No. 23-

IN THE

Supreme Court of the United States

RANDALL BOCK M.D.,

Petitioner,

v.

CANDACE SLOANE AND GEORGE ABRAHAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RONALD D. COLEMAN
Counsel of Record
DHILLON LAW GROUP
50 Park Place, Suite 1105
Newark, NJ 07102
(973) 298-1723
rcoleman@dhillonlaw.com

Counsel for Petitioner

130100

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

This petition concerns the studied, repeated defiance over the past nine years by the United States Court of Appeals for First Circuit of this Court's 2015 ruling in North Carolina Board of Dental Examiners v. FTC, 574 U.S. 494 (2015) by repeatedly upholding judicial grants of sovereign and quasi-judicial immunity to market participants on the state's medical licensing board with no consideration for this Court's test for state action immunity, even where, as here, the defendant market actors are sued under the Sherman Act.

The question presented is, does the rule of Dental Examiners extend to physician licensing boards?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

There are no related cases.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES

PETITION FOR A WRIT OF CERTIORARI

Dr. Randall Bock respectfully petitions for a writ of certiorari to review the decision of the First Circuit Court of Appeals.

OPINIONS BELOW

The First Circuit Court denied *en banc* review of the panel decision, which makes it the final ruling. The panel decision is at reprinted in Appendix A and the district court's judgment of dismissal is reprinted in Appendix B. Justice Jackson extended to May 12, 2024 the deadline to file a petition.

JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sherman Act, 15 U.S.C. §§ 1-38

STATEMENT OF THE CASE

Petitioner Dr. Bock had a thriving primary care medical practice in Revere, Massachusetts for 27 years after graduating in 1981 from the University of Rochester. As the opioid epidemic manifested itself in the 2000's he found himself providing detoxification treatment for opioid addicts seeking to quit opioids completely, over time, rather than spend their lives on methadone or

Suboxone®—often referred to as the "Lifetime Suboxone® Subscription Model," which requires patients to make monthly visits to treating physicians for new prescriptions, for a fee of $150 per visit for life.

In contrast, Dr. Bock's four-to-six-month slow detoxification program became well known for its success, with his clinic's attracting patients from throughout New England. In addition to prescribing a different, less soporific medication, the program was premised on gradual tapering from reliance on any drug—and included testing and one-on-one counseling to help patients develop their individuality, assert their own interests, and regain control over their lives.

In 2012, defendant Candace Sloane, also a physician, was appointed to the Massachusetts Medical Board (the "Board"). Shortly thereafter, she became chair, staying on as chair for nine year. Defendant George Abraham, also a physician, was another member of the seven-member Board during this time, and consistently voting with Sloane on all issues taken up by the Board.

In 2014, Sloane and Abraham summarily suspended Dr. Bock's medical license on the ground that his opioid addiction treatment made him an imminent danger to public safety.

At a subsequent administrative hearing, the Board relied on a solitary expert to condemn Dr. Bock's treatment protocol. She testified that she had not reviewed a single patient's medical record, answering a series of key questions posed by the hearing officer, or magistrate, as follows:

> MAGISTRATE: Sorry, did you review any medical records from Doctor Bock?
>
> EXPERT: No, I did not review the medical records. I reviewed only what was stated previously.
>
> MAGISTRATE: Okay.
>
> BOARD COUNSEL: Were you asked to review the medical records?
>
> EXPERT. No.

The magistrate then asked the expert about the "disease model" of opioid addiction, which is the premise of the medication-for-life model rejected by Dr. Bock:

> MAGISTRATE: But when you call it a "model," does this mean that this is like a working hypothesis?
>
> EXPERT: No, it's not a working hypothesis, it is a brain disease by definition. This has been supported by the National Institute of Drug and Alcohol Abuse. And Nora Volkow who is the director of the NIDA has done significant research to prove that it is a disease, a chronic disease.
>
> MAGISTRATE: What is that organization? Like, who are those people? It sounds really official but I have no idea who they are.

EXPERT: So, they are a group of addiction psychiatrists. Nora Volkow actually was part of the White House consultant in addressing the issues and she is a major researcher in the field of addiction psychiatry. So, people who—part of the National Institute of Drug and Alcohol Abuse, there are lot of experts in the field of addiction psychiatry who are either working there or consultants for the NIDA.

MAGISTRATE: And so, like, does the AMA consider it a disease?

EXPERT: Yes, the American Medical Association also considers it as a disease.

MAGISTRATE: Okay. Are there any boards or organizations that don't consider it a disease that you're aware of?

EXPERT: Not any reputable organizations that I'm aware of.

MAGISTRATE: That's a cheeky way to respond. Are there any disreputable organizations in your opinion?

EXPERT: Well, there is basically—there have been always a question and there are questions about, you know, contesting the fact that addiction is a disease but not supporting fully, that I am aware of, that are supporting the model that addiction is not a disease.

Dr. Bock ultimately—after four years—prevailed in the administrative process, the hearing officer declaring that the Board had not met its burden to suspend Dr. Bock's medical license and destroy his ability to be gainfully employed in his profession. Sloane and Abraham, however, declared they would not restore Dr. Bock's license because it had lapsed in the interim.

In Massachusetts, medical licenses lapse on the physician's birthday every two years if the fee of $600 is not paid for renewal. The board had a policy in place for years that licenses under suspension would not be renewed, guaranteeing that licenses would inevitably lapse if the suspension was not lifted prior to the next birth date. This policy was intended to block physicians exonerated by review boards from getting their licenses back right away.

Dr. Bock thus sought certiorari from the Massachusetts Supreme Judicial Court for relief from this decision, arguing that the Board's practice was facially unconstitutional. Presiding over the matter pursuant to that court's "single justice" practice under Mass. G.L. c. 211 §3, Justice Kimberly Budd agreed that discriminating between physicians solely on when their birth date happened to fall was arbitrary and unconstitutional. *Bock v. Board of Registration in Medicine*, SJ-2019-0210. In response to an order requiring the return of Dr. Bock's license, Sloane and Abraham swore to the court that they would return Dr. Bock's license to him with a validity of two years.

When Sloane and Abraham called Dr. Bock to the Board's offices to return his license to him, however, they told him not to "get used to the idea of being licensed"

because his license would be going away soon. Sure enough, the Board, summarily suspended his license a mere two days later. Later, Dr. Bock obtained the transcript of discussions between Sloane and Abraham regarding Justice Budd's ruling and discovered this exchange:

> [I]t isn't that he's become a serious threat, he always was, but it was protected because he had a lapsed license. Now we have lost the lapsed license because of the Single Justice perspective, and for that reason he is a serious threat that we need to deal with right now. And that is why we are being advised by staff to do a Summary Suspension Type B.

While Sloane and Abraham cast their opposition to Dr. Bock's practice as concern that "he always was" a serious threat to public health—notwithstanding the absence of any evidence, as admitted by the Board's hearing expert, of negative patient outcomes—the real "serious threat" on their mind was to the "Lifetime Subscription Model" that made innumerable physicians very wealthy.

Dr. Bock's treatment represented a serious threat to a substantial constituency among medical doctors in Massachusetts—and the Board, in every meaningful way, represented that constituency. Indeed, the Board has a history of renting its powers out to a physician's hospital system or to competing physician groups in order to eliminate competition.

It was to protect the economic interests of that constituency that Dr. Bock's medical license was summarily

suspended again in 2019 despite his exoneration. This second suspension was also based solely on Dr. Bock refusal to hew to system enforced by the Board, for reasons having nothing to do with public safety and everything to do with physician incomes.

Once again there was an administrative hearing; once again a hearing officer exonerated Dr. Bock; once again the Board was ordered to return his license immediately; once again the Board, under the leadership of Sloane and Abraham, angrily complied. Indeed, this time, in light of the existing record of the Board's baseless abuse of their licensure power, Dr. Bock's license was returned in a matter of weeks.

By now, however, Dr. Bock had suffered a catastrophic loss of income over the periods of time during which his license had been wrongfully suspended. He turned to the United States District Court for the District of Massachusetts for relief, seeking relief under the Sherman Act, 15 U.S.C. §§ 1-38. Notwithstanding the rule of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which requires that a court analyze market participation of licensing when licensing boards are sued under the Sherman Act, the district court refused to even undertake that analysis. Instead, it simply held that the Board was entitled to immunity and dismissed the single Sherman Act count on immunity grounds. A First Circuit affirmed the decision and the full Circuit denied *en banc* review. This petition follows.

REASONS FOR GRANTING THIS PETITION

THE FIRST CIRCUIT DISREGARDED THIS COURT'S CONTROLLING PRECEDENT

I

In *North Carolina Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015), this Court declared that economic liberty is as important as the individual freedoms in the Bill of Rights, and that enforcement of the antitrust laws was vital for safeguarding the Nation's economic liberty. Applying its reasoning to the context of professional licensing, the Court explained that they could not be set aside by hypothetical concerns that market participants would refuse to serve on licensing boards if exposed to personal liability under the antitrust laws. When market participants control a professional licensing board, the Court held, their action must be analyzed under the Midcal framework before they are granted state action immunity from the Sherman Act.

In Dental Examiners the Court fully explained what active supervision entails: (1) the action for which the market participants are sued under the Sherman Act must be shown to have been taken pursuant to a clearly articulated state policy, and (2) a state official must take political responsibility for each decision reached by the market participants in each plaintiff's case as an action taken indeed pursuant to a clearly articulated and affirmatively expressed state policy.

In the case of the conduct by Sloane and Abraham alleged by Dr. Bock, the defendants would not be entitled

to immunity unless the court established, as a matter of law and based on the allegations of the pleadings, that their repeated suspension of Dr. Bock's license was taken pursuant to a clearly articulated and affirmatively expressed state policy. In other words, the defendants would have to show that Massachusetts state policy either required enforcement of the "Lifetime Suboxone® Subscription Model" or prohibited slow detoxification off opiates.

Neither the district court nor the First Circuit performed this mandatory Midcal analysis, however, in evaluating Dr. Bock's single-count Sherman Act complaint. Both instead simply granted blanket sovereign and quasi-judicial immunity to the market participants by virtue of their membership on the licensing board, as if the rule of Dental Examiners never existed. Relying on a 1990 case, *Bettencourt v. Board of Registration in Medicine*, 904 F2d 772 (1990), the First Circuit refused to "adopt" Dental Examiners in a single-count Sherman Act case, writing as follows:

> Dr. Bock's reliance on *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015) ("Dental Examiners"), is misplaced. Dental Examiners, which concerned the distinct doctrine of state-action antitrust immunity, expressly did not address "the question whether agency officials, including [state regulatory] board members, may, under some circumstances, enjoy immunity from damages liability." *Id*. at 513. Nor is the reasoning of Dental Examiners or the doctrine of state-action immunity inconsistent

> with the notion that state regulatory board members may receive quasi-judicial/quasi-prosecutorial immunity from an antitrust claim that implicates their performance of adjudicatory or prosecutorial functions. Finally, Dr. Bock cites no case holding that judicial and prosecutorial immunity from damages suits does not apply to Sherman Act claims, and we have found none.

The First Circuit's purported reliance on its own decision in Bettencourt, in turn, is actually premised entirely on three sentences in the opinion of the district court, stating, "The Board of Registration is a state agency and the Commonwealth of Massachusetts has not consented to be sued in federal court. The bar applies whether the relief sought is legal or equitable. Insofar as he seeks damages from the Board members in their official capacities, plaintiff 's suit in effect is a suit against the state and is also barred." The issue of the Board's status as a "stage agency" was never before the Circuit Court in Bettencourt which, again, was decided before Dental Examiners.

Neither Bettencourt nor the record here support the holding, made by the trial court here and affirmed by the First Circuit, that *as a matter of law* the Board is entitled to "state-action immunity"—and certainly not after Dental Examiners, which urgently made the point that the policies embodied in antitrust laws are not to be casually tossed aside by judicial grants of sovereign immunity to licensing boards. The First Circuit's refusal to evaluate whether the Board's members, particularly the defendants, were market participants when they abused

their licensing power to deprive their competitor Dr. Bock of his livelihood was plain error, and should be reversed.

II

Dr. Bock was a very prominent physician who provided slow detoxification off opiates to patients who wanted to be totally drug-free and independent. His fame covered four states and he had a large following on YouTube. Patients came to him from four northeastern states by word of mouth because they did not want to be coerced into paying indefinitely into the Lifetime Suboxone® Subscription Model. Dr. Bock thus offered a unique choice within the Massachusetts medical marketplace.

Market participants Sloane and Abraham used their control of the Massachusetts medical board to overtly interfere with this market choice and destroyed the ability of opioid patients to avoid the Lifetime Suboxone® Subscription Model. And they were very vocal about what they were doing. They spoke on the record and issued official statements that they suspended Dr. Bock's medical license because he offered an alternative to the Lifetime Suboxone® Subscription Model.

As a direct result of Sloane and Abraham's conduct, consumers were deprived of a lawful, effective and economically superior treatment choice from the medical marketplace and Dr. Bock's practice was ground to dust. If the First Circuit or the District of Massachusetts had followed this Court's rulings in Dental Examiners and Midcal, they would have had no difficulty finding, for purposes of evaluating the sufficiency of Dr. Bock's complaint under Fed. R. Civ. P. 12(b)(6), that state policy, and federal policy strongly favor slow detoxification off

opiates, and what Dr. Bock practiced was pursuant to this clearly articulated and affirmatively expressed state policy.

In contrast, Sloane and Abraham's interference with the marketplace by eliminating Dr. Bock from it was contrary to a clearly articulated and affirmatively expressed state policy. Theirs was an action in favor of competitors who enforced the Lifetime Suboxone® Subscription Model, which was not a clearly articulated state policy then or now. Their elimination of Dr. Bock from the medical marketplace was a *per se* violation of the Sherman Act and interfered with interstate commerce. See, *Teladoc, Inc. v. Texas Medical Board*, No. 1:15-cv-00343-RP (WD Tex. 2016).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, the First Circuit's opinion affirming the dismissal of Dr. Bock's complaint vacated and the matter remanded to the United States District Court for the District of Massachusetts for further proceedings.

Respectfully submitted,

Ronald D. Coleman
Counsel of Record
Dhillon Law Group
50 Park Place, Suite 1105
Newark, NJ 07102
(973) 298-1723
rcoleman@dhillonlaw.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ENTERED NOVEMBER 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1492

RANDALL BOCK, M.D.,

Plaintiff-Appellant,

v.

CANDACE LAPIDUS SLOANE, SOLELY IN HER INDIVIDUAL CAPACITY; GEORGE ABRAHAM, SOLELY IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

Before Barron, *Chief Judge*, Kayatta and Rikelman, *Circuit Judges.*

JUDGMENT

Entered: November 13, 2023

Plaintiff-Appellant Randall Bock, M.D. ("Dr. Bock"), appeals from the district court's dismissal of his Sherman Act claim against Defendants-Appellees Candace Lapidus Sloane and George Abraham in their individual capacities ("Defendants"). After careful review of the parties' briefs

and the relevant portions of the record, we affirm the district court's conclusion that Defendants are entitled to absolute quasi judicial/quasi-prosecutorial immunity. *See Legal Sea Foods, LLC* v. *Strathmore Ins. Co.*, 36 F.4th 29, 33-34 (1st Cir. 2022) (describing motion to dismiss standard and standard of review); *Goldstein* v. *Galvin*, 719 F.3d 16, 24-27 (1st Cir. 2013) (describing absolute quasi judicial/quasi-prosecutorial immunity).

We have held that members of the Massachusetts Board of Registration in Medicine ("BORIM") are entitled to absolute immunity when exercising their prosecutorial or adjudicatory functions. *See Bettencourt* v. *Bd. of Registration in Med. of Mass.*, 904 F.2d 772, 782-84, 782 n.13 (1st Cir. 1990); *see also Wang* v. *N.H. Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995) (clarifying that absolute immunity extends to a medical licensing board member's actions in "instigating and prosecuting [disciplinary] charges against" a physician). Dr. Bock advances no convincing challenge to the district court's determination that his claim seeks to hold Defendants liable for their performance of their prosecutorial and adjudicatory functions as BORIM members.

Additionally, Dr. Bock's reliance on *North Carolina State Board of Dental Examiners* v. *FTC*, 574 U.S. 494 (2015) ("*Dental Examiners*"), is misplaced. *Dental Examiners*, which concerned the distinct doctrine of state-action antitrust immunity, expressly did not address "the question whether agency officials, including [state regulatory] board members, may, under some

circumstances, enjoy immunity from damages liability." *Id.* at 513. Nor is the reasoning of *Dental Examiners* or the doctrine of state-action immunity inconsistent with the notion that state regulatory board members may receive quasi judicial/quasi-prosecutorial immunity from an antitrust claim that implicates their performance of adjudicatory or prosecutorial functions. Finally, Dr. Bock cites no case holding that judicial and prosecutorial immunity from damages suits does not apply to Sherman Act claims, and we have found none.

In light of our conclusion on absolute immunity, we take no position on whether the district court also correctly held that Dr. Bock failed to allege a plausible Sherman Act claim and that Defendants are entitled to qualified immunity.

Affirmed. *See* 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, FILED JUNE 1, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 22-10905-NMG

RANDALL BOCK,

Plaintiff,

v.

CANDACE LAPIDUS SLOANE, *et al.*,

Defendants.

Filed June 1, 2023

MEMORANDUM AND ORDER

GORTON, J.

Plaintiff Randall Bock ("Bock" or "plaintiff"), acting *pro se*, brings a one-count complaint against Candace Lapidus Sloane ("Sloane") and George Abraham ("Abraham") (collectively, "defendants"), in their individual capacities, for alleged violations of Section 1 of the Sherman Act. Bock claims that defendants took

unlawful actions against him while they were serving as members of the Massachusetts Board of Registration in Medicine ("the Board"). Pending before the Court is defendants' motion to dismiss for failure to state a claim. For the reasons that follow, the motion will be allowed.

I. Background

A. Factual Background

Bock is a physician residing in Massachusetts who treats opioid use disorders and has been licensed in Massachusetts since 1984 except during certain periods of suspension. Defendants Sloane and Abraham are both residents of Massachusetts. Sloane was a member and Chair of the Board from 2011 to 2020. Abraham was a Board member from some time before 2014 until 2021 and served at various times as Vice Chair and Chair of the Board. Bock seeks damages against Sloane and Abraham in their individual capacities.

The allegations in the complaint refer to a litany of events, policies and proceedings beginning in about 2006 and continuing until 2021. Bock's factual allegations are interspersed with myriad legal arguments and with his speculation about the motivations of defendants. He has enclosed with his complaint a transcript of a September 26, 2019, Board meeting.

Defendants have submitted more than a dozen exhibits of public administrative actions and judicial proceedings which provide additional information about: 1) the first

disciplinary proceeding against Bock, beginning in early 2014; 2) his appeals therefrom, ending, in pertinent part, in late 2018; 3) litigation with respect to the reinstatement of his medical license, throughout 2019; 4) the second disciplinary proceeding as to plaintiff 's medical license, beginning in 2019; and 5) his appeals therefrom, ending in late 2021.

Reduced to its underlying theory of unlawful conduct, the complaint alleges that Sloane and Abraham violated Section 1 of the Sherman Act by causing the Board to take unwarranted, adverse action against Bock's medical license to the detriment of market competition. Specifically, in 2014, the Board issued a Statement of Allegations against Bock and, contemporaneously, temporarily suspended his medical license. The suspension was referred to the Division of Administrative Law Appeals ("DALA"), an independent agency in Massachusetts which provides due process hearings with respect to state agency actions and then makes a "recommended decision" to the pertinent agency.

After convening a hearing on the summary suspension, DALA recommended that the suspension be upheld and the Board accepted and adopted that recommendation. Bock appealed to a single justice of the Massachusetts Supreme Judicial Court ("SJC") who remanded the matter to DALA because it had applied an incorrect evidentiary standard. DALA convened another hearing on the merits of the suspension in 2018 and issued a recommended decision to the Board that Bock had violated certain statutes and regulations but that he had not provided substandard care to his patients.

Appendix B

The Board accepted and adopted DALA's second recommended decision and issued its final decision in November, 2018, but did not reinstate Bock's license at that time because it had lapsed during the period of summary suspension. Bock filed a petition for certiorari with a single justice of the SJC who reported the case to the full SJC. Before that Court decided the case, the Board reinstated Bock's license in September, 2019.

In the meantime, the Board issued a second Statement of Allegations in July, 2019, with respect to a recently-disclosed settlement of a malpractice lawsuit against Bock. Thus, although the Board reinstated plaintiff 's license in September, 2019, it suspended his license for a second time the following month. Bock appealed that suspension and, in 2020, DALA recommended that his suspension be vacated. The Board accepted and adopted that recommendation. In June, 2021, DALA recommended dismissal of the second Statement of Allegations which the Board did in October, 2021.

Bock alleges that Sloane and Abraham promoted and manipulated the Board proceedings regarding his license because of their opposition to his treatment model for opioid use disorder. He avers that he has, for many years, followed a treatment model in which patients with opioid use disorders are tapered off Suboxone rather than forced to purchase it monthly "for the rest of their natural lives." Bock concludes that Sloane, Abraham and the Board persecuted him for this treatment model and sought to "eliminate [his] business", thereby harming competition and affecting interstate commerce.

B. Procedural History

Plaintiff filed suit *pro se* in the District of Massachusetts in June, 2022, and shortly thereafter filed motions to reassign this action and to disqualify opposing counsel. This Court denied those motions in July, 2022. Defendants filed the pending motion to dismiss for failure to state a claim in August, 2022, which plaintiff timely opposed. In the interim, Bock filed a second motion to disqualify opposing counsel which this Court denied.

II. Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the subject pleading must contain sufficient factual matter to state a claim for relief that is actionable as a matter of law and "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible if, after accepting as true all non-conclusory factual allegations, the court can draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011).

When rendering that determination, a court may consider certain categories of documents extrinsic to the complaint "without converting a motion to dismiss into a motion for summary judgment." *Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013) (citing *Watterson*

v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). For instance, a court may consider documents of undisputed authenticity, official public records, documents central to a plaintiff's claim and documents that were sufficiently referred to in the complaint. *Watterson*, 987 F.2d at 3.

A court may not disregard properly pled factual allegations in the complaint even if actual proof of those facts is improbable. *Ocasio-Hernandez*, 640 F.3d at 12. Rather, the court's inquiry must focus on the reasonableness of the inference of liability that the plaintiff is asking the court to draw. Id. at 13.

B. Application

Defendants move to dismiss the complaint on the following grounds: 1) Sloane and Abraham are entitled to absolute quasi-judicial immunity, 2) Bock has failed to state a plausible claim for an antitrust violation and 3) his claim is barred by qualified immunity and/or state-action immunity.

1. Quasi-Judicial Immunity

Sloane and Abraham contend that they are entitled to absolute immunity with respect to actions they took as Board members in their quasi-judicial capacity. In *Bettencourt v. Bd. of Registration in Medicine of Com. of Mass.* [hereinafter "Bettencourt"], the First Circuit Court of Appeals ("the First Circuit") held that Board members are entitled to absolute immunity when acting in a quasi-judicial capacity. *See* 904 F.2d 772, 782-84 (1st

Cir. 1990). An official acts in a quasi-judicial capacity if he or she

> perform[s] *functions* essentially similar to those of judges or prosecutors, in a setting similar to that of a court.

Id. at 782.

The First Circuit specifically addressed the adjudicatory function of a Board member in the context of "revoking a physician's license" and held that quasi-judicial immunity is appropriate in such circumstances. Id. at 783-84. Although plaintiff suggests that Bettencourt is a "zombie" precedent and refers to *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494 (2015) [hereinafter "N. Carolina Dental"], in support of such assertion, that decision is not relevant to the issue of whether defendants are entitled to quasi-judicial immunity.

N. Carolina Dental concerned the purported state-action immunity of a state dental board and did not involve a claim for money damages against individual board members. The Supreme Court explained that the case

> [did] not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability.

Id. at 513. The First Circuit has expressly held that *N. Carolina Dental* does not disturb the absolute quasi-

judicial immunity afforded to Board members under *Bettencourt*. *See Padmanabhan v. Hulka*, 2019 WL 10378226, at *1 (1st Cir. July 10, 2019).

There is no reason to doubt the continuing vitality of the quasi-judicial immunity for Board members recognized in *Bettencourt* and the question in the case at bar is, therefore, whether the allegations against Sloane and Abraham are directed at their performance of an adjudicative or prosecutorial function. Bock asserts that, as Board members, Sloane and Abraham: 1) summarily suspended his license in 2014 and eliminated him from the "medical marketplace", 2) mishandled patient complaints, 3) issued unfounded Statements of Allegations, 4) allowed investigations and prosecutions to be mishandled, 5) wrongfully kept the suspension of his license in place from 2014 through 2019 and 6) unfairly suspended his license again in 2019.

An individual Board member acts in a manner similar to a judge when he or she

> weighs evidence, makes factual and legal determinations, chooses sanctions, [or] writes opinions explaining [his or her] decisions. . . .

Bettencourt, 904 F.2d at 783; *see also Ramsaran v. Sloane*, 159 N.E.3d 1088, 2020 WL 7821410 (2020) (explaining in an unpublished opinion that the defendant Board member was entitled to immunity when determining whether to bring a charge, rely on certain evidence or issue a Statement of Allegations).

Furthermore, the First Circuit has held that members of similar boards are immune from liability for their performance of a quasi-judicial or prosecutorial function in circumstances where they "instigat[e] and prosecut[e]" charges, *Wang v. N.H. Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995), or suspend a license even if the suspension involved a "grave and unacceptable procedural error", *Guzman-Rivera v. Lucena-Zabala*, 642 F.3d 92, 99 (1st Cir. 2011).

The Court concludes that Bock's allegations are squarely directed at the performance by Sloane and Abraham of quasi-judicial functions to which immunity applies. The conduct in question is: 1) comparable to that of a judge and, in some respects, a prosecutor, 2) likely to "stimulate a litigious reaction" and 3) occurred in the context of proceedings with adequate procedural safeguards. *Bettencourt*, 904 F.2d at 783 (listing those three factors as guides for analyzing "how closely analogous the adjudicatory experience of a Board member is to that of a judge"); *Wang*, 55 F.3d at 701 (explaining that the distinction between a quasi-judicial and a prosecutorial function does not affect the applicability of absolute immunity). Although Bock emphasizes that his claims are brought against Sloane and Abraham in their "individual capacities", that distinction does not negate their entitlement to quasi-judicial immunity in this case. *See id.* (citing *Bettencourt*, 904 F.2d at 782-85).

Finally, the complaint is littered with speculative pronouncements about purported improper motivations of Sloane and Abraham. Even if it were appropriate

to accept such speculation as factual allegations, the motives of officials entitled to absolute immunity do not affect the application of the immunity. *See Cleavinger v. Saxner*, 474 U.S. 193, 199-201, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985) (explaining that absolute immunity is not "affected by the motives with which [one's] judicial acts are performed") (quoting *Bradley v. Fisher*, 80 U.S. 335, 347, 13 Wall. 335, 20 L.Ed. 646 (1871)); *Bettencourt*, 904 F.2d at 785 n.16 (finding that Board members were entitled to absolute immunity even though plaintiff claimed they had participated in "an ongoing conspiracy to deprive physicians of their rights").

In light of the foregoing, the Court concludes that Sloane and Abraham are entitled to absolute quasi-judicial immunity in this matter.

2. Section 1 of the Sherman Act

Furthermore, Bock has failed to allege facts sufficient to state a claim under the Sherman Act. In order to state a claim that Section 1 of the Sherman Act has been violated, a plaintiff must plausibly allege:

> (1) the existence of a contract, combination or conspiracy;
>
> (2) that the agreement unreasonably restrained trade . . . and
>
> (3) that the restraint affected interstate commerce.

Dahl v. Bain Capital Partners, LLC, 937 F. Supp. 2d 119, 134 (D. Mass. Mar. 13, 2013) (citation omitted).

A claim under Section 1 of the Sherman Act cannot survive a motion to dismiss if the conduct alleged "stems from independent decision [rather than] from an agreement, tacit or express." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (cleaned up). A complaint that alleges mere "parallel conduct" or states only "a conclusory allegation of agreement at some unidentified point" is insufficient. *Id.* at 557. The *Twombly* standard does not, however, permit this Court to dismiss a Section 1 claim on grounds that a plausible theory of permissible conduct appears more probable than a plausible theory of liability. *See Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 46 (1st Cir. 2013) (emphasizing the difference between a court's analysis at the motion to dismiss stage and its analysis at "later litigation stages"). Instead, the Court must assess whether the complaint alleges

> the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible.

Id. at 46.

Bock labels the conduct of Sloane and Abraham as unlawful collusion in conclusory fashion but does not proffer the general contours of a plausible agreement or conspiracy. He repeatedly expounds that there was

no medical basis or state policy which justified taking action against him based upon his "non-adherence to the Lifetime Subscription Model" but nothing about that conclusory allegation suggests that defendants' conduct stemmed from any mutual agreement.

The most pertinent allegations in the complaint assert that the Board's treatment of patient complaints about Bock changed once Sloane and Abraham "took over the medical board." Bock also avers that Sloane and Abraham supported one another or agreed with one another at certain meetings. Such allegations suggest only that Sloane and Abraham participated in typical disciplinary proceedings together in their role as Board members but provide no basis to infer the existence of an agreement or conspiracy between them.

Furthermore, the allegations in the complaint do not support a plausible inference that Sloane and Abraham acted as separate entities. A violation of Section 1 of the Sherman Act requires a conspiracy or agreement between two or more *separate* entities and thus conduct by individuals who belong to, and act for the benefit of, the same organization is insufficient to state a claim. See *Podiatrist Ass'n v. La Cruz Azul de P.R., Inc.*, 332 F.3d 6, 13 (1st Cir. 2003).

Because Sloane and Abraham were both Board members, the complaint must allege that they acted as "independent, self-interested economic agents" rather than for the benefit of the entity (the Board) of which they were both members. *Id.* at 14. Bock's complaint does not,

however, set forth any facts suggesting that Abraham or Sloane had self-interested economic interests separate from the unilateral, regulatory aims of the Board itself. For the foregoing reasons, the Court concludes that the allegations in the complaint fail to state a claim that defendants violated Section 1 of the Sherman Act.

3. Qualified Immunity

In addition to this Court's determination that defendants are entitled to quasi-judicial immunity with respect to the conduct at issue and that plaintiff fails to state a plausible claim under Section 1 of the Sherman Act, the Court also finds that defendants would be entitled to qualified immunity in any event.

Whether defendants are entitled to qualified immunity requires a two-prong analysis as to whether: 1) plaintiff has alleged facts which state a violation of his statutory or constitutional rights and 2) whether the subject right was clearly established at the time of the alleged violation. *See Díaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011). The second prong of the analysis itself consists of two parts:

> (a) whether the legal contours of the right in question were sufficiently clear that a reasonable official would have understood that what he was doing violated that right, and (b) whether the particular factual violation in question would have been clear to a reasonable official.

Id.

Thus, even if this Court were to find that Bock states a plausible claim under Section 1 of the Sherman Act (which it does not), the Court is unaware of any prior case law which "clearly established" that a member of a medical licensing board may be held individually liable under the antitrust laws for participating in enforcement actions against a licensee. Plaintiff, upon whom the burden rests to demonstrate the inapplicability of defendants' qualified immunity defense, cites no authority in his favor other than *N. Carolina Dental*, 574 U.S. 494. As this Court has already noted, the Supreme Court's decision in *N. Carolina Dental* did not address the specific liability or immunity of "agency officials, including board members". *Id.* at 513.

ORDER

For the foregoing reasons, defendants' motion to dismiss (Docket No. 26) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: June 1, 2023