UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

AMERICAN OSTEOPATHIC ASSOCIATION, AMERICAN COLLEGE OF OSTEOPATHIC INTERNISTS, INC., MARIA ASPRILLA, MATTHEW HARDEE, EMILY HURST, ERIN HUSTON, NANCY LAW, and SEGER MORRIS, *individually and on behalf of all others similarly situated*, *Plaintiffs*, v. AMERICAN BOARD OF INTERNAL MEDICINE AND DOES 1-20, *Defendants*.	Case No. 1:25-cv-14691 Judge Sunil R. Harjani

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this statement under 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the U.S. Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States enforces the federal antitrust laws, including the Sherman Act, 15 U.S.C. §§ 1 and 2, and has a strong interest in their correct application. The United States has a particular interest in safeguarding robust competition in healthcare, which is crucial to Americans' well-being. Diminished competition among healthcare providers can cause patients to pay more for medical care and limit their options for choosing providers and medical treatments.

The United States urges this Court to reject the American Board of Internal Medicine's incorrect arguments that "[a] certifying organization's decision about its own eligibility standards, including who may attest to a candidate's readiness, is not

conduct Section 2 is intended to target" and that "a professional organization is free to set standards without incurring antitrust liability" under Section 2 of the Sherman Act. ABIM Reply Br. 13. This asserted blanket Section 2 exemption is not supported by the case law. And the United States has previously filed Statements of Interest arguing against the creation of such exemptions. *See* Statement of Interest of the United States of America, *Dream Big Media Inc., et al. v. Alphabet, Inc., et al.*, No. 22-cv-02314-RS (N.D. Cal. Nov. 20, 2023).

"The Supreme Court has . . . made pellucid . . . that anticompetitive acts are not immune from [the antitrust laws] because they are performed by a professional organization." *N. Carolina State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 375 (4th Cir. 2013), *aff'd* 574 U.S. 494 (2015). There is serious anticompetitive potential when the organization is composed of "active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *N. Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015). For this reason, "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy." *Id.*

Indeed, courts have applied Section 2 to professional organizations like ABIM.[1] For instance, in *Daniel v. American Board of Emergency Medicine*, the court denied

[1] Courts have likewise applied Section 1 to restraints adopted by other professional organizations. *See, e.g.*, *FTC. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (association of dentists); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 347-51, 357 (1982) (members of a medical foundation); *Nat'l Soc'y of Pro. Eng'rs v.*

a motion to dismiss a Section 2 claim against American Board of Emergency Medicine for discontinuing one of the two ways that candidates could qualify for its certification exam, because it allegedly limited the number of physicians eligible to practice emergency medicine and maintained its monopoly in the market for emergency medicine services. 802 F. Supp. 912, 917-18, 927 (W.D.N.Y. 1992). And in *Torrey v. Infectious Diseases Society of America*, the court denied a motion to dismiss Section 2 claims against Infectious Diseases Society of America for allegedly excluding certain physicians who treat long-term Lyme disease from participating in the formulation of treatment guidelines and for reporting them to medical boards in an attempt to

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United States, 435 U.S. 679, 692 (1978) (canon of ethics promulgated by association of professional engineers); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781-82, 791 (1975) (fee schedule by state bar association). This is true even when the alleged conspirators act in their capacity as board or association members. *See Robertson v. Sea Pines Real Est. Cos., Inc.*, 679 F.3d 278, 285-86 (4th Cir. 2012) (holding by-laws passed by the boards of two Multiple Listing Services satisfied the concerted action requirement, even though "defendants passed the MLS by-laws in their capacity as MLS board members"); *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1202 (10th Cir. 2006) ("[E]xempt[ing] associations of horizontal competitors from liability under the antitrust laws so long as its board members are acting within the scope of their authority . . . would eviscerate the protections of the Sherman Act."). And while collective standardization activities can have significant procompetitive potential when "private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition," *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988), significant antitrust concerns arise when collective standardization activities are pursued without procedural safeguards such as openness and balance of interests. For instance, certain protections in the Standards Development Organization Act of 2004 apply only to organizations that develop standards "using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus," as set forth in applicable regulations. 15 U.S.C. §§ 4301(a)(8); *see also* Revised Final Judgment, *United States v. American Bar Association*, No. 95-1211 (D.D.C. June 25, 1996) (consent decree requiring the ABA to publish accreditation standards).

have their medical licenses revoked. No. 5:17-CV-00190-RWS, 2018 WL 10124894, at *1, *11 (E.D. Tex. Sept. 27, 2018). In neither case did the court suggest any sort of Section 2 exemption for professional organizations.

As purported support for its novel Section 2 exemption, ABIM relies on *Shachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989), and *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). ABIM Reply Br. 13. But neither case supports ABIM's argument.

First, contrary to ABIM's claim, *Schachar* does not "make[] clear that a professional organization is free to set standards without incurring antitrust liability" under Section 2. ABIM Reply Br. 13. *Schachar* involved only a Section 1 claim, not Section 2. 870 F.2d at 398. And, in that case, the claim failed because of the lack of a restraint of trade—an element of a Section 1 claim—not any sort of exemption. *Id.*

And ABIM is correct that *Goldwasser* says "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." 222 F.3d at 397. But ABIM omits the very next sentence making clear that "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" applies only "*[i]n the absence of any purpose to create or maintain a monopoly*." *Id.* (emphasis added) (citation omitted); *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) ("The right claimed by the publisher [to select its customers and to refuse to accept advertisements from whomever it pleases] is

neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.").

Here, Plaintiffs do not frame their Section 2 claim as a unilateral refusal to deal with a rival. On the contrary, they challenge how ABIM conditions one product (its certification) on the use of another (program directors certified by ABIM). Compl. ¶¶ 5-7. By coercing residents and fellows to seek out program directors who themselves have been certified by ABIM, Plaintiffs allege that ABIM coerces hospitals and physicians to deal with it. Compl. ¶¶ 7, 46, 47, 65, 71, 76; *see Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020) (explaining difference between conditional dealing and a "simple refusal to deal"), *cert. denied*, 141 S. Ct. 2877 (2021); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (describing the routine application of Section 2 to "some assay by the monopolist into the marketplace" to affect a third party's ability to deal with rivals). But even assuming *arguendo* that the challenged conduct were properly viewed as a type of unilateral refusal to deal with a rival, the conduct would not be per se lawful. Courts make "case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive." *Viamedia*, 951 F.3d at 457.

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Respectfully submitted,

/s/ L. Allison Herzog

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