UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRUCE E. ELLISON, M.D., **Plaintiff,** **v.** **AMERICAN BOARD OF ORTHOPAEDIC SURGERY, INC.,** **Defendant.**	Civ. No. 16-8441 (KM) (JBC) **MEMORANDUM OPINION**

KEVIN MCNULTY, U.S.D.J.:

Plaintiff Bruce E. Ellison, M.D., ("Dr. Ellison") brought this action against Defendant American Board of Orthopaedic Surgery, Inc., ("ABOS") based on alleged violations of federal antitrust law in relation to the certifications ABOS provides to certain qualifying physicians ("Board Certification"). Dr. Ellison asserts that ABOS improperly restrains trade by colluding with hospitals in requiring orthopedic surgeons to obtain Board Certification as a condition of practicing at those hospitals. According to the Amended Complaint,[1] ABOS prevents Dr. Ellison from obtaining Board Certification unless he first has hospital medical staff privileges, thereby reducing competition at hospitals by

---

[1] For ease of reference, certain items from the record will be abbreviated as follows:

"DE __" =	Docket Entry in this case
"AC" =	Amended Complaint (DE 28)
"Def. Mot." =	Defendant's Memo of Law in Support of its Motion to Dismiss the Amended Complaint (DE 29-1)
"Pl. Opp." =	Plaintiff's Memo in Opposition to Defendant's Motion to Dismiss the Amended Complaint (DE 32)
"Def. Reply" =	Defendant's Reply Memo of Law in Further Support of its Motion to Dismiss the Amended Complaint (DE 33)

excluding surgeons who, like Dr. Ellison, practice exclusively at ambulatory surgery centers or other places that do not offer those medical staff privileges. (AC ¶ 3) Dr. Ellison seeks declaratory and injunctive relief, as well as damages. ABOS has moved to dismiss the Amended Complaint on a variety of grounds. For the reasons explained in this opinion, I will dismiss the Amended Complaint pursuant to Rule 12(b)(6) for failure to meet the minimal pleading standards of Rule 8.

I. Summary

a. Factual background

Dr. Ellison holds a medical license in California, where he currently treats patients as an orthopedic surgeon. (AC ¶¶ 6, 22) For "personal and professional reasons, Dr. Ellison would like to obtain medical staff privileges" at a hospital in northern New Jersey. (*Id.* ¶ 40) The hospitals in which he seeks to apply require that he have Board Certification provided by ABOS. (*Id.* ¶ 41)

ABOS is a nonprofit organization incorporated in Delaware that conducts Board Certification programs for orthopedic surgeons. (*Id.* ¶ 7) It has twelve active directors and officers who reside in nine different states, none of which are located in New Jersey. (*Id.* ¶ 8; DE 29-2 ¶ 4) It also has two "Directors-Elect" who reside in Tennessee and Pennsylvania, as well as one public member who resides in Iowa. (AC ¶ 8) ABOS arranges for the administration of the written portion of its Board Certification exam through a third-party subcontractor at testing locations throughout the United States, including in New Jersey, collects "up to a million dollars or more annually" from physicians located in New Jersey, and communicates with hospitals and patients in New Jersey about which physicians hold Board Certifications. (*Id.* ¶¶ 27-29; DE 29-2 ¶ 5) ABOS does not maintain any offices, records, property, or staff in New Jersey. (DE 29-2 ¶ 4)

According to the Amended Complaint, the largest hospital system in New Jersey, RWJBarnabas Health, requires the hospitals under its purview to provide medical staff privileges only to doctors who have obtained Board

Certification. (*Id.* ¶¶ 11-12) St. Peter's University Hospital, located in New Brunswick, New Jersey, also requires Board Certification as a condition of obtaining medical staff privileges. (*Id.* ¶ 15) Similarly, Rutgers University Hospital requires Board Certification in order to obtain medical staff privileges and will not process the applications for employment of prospective doctors unless the applicant has acquired Board Certification within seven years of completing residency training. (*Id.* ¶¶ 13-14)

Dr. Ellison alleges that the requirement for Board Certification precludes him from obtaining medical staff privileges "at the major hospitals in the regions of northern New Jersey." (*Id.* ¶ 16) Dr. Ellison successfully passed the written portion of ABOS's exam ("Part I") in Chicago, Illinois. (AC ¶¶ 42-44; DE 29-2 ¶ 6) This qualified him to take the oral portion of the exam ("Part II"), which is only administered in Chicago. (AC ¶¶ 42-44; DE 29-2 ¶ 7) However, ABOS subsequently refused to allow him to take Part II of the exam because he did not have medical staff privileges, a newly imposed prerequisite. (*Id.* ¶¶ 3, 30, 45)

This, says Dr. Ellison, confronted him with the proverbial catch-22: without medical staff privileges he cannot take Part II of the certification exam, but without certification he cannot acquire medical staff privileges. This practice, Dr. Ellison alleges, reduces competition to hospitals by shutting out surgeons, like himself, who practice exclusively at ambulatory surgery centers (which do not provide medical staff privileges), thereby preventing the attainment of Board Certification and reducing the supply of orthopedic surgeons available to patients. (*Id.* ¶¶ 3, 30, 33, 45) There is an exception to the staff-privileges prerequisite for physicians who have recently completed their residency, but that exception is unavailable to Dr. Ellison at this stage in his career. (*Id.* ¶ 5)

Dr. Ellison has not applied for medical staff privileges at these New Jersey hospitals because, without board certification, rejection is likely, and a rejection of an application for medical staff privileges allegedly "results in an

automatic adverse entry in the National Practitioner Data Bank, which severely damages the reputation of a physician." (*Id.* ¶ 19)

Dr. Ellison asserts that ABOS has acted in concert with hospitals to require Board Certification as a precondition for employment, thus interfering with the market of orthopedic surgery services provided at hospitals in northern New Jersey. (*Id.* ¶¶ 35, 37) He claims that this is an anticompetitive tying arrangement between ABOS and hospitals in violation of Section 1 of the Sherman Act. (*Id.* ¶ 49). In this respect, ABOS and the hospitals are allegedly acting in concert for ABOS's pecuniary benefit. (*Id.* ¶¶ 46-50) This, Dr. Ellison asserts, reduces "the availability of physicians in the relevant market, which reduces patient choice and increases health care costs." (*Id.*) He seeks damages, a declaratory judgment that ABOS has violated the Sherman Act, injunctive relief allowing Dr. Ellison to take Part II of the exam, an order requiring ABOS to cease requiring surgical privileges as a precondition for taking Part II of the exam, attorneys fees, and costs. (*Id.* ¶¶ 56-61)

b. Procedural history

Dr. Ellison first brought suit against ABOS in the United States District Court for the Northern District of Illinois in December 2015 (the "Illinois Complaint") seeking the same relief he seeks in the present suit. *See Ellison v. American Board of Orthopaedic Surgery, Inc.*, No. 15-cv-11848, Docket Entry 1, Illinois Complaint ¶¶ 3, 28–32. However, Dr. Ellison voluntarily dismissed the Illinois Complaint in April 2016. *Id.*

That same month Dr. Ellison filed a factually similar complaint in the Superior Court of New Jersey, Law Division, Union County, alleging that ABOS violated the New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. § 56:8-1, *et seq.*, and the New Jersey Antitrust Act, N.J. Stat. Ann. § 56:9-1, *et seq.* (*See* DE 1) Dr. Ellison sought treble damages, attorneys' fees, and declaratory and injunctive relief requiring ABOS to allow him to take the Part II exam.

In November 2016, ABOS removed the case to federal court ("Removed Complaint") on the basis of diversity of citizenship. *See* 28 U.S.C. § 1332(a).

The notice of removal states that Dr. Ellison is domiciled in California, and that ABOS is a Delaware corporation with its principal place of business in North Carolina. (DE 1 ¶¶ 11–15)[2]

In February 2017, ABOS moved to dismiss the Removed Complaint on a variety of grounds. (DE 4) I granted that motion and dismissed the Removed Complaint pursuant to Rule 12(b)(6) for failure to meet the minimal pleading standards of Rule 8. (DE 17) In that opinion I noted that "[t]he vagueness of the Complaint makes it difficult to discern what, if anything, connects Dr. Ellison, ABOS, and any wrongful acts to the State of New Jersey." (*Id.* at p. 5.) Additionally, without alleging a concrete injury in fact, I could not "accept that Dr. Ellison possesse[d] a cause of action in any jurisdiction where he theoretically could have sought, and been refused, admitting privileges." (*Id.*) Finding that Dr. Ellison had failed to state a claim, I did "not reach, or prejudge" the issues related to personal jurisdiction, venue, or standing raised by ABOS and entered the dismissal of the Removed Complaint without prejudice to the filing of a motion to amend. (*Id.*)

Dr. Ellison subsequently moved for leave to amend the complaint, which was granted, and filed an Amended Complaint. (DE nos. 21, 27, 28) *See Ellison v. Am. Bd. of Orthopaedic Surgery, Inc.*, No. 16-8441, 2018 WL 1919953, at *1 (D.N.J. Apr. 24, 2018). The Amended Complaint drops the counts alleging violations of New Jersey state law and instead alleges a single count of restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (*See* AC)

Now before the Court is ABOS's motion to dismiss the Amended Complaint for lack of personal jurisdiction, improper venue, lack of standing, and failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(2), (3), and (6). (DE 29) For the reasons stated below, I will dismiss the Amended Complaint

---

2 The Removed Complaint alleges, less specifically, that Dr. Ellison is located in California and that ABOS is headquartered in North Carolina. (DE no 1-1 ¶¶ 2, 3; DE 1-3, Civil Cover Sheet)

pursuant to Rule 12(b)(6) for failure to meet the minimal pleading standards of Rule 8.

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party, bears the burden of showing that no claim has been stated. *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n. 9 (3d Cir. 2011). For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir. 2014).

Federal Rule of Civil Procedure 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id.* at 570; *see also West Run Student Housing Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 169 (3d Cir. 2013). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678.

A. Sherman Act claim

The Sherman Anti–Trust Act declares "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... to be illegal." 15 U.S.C. § 1. "Although this

prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." *Animal Sci. Prod., Inc.*, 34 F. Supp. 3d at 480 (quoting *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 4–5 (1958)).

"In order to sustain a cause of action under § 1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy." *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81–82 (3d Cir.1977). *Accord Howard Hess Dental Laboratories Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 253 (3d Cir.2010) ("A plaintiff asserting a Section 1 claim ... must allege four elements: '(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.'") (citing *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 207 (3d Cir.2005)); *cf. Franco v. Connecticut Gen. Life Ins. Co.*, 818 F.Supp.2d 792, 829 (D.N.J.2011) ("Pleading a colorable Sherman Act section 1 claim requires a plaintiff to allege (1) an agreement (2) imposing an unreasonable restraint of trade within a relevant product market and (3) resulting in antitrust injury, that is 'injury of the type the antitrust laws were intended to prevent and ... that flows from that which make defendants' acts unlawful.'").

The essence of a Section 1 claim is the existence of an unlawful agreement. *See Gordon*, 423 F.3d at 207 ("Unilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.") (internal citations omitted). "Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff.... Accordingly,

it requires proof of a causal relationship between pressure from one conspirator and an anticompetitive decision of another conspirator." *Id.* (internal citations omitted).

"To allege such an agreement between two or more persons or entities, a plaintiff must allege facts plausibly suggesting 'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *Howard Hess Dental Labs. Inc.*, 602 F.3d at 254 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 755 (1984)). With respect to the alleged conspiracy between ABOS and northern New Jersey hospitals, Dr. Ellison has failed to allege an agreement that plausibly suggests such an unlawful arrangement.

The Amended Complaint states only in a conclusory manner that northern New Jersey hospitals conspired and knew about the alleged plan to bolster ABOS's market position. The Amended Complaint alleges, for instance, that "Defendant ABOS has undertaken its actions with a common design and understanding with hospitals to exclude some competent orthopedic surgeons from the relevant market, including Dr. Ellison." (AC ¶ 51) This type of conclusory allegation is found throughout the Amended Complaint. (*E.g.*, AC ¶¶ 2, 10, 31, 34, 46, 47, 49, 52-54). "But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much." *Howard Hess Dental Labs. Inc.*, 602 F.3d at 255 (3d Cir. 2010) (citing *Twombly*, 550 U.S. at 564).

There are no such allegations here. Without more, the mere fact that certain hospitals require Board Certification for admitting privileges combined with a bare assertion that hospitals conspired with ABOS is not a sufficient recitation of facts to allege an unlawful agreement. *See Twombly*, 550 U.S. at 556-57 ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel

conduct are set out in order to make a [Sherman Act] § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

ABOS points out that the hospitals' conduct in requiring Board Certification could very well be based on its own independent action: "hospitals may look to certification as a quality standard in granting privileges wholly apart from any ABOS purported influence." (Def. Mot. at 26) This explanation may indeed be a reasonable basis for the hospitals' independent action. More significantly, the Amended Complaint does not assert *any* plausible basis for a conspiracy between ABOS and the vast network of New Jersey hospitals, nor does the Amended Complaint include any plausible allegations that place the hospitals' conduct in a context that raises a suggestion of a preceding agreement. Dr. Ellison has not pled "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556.

Consequently, Dr. Ellison fails to sufficiently state a claim for an improper agreement under Section 1 of the Sherman Act. The Court need not opine on whether the other elements of a Section 1 Sherman Act violation are sufficiently pled because the failure to allege an unlawful agreement alone warrants dismissal for failure to state a claim. *See Howard Hess Dental Labs. Inc.*, 602 F.3d at 254 ("Section 1 claims are limited to combinations, contracts, and conspiracies, and thus always require the existence of an agreement.").

The Court need not reach the other grounds for dismissal and dismisses the Amended Complaint solely on the basis that Dr. Ellison has not sufficiently alleged an unlawful agreement under Section 1 of the Sherman Act, without prejudging those other grounds.

B. Prejudice/Other Grounds

This opinion rests on the facial insufficiency of the claim and does not begin to reach such grounds for dismissal as, e.g., antitrust standing. Antitrust causes of action, however, are notoriously complex, and antitrust pleading

notoriously difficult. Given, as I say, the difficulty of pleading such a claim, I will enter this dismissal without prejudice to the submission, within 30 days, of a second amended complaint that remedies the defects of the amended complaint.[3]

III. CONCLUSION

ABOS's motion to dismiss the Amended Complaint is granted on Rule 12(b)(6) grounds. This dismissal is without prejudice to the filing of a second amended complaint within 30 days.

An appropriate Order follows.

Dated: October 29, 2018

HON. KEVIN MCNULTY, U.S.D.J.

---

[3] I note that the Amended Complaint adds an allegation of a New Jersey connection—*i.e.*, that Dr. Ellison, a California practitioner, seeks to apply for privileges at New Jersey hospitals for reasons of professional growth. (AC ¶ 17) He alleges that three major hospital systems in New Jersey require board certification, so that *if* he applied for admitting privileges, he would anticipate rejection, which would be a blot on his record. I do not now rule on whether that bare statement of intent, with no corroborating facts, suffices to establish the necessary connection to New Jersey. I iterate my earlier admonition, however, that if such an allegation clears the hurdle of a motion to dismiss but is not supported by any objective evidence, it may make sense to consider now whether "to file this lawsuit in a district where the defendant is incorporated and has its principal place of business, or in the alternative in a district where the acts complained of actually took place." (DE 17 at p.5) Such a course might avoid miring the lawsuit in non-merits discovery and litigation pertaining to jurisdiction, venue, and the like.