawsuit for antitrust conspiracy into multiple different venues as may be preferred by each of the co-conspirators.

Under the co-conspirator theory, personal jurisdiction extends over distant co-conspirators such as ABFM, as held by the Fifth Circuit in *Hilgeman v. Nat'l Ins. Co* while quoting multiple other precedents holding likewise:

The "co-conspirator theory" was described by one court in the following terms:

"Plainly stated, this doctrine provides that in a multi-defendant securities proceeding, where a common scheme of acts or transactions to violate the securities act is alleged, if venue is established for any of the defendants in the forum district there is sufficient justification to establish venue as to the other defendants, even in the absence of any contact or substantial contact by any one defendant within that district." (Footnote omitted.)

S.E.C. v. National Student Marketing Corp., 360 F. Supp. 284, 291-92 (D.D.C.1973). ***This theory has been adopted by many federal courts, including this circuit***, e.g., *Sargent v. Genesco, Inc.*, 492 F.2d 750, 759 (CA5, 1974); *Klepper Krop, Inc. v. Hanford*, 411 F. Supp. 276 (D.Neb.1976); *Zorn v. Anderson*, 263 F. Supp. 745 (S.D.N.Y.1966).

Hilgeman v. Nat'l Ins. Co., 547 F.2d 298, 302 n.12 (5th Cir. 1977) (emphasis added).

At this pleading stage it is taken to be true that ABFM certifies physicians in Texas (as ABFM admits, Dkt. 72, at 9), that ABFM (and ABIM) have “targeted their actions against physicians who reside and practice in Texas (Dkt. 66, Am. Compl. ¶ 29), and that ABFM conspired with at least one group in Texas (the Federation of State Medical Boards, based in the Dallas area) to threaten revocation in a joint statement with ABIM as quoted Point III, *infra*. These actions by ABFM have harmed AAPS’s conferences as held in Texas. (*Id.* ¶ 114) ABFM cannot credibly assert that is surprised by being sued in Texas, or that it is unfair for it to be hauled into Court here.

II. Subject Matter Jurisdiction Exists over ABFM Here.

As alleged by Plaintiffs in the Amended Complaint:

Without ever providing Plaintiff Hanson with a hearing, ABFM informed him that his ABFM board certification was rescinded and withdrawn as of the date of its letter, May 21, 2024. But ABFM has held that revocation in abeyance pending its board meeting scheduled sometime in October, without providing Hanson a hearing then either.

(Dkt. 66, Am. Compl. ¶ 88) Then, a few months later:

Defendant ABFM’s foregoing retaliation against Plaintiff Hanson, taken based on collusion with other Defendants, was pending when he attended a conference by AAPS held in San Antonio in September 2024.

(*Id.* ¶ 156) The chilling effect on speech at the AAPS conference was predictable:

Plaintiff Hanson, who is board certified by Defendant ABFM, attended an AAPS conference while subjected to retaliation by Defendant ABFM against his board certification, and this pending retaliation chilled this physician's participation in the videoed conference in infringement both on his constitutional right to speak and on AAPS's constitutional right to hear.

(*Id.* ¶ 114)

This establishes Article III standing under the law of the case, as held by the Fifth Circuit:

Again, looking through the relaxed First Amendment standing lens while applying the motion to dismiss standard, it is plausible that a favorable decision would redress AAPS's injury: physicians would be unmuzzled and unafraid to speak dissenting opinions and attend AAPS's conferences, helping restore its lost attendance and lost revenue.

Ass'n of Am. Physicians & Surgeons Educ. Found. v. Am. Bd. of Internal Med., 103 F.4th 383, 392-93 (5th Cir. 2024).

Yet ABFM tries to downplay this injury by arguing that Hanson "admits that he still attended and spoke at an AAPS conference in San Antonio." (Dkt. 72, at 4). He attended, but his speech was chilled by ABFM and that is sufficient injury to establish standing both by Hanson and AAPS.

In addition, Hanson was denied due process in the temporary revocation of his board certification by ABFM, as ABFM did not even provide him with a hearing:

In violation of due process, Defendant ABFM revoked the board certification of Plaintiff Hanson without providing him with *any* hearing.

(Dkt. 66, Am. Compl. ¶ 232, emphasis in original)

ABFM echoes the arguments of ABIM and ABOG by asserting that ABFM is not a state actor. But revoking board certification has the effect of making it impossible for a

physician to practice medicine, which is traditionally a function of the state analogous to de-licensure, prison management and other state domains, as Plaintiffs explain in detail in their other briefs also filed today. Moreover, ABFM acts in entwinement with the state, most notably the Federation of State Medical Boards (FSMB), sufficient to bring it within the finding of state action by a private corporation by the U.S. Supreme Court in *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001).

III. ABFM's Joint Statement with ABIM Prevents ABFM From Obtaining Dismissal.

ABFM's joint statement with ABIM, in collusion with FSMB, joins ABFM at the hip of ABIM for the causes of action here based in antitrust law, state action doctrine, and tortious interference, as expressly set forth in the Amended Complaint:

Reflecting their collusion, Defendants ABIM and ABFM issued a joint statement expressing their threats against board-certified physicians on September 9, 2021, which stated that:

The Federation of State Medical Boards (FSMB), which supports its member state medical licensing boards, has recently issued a statement saying that providing misinformation about the COVID-19 vaccine contradicts physicians' ethical and professional responsibilities, and therefore may subject a physician to disciplinary actions, including suspension or revocation of their medical license. We at the American Board of Family Medicine (ABFM), the American Board of Internal Medicine (ABIM), and the American Board of Pediatrics (ABP) support FSMB's position. We also want all physicians certified by our boards to know that such unethical or unprofessional conduct may prompt their respective board to take action that could put their certification at risk.¹

¹ Joint Statement on Dissemination of Misinformation (September 9, 2021) <https://www.abim.org/media-center/press-releases/joint-statement-on-dissemination-of-misinformation/> (viewed Apr. 4, 2025).

(Dkt. 66, ¶ 202) All of the arguments in Plaintiffs’ extensive opposition brief against ABIM, with respect to the antitrust and First Amendment violations, and the claim for tortious interference, likewise apply to ABFM due to its above agreement with ABIM to retaliate by revoking board certifications. Simply put, co-conspirators are typically liable for acts by others performed in furtherance of a conspiracy. *See, e.g., United States v. Sanjar*, 876 F.3d 725, 743 (5th Cir. 2017) (criminal context); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940) (“Conspiracies under the Sherman Act are on ‘the common law footing’: they are not dependent on the ‘doing of any act other than the act of conspiring’ as a condition of liability.”).

The standard in a civil case such as this is not narrower than a criminal case where defendants have far more rights and benefit from higher burdens of proof. Understandably, ABFM seeks to separate and limit its liability and jurisdictional exposure from that of its co-Defendants here. But ABFM’s motion to dismiss is not the appropriate stage for engaging in this fact-intensive inquiry, and it would upset a long line of precedents about liability from conspiracies to accept ABFM’s arguments.

CONCLUSION

Plaintiffs AAPS and Hanson respectfully request that Defendant ABFM's motions to dismiss for lack of personal jurisdiction (Dkt. 72) and under Rules 12(b)(1) and 12(b)(6) (Dkt. 73) be fully denied.

Dated: April 4, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document uses size 13 Times New Roman font, and that its substantive body is 9 pages long.

CERTIFICATE OF SERVICE

I hereby certify that on this day of April 4, 2025, I filed the foregoing document through operation of the Court's CM/ECF system, which I understand to cause service on all counsel of record for all the parties.

Dated: April 4, 2025

Respectfully submitted,

/s/ Andrew L. Schlafly
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