IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE, *et al.*,	§	
Plaintiffs,	§	
v.	§	Civil Action No. SA-14-CV-35-OLG
AMERICAN ACADEMY OF ALLERGY, ASTHMA & IMMUNOLOGY, *et al.*,	§	
Defendants.	§	

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Before the Court is Plaintiffs' motion for preliminary injunction. Docket No. 12. For the following reasons, the motion is DENIED.

I. Background

Plaintiff Academy of Allergy & Asthma in Primary Care ("AAAPC") is a national association of approximately 250 primary care physicians who practice allergy testing and allergen immunotherapy.[1] Plaintiff United Biologics, LLC d/b/a United Allergy Service ("UAS") is a company which provides nationwide support services to physicians practicing allergy testing and allergen immunotherapy.

Defendants include individuals who are board-certified to practice allergy immunotherapy by the American Board of Allergy and Immunology ("ABAI");[2] their

[1] According to Plaintiffs, allergen immunotherapy is a process of introducing allergens incrementally into a patient's system to desensitize the patient to such allergens. *See* Am. Compl. ¶ 35, Docket No. 71. It is the only known cure to allergic rhinitis for seasonal and perennial allergies. *Id.* Over-the-counter and prescription allergy medications merely mask allergy symptoms, but do not cure the problem. *Id.*

[2] The individual defendants are Dr. Donald Aaronson, Dr. Garry Gross, Dr. Lyndon Mansfield, Dr. James Sublett, and Dr. David Weldon. The ABAI is not a defendant in this case.

corporations or professional associations;[3] and professional organizations with whom they are affiliated.[4]

At issue is an alleged boycott organized by Defendants "to restrict competition in the market for allergy testing and allergen immunotherapy for seasonal and perennial allergies." Am. Compl. ¶ 1, Docket No. 71. Plaintiffs allege that Defendants "actively engaged in [a] self-described 'turf war' by contacting insurance companies, managed care organization health plans, and other third-party payors to convince them not to do business with or reimburse the allergy testing and allergen immunotherapy services of primary care physicians and UAS." *Id.* ¶ 2. Plaintiffs assert that Defendants' actions violated section 1 of the Sherman Act, as well as the state law equivalent, the Texas Free Enterprise and Antitrust Act. Moreover, Plaintiffs assert that Defendants' actions constituted tortious interference with existing contracts and business relations, tortious interference with prospective business relations, and civil conspiracy.

After filing suit, Plaintiffs moved for a preliminary injunction to enjoin Defendants from contacting insurance companies and other third-party payors in an attempt to convince those payors that allergy testing and allergen immunotherapy should be restricted to board-certified physicians. Docket No. 12. On April 2, 2014, the Court held an evidentiary hearing in which both sides had an opportunity to present evidence and oral argument.

---

[3] Defendant Dallas Allergy and Asthma Center, P.A. ("Dallas Allergy") is allegedly owned and operated by Dr. Gross. Defendant Family Allergy & Asthma LLC ("Family Allergy") is allegedly owned and operated by Dr. Sublett. Defendant Lyndon E. Mansfield M.D. P.A. ("Mansfield P.A.") is allegedly owned and operated by Dr. Mansfield.

[4] The professional organizations are Defendants American Academy of Allergy, Asthma & Immunology ("AAAAI"), the American College of Allergy, Asthma & Immunology ("ACAAI"), and the Joint Council of Allergy, Asthma & Immunology ("JCAAI"). The JCAAI is allegedly an umbrella trade organization, whose board is composed of members nominated by the AAAAI and the ACAAI. Defendants Dr. Aaronson and Dr. Gross are allegedly officers of the JCAAI.

II. Legal Standard

A preliminary injunction is an "extraordinary and drastic remedy" that should only be granted "when the movant, by a clear showing, carries the burden of persuasion." *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 772 (N.D. Tex. 2012) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). To establish entitlement, the movant must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Paulsson Geophysical Services, Inc. v. Sigmar*, 529 F.3d 303, 309 (5th Cir. 2008). The movant must satisfy a cumulative burden of proving each of the four elements. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Id.*

III. Discussion

Plaintiffs have failed to carry their burden of establishing the four elements required for a preliminary injunction. Accordingly, the Court must deny their request.

1. Likelihood of Success

To be entitled to a preliminary injunction, a plaintiff must show a likelihood of success on the merits. While Plaintiffs have presented compelling arguments for antitrust relief, their evidence is insufficient to carry their heavy burden of showing a likelihood of success.

A. Sherman Act § 1

Sherman Act § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with

foreign nations, is declared to be illegal." 15 U.S.C. § 1. "In order to state a claim under section 1 of the Sherman Act, a plaintiff must show that the defendants (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." *Tunica Web Adver. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 409 (5th Cir. 2007) (internal quotation marks omitted).

i. Conspiracy

Plaintiffs allege a conspiracy among physicians board-certified to practice allergy care,[5] their professional associations, and their trade organizations to "boycott" primary-care physicians who are not board-certified and their support service, UAS. Plaintiffs allege that the board-certified allergists seek to limit competition in the allergy care market "to protect their own profits and ensure that patients continue to pay their inflated prices, despite the need for additional supply in the market." Am. Compl. ¶ 3. Plaintiffs allege that, to accomplish this objective, Defendants contacted third-party payors and "through persuasion, enticement, or coercion" convinced the third-party payors not to pay allergy care claims submitted by primary care physicians or their support service, UAS. *Id.* ¶ 2.

To show conspiracy, a plaintiff must establish concerted action on the part of the defendants. *Tunica* 496 F.3d at 409 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). At the preliminary injunction stage, the Court is permitted to consider evidence that might otherwise be inadmissible. *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993).

Here, the evidence Plaintiff submitted tends to suggest that Defendants conspired to limit primary care physicians from entering the market for allergy care. Among other things, Plaintiffs point to a newsletter written by one of the individual Defendants, Dr. James Sublett, on

[5] These board-certified physicians are also called "allergists."

behalf of an organizational Defendant, the Joint Council of Allergy, Asthma & Immunology ("JCAAI"). Mot. for Prelim. Inj., Ex. E-13. In the newsletter, Dr. Sublett notes the rise of allergy care by primary care physicians with the assistance of support services, such as UAS, which provide the primary care physicians with in-office technicians. To respond to the increased practice of allergy care by non-board-certified allergists, Dr. Sublett suggests to board-certified allergists:

> We believe one approach you can take is to educate primary care physicians AND local carriers about the allergy standard of care. To that end, the Immunotherapy Committees of the College[6] and the Academy[7] have developed a slide set, "Pearls [*sic*] and Pitfalls of Allergy Diagnostic Testing." This is a 75 slide-set covering all kinds of allergy testing and how the results should be interpreted to arrive at the correct diagnosis and treatment. The slides and an accompanying article are directed to PCPs [primary care physicians] and carriers.
>
> JCAAI encourages you to present these talks in your neighborhood, and leave behind the accompanying article; this will give Allergists a better chance to level the playing field. This contact with the PCP (and their patients) and/or carrier allows you to present the advantages of allergy care provided by a trained board-certified allergist who will supervise and interpret skin tests and help make therapeutic recommendations as to whether a patient *needs* allergen immunotherapy. We need to educate our local PCPs as to how we can aid them in enhancing the services they provide to their patients by achieving better results. We can help them understand that we can also provide immunotherapy for administration in the PCPs office, if they wish. You should discuss the dangers of misdiagnosis and administration of incorrect doses of immunotherapy with your PCP's [*sic*]. Your presentation needs to be general in nature and should not mention any particular company. This type of communication—brought to the carriers—could be very helpful, since they do not want to pay for ineffective treatments.

Mot. for Prelim. Inj., Ex. E-13 (emphases in the original).

As is evident from the quoted passage, Dr. Sublett, on behalf of the JCAAI, requests board-certified allergists to "educate" primary care physicians, their patients, and third-party payors in their communities. Regardless of whether this "education" is illegal, it appears likely

[6] i.e., Defendant American College of Allergy, Asthma & Immunology ("ACAAI")
[7] i.e., Defendant American Academy of Allergy, Asthma & Immunology ("AAAAI")

that Defendants did not act independently, but instead had a "conscious commitment to a common scheme." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (stating that to prevail on a vertical price-fixing claim, there must be "evidence that tends to exclude the possibility of independent action"). Accordingly, Plaintiffs can likely prove concerted action among board-certified allergists.

ii. Restraint of Trade

Next, to prevail on their Sherman Act § 1 claim, Plaintiffs must show that Defendants engaged in an unreasonable restraint of trade. *See Monsanto*, 465 U.S. at 768 (stating that a plaintiff must show that the defendants' common scheme was "designed to achieve an unlawful objective").

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1; *see Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). While § 1 could be interpreted to proscribe all contracts, the Supreme Court has never taken a literal approach to its language. *Leegin*, 551 U.S. at 885. "Rather, the Court has repeated time and again that § 1 outlaws only unreasonable restraints." *Id.* (internal quotation marks omitted).

To determine whether a practice is an unreasonable restraint in violation of § 1, courts generally apply the "rule of reason." *Id.*; *Tunica*, 496 F.3d at 411. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin*, 551 U.S. at 885 (internal quotation marks omitted). As the Supreme Court noted:

> the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its

> condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918). Also significant is whether the businesses involved have market power. *Leegin*, 551 U.S. at 885–86. While a court should consider "the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained," it should do so only to "interpret facts and to predict consequences." *Bd. of Trade of Chicago*, 246 U.S. at 238. A good intention will not save an otherwise objectionable regulation or the reverse. *Id.*

Some types of agreements have been found to be almost inherently anticompetitive. *Tunica*, 496 F.3d at 412. "Such agreements can be considered *per se* violations of section 1, meaning that the law does not require a plaintiff to provide the usual proof that the agreement at issue is actually anticompetitive in the particular case." *Id.* (citing *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998)). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects and "lack any redeeming virtue." *Leegin*, 551 U.S. at 886 (citing *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)). On a general level, "[t]he decision to apply the *per se* rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive." *Nw. Wholesale Stationers*, 472 U.S. at 290 (internal quotation marks omitted) (ellipsis in the original).

Plaintiffs allege that Defendants unlawfully restricted competition through a group boycott and price-fixing. Plaintiffs' price-fixing claim will be discussed briefly before turning to Plaintiffs' boycott claim.

a. Price-Fixing

Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, are *per se* unlawful. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Vertical price restraints are judged by the rule of reason. *Leegin*, 551 U.S. at 907.

Plaintiffs allege that Defendants fixed prices in two ways. First, Plaintiffs allege that "Defendants have sought to convince third-party payors not to pay at all primary care physicians for allergy testing or allergen immunotherapy or those using the services of UAS." Mot. for Prelim. Inj. at 11. This is not a price-fixing claim, but instead is a boycott claim. *See e.g. United States v. Gen. Motors Corp.*, 384 U.S. 127, 148–49 (1966) (Harlan, J. concurring) (noting that allegations of a concerted refusal to deal raise a boycott claim). Second, Plaintiffs allege that "Defendants have pushed for prices that limit the amount paid for immunotherapy prepared by [primary care physicians and UAS] as compared to board-certified allergist, [thereby] protecting the high shot fees that allergists charge." Mot. for Prelim. Inj. at 11. This second claim alleges a vertical, rather than a horizontal, conspiracy since it alleges price-fixing between the board-certified allergists and the third-party payors, and those groups are not competitors. *See e.g. Leegin*, 551 U.S. at 893 (explaining how horizontal cartels can be facilitated by vertical agreements setting prices). Since Plaintiffs allege a vertical price-fixing conspiracy, the alleged conspiracy is judged by the rule of reason. *Id.*

Plaintiffs have not shown that they are likely to succeed on the merits of their vertical price-fixing claim. First, it is unclear whether Plaintiffs allege a conspiracy between the board-certified allergists and the third-party payors. The focus of Plaintiffs complaint is on alleged agreements among board-certified allergists, not agreements between board-certified allergists

and third-party payors.[8] Second, Plaintiffs have not provided evidence that the third-party payors fixed prices. The only evidence Plaintiffs offer concerns a limit on the number of allergy immunotherapy doses one insurer, Aetna, would allow. Mot. for Prelim Inj., Ex. F-1 (stating that Aetna would only allow 120 doses for the first year of allergen immunotherapy and 90 for subsequent years). While Plaintiffs argue that this limit on alleged doses fixes prices and would disproportionately affect primary care physicians and UAS, these connections are not obvious and are disputed. *See id.*[9] Finally, even if the Court were to determine at this preliminary injunction stage that the evidence is sufficient to show a conspiracy to fix prices, Plaintiffs have not shown under the rule of reason that this agreement to fix prices has anticompetitive effects. *See Leegin*, 551 U.S. at 894 (recognizing that vertical price-fixing agreements can have procompetitive and anticompetitive effects).

Because Plaintiffs have not shown that they are likely to prove a price-fixing conspiracy between Defendants and third-party payors; because it is not obvious that third-party payors actually fixed-prices; and because Plaintiffs have not shown under the rule of reason that the alleged price-fixing suppressed competition, the Court finds that Plaintiffs have not shown that they are likely to establish a Sherman Act violation through illegal price-fixing.

---

[8] Furthermore, even if Plaintiffs have alleged a vertical conspiracy, they must ultimately prove that the third-party payors conspired with board-certified allergists and did not act independently. *See Monsanto*, 465 U.S. at 768; *Tunica*, 496 F.3d at 409; *Royal Drug Co., Inc. v. Group Life & Health Ins.* (affirming summary judgment for an insurance company where Plaintiff did not show that the insurance company's differentiated payments to pharmacies was the result of an illegal conspiracy between the insurance company and the benefitting pharmacies).

[9] The restrictions facially restrict treatment, rather than prices, and apply to both board-certified allergists and primary care physicians. Aetna's limit on doses reimbursed is also discussed below under the group boycott section since the limit can be interpreted as a tool for boycotting Plaintiffs if the board-certified allergists and the third-party payors agreed to use the limit on doses to effectively put Plaintiffs out of business. *See e.g. Consol. Metal Products, Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 289 (5th Cir. 1988) (analyzing a trade association product certification as an alleged group boycott where an equipment manufacturer claimed that the certification was withheld as a means of enforcing a group boycott).

b. Group Boycott

Next, Plaintiffs allege that Defendants violated the Sherman Act by organizing a group boycott. Specifically, Plaintiffs allege that Defendants contacted third-party payors and "through persuasion, enticement, or coercion" convinced third-party payors not to pay allergy care claims submitted by primary care physicians or their support service, UAS. Am. Compl. ¶ 2.

The Supreme Court has recognized that boycotts may involve both horizontal and vertical elements. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135–36 (1998). In fact, the Court has recognized that a group boycott "in the strongest sense" involves "[a] group of competitors threatening to withhold business from third parties unless those third parties would help them injure their directly competing rivals." *Id.* at 135. Here, Plaintiffs allege a boycott involving horizontal and vertical elements. The heart of the conspiracy is a horizontal agreement among competitors—board-certified physicians—to limit competition. These horizontal competitors allegedly enlisted the help of third-party payors. This relationship between the board-certified physicians and the third party payors is a vertical relationship.

At the preliminary injunction hearing, Plaintiff UAS's chief commercial officer, Michael DelVacchio, testified that beginning in the fall of 2012 various third-party payors began auditing and then denying reimbursement for allergy care provided by primary care physicians supported by UAS. Prelim. Inj. Hr'g Tr. 53:1–19, Apr. 2, 2014. Some third-party payors also allegedly restricted the allergy care that they would reimburse in a manner that disproportionately harmed primary care physicians and UAS compared to board-certified allergists.[10] Finally, and most

[10] For example, Plaintiffs provided evidence that Aetna decreased the allergen immunotherapy doses that it would reimburse to 120 for the first year of treatment, and 90 for subsequent years. Mot. for Prelim. Inj., Ex. F-1. Mr. DelVacchio stated that this change had the effect of reducing reimbursement for allergy care by primary care physicians by 70 percent. Hr'g Tr. 56:13–19. In contrast, this change had little if no effect on board-certified allergists because of the way that board-certified allergists treated patients. *Id.* 87:9–21. Board-certified allergists typically use fewer doses to complete the same treatment. *Id.* Additionally, third-party payors allegedly began

significantly, some third-party payors restricted allergy care to only those physicians with specialized training, such as board-certified allergists. Mot. for Prelim. Inj., Exs. F-2, F-3 & F-4.

While the connection between the allergy care reimbursement policies imposed by third-party payors and the advocacy of Defendants is not entirely clear, Mr. DelVacchio testified that he was aware of meetings between Defendants and some third-party payors. *See e.g.*, Hr'g Tr. 60:19–21. Additionally, Defendant JCAAI noted in a newsletter that the change in reimbursement policy at Aetna was "the result of a number of discussions with a Senior Medical Director at Aetna." Mot. for Prelim. Inj., Ex. F-1. Plaintiffs also point out that policy change notices sent by certain third-party payors refer to medical standards for the practice of allergy care developed by Defendant AAAAI. *Id.*, Exs. F-3 & F-4. Finally, internal records from Defendant organizations call for their board-certified physician members to contact third-party payors, which suggests that the members may have actually done so. *See e.g.*, Mot. for Prelim. Inj., Ex. E-13.

Plaintiffs argue that the horizontal element of the alleged boycott—i.e., the agreements between board-certified allergists—is supported by evidence and that this horizontal element makes the boycott *per se* illegal once a conspiracy among these competitors is found. Mot. for Prelim. Inj. at 15. Plaintiffs also argue, alternatively, that the conspiracy to boycott is illegal under the rule of reason. *Id.* at 15–16. In response, Defendants argue that this case is not analogous to group boycott cases subject to the *per se* liability rule. *See e.g.*, Hr'g Tr. 178:10–179:7. Defendants allege legitimate medical justifications for advocating that third-party payors adopt certain reimbursement policies, if Defendants advocated at all.

---

listing self-administration of immunotherapy by patients as investigational. *Id* 59:4–7. This change allegedly disproportionately harmed primary care physicians compared to board-certified physicians because primary care physicians approve self-administration at a much higher rate than board-certified physicians. *Id.* 45:9–23 (testimony of Dr. Bernice Gonzalez).

The Supreme Court and Fifth Circuit have both noted that categories like "*per se*" and "rule of reason" are less fixed than they tend to appear. *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 779 (1999); *Consol. Metal*, 846 F.2d at 291 n.17. While some agreements are manifestly "naked" restraints on trade, the competitive effects of others are not intuitively obvious. *Cal. Dental*, 526 U.S. 780–81; *Consol. Metal*, 846 F.2d at 291 n.17. *Per se* liability should only be imposed where a restraint has "manifestly anticompetitive effects and lack[s] any redeeming virtue." *Leegin*, 551 U.S. at 886; *cf. Gen. Motors Corp.*, 384 U.S. 127 (1966) (finding an agreement between an automobile manufacturer and some of its distributors to eliminate price-cutting dealers to be a *per se* illegal group boycott where the boycott was aimed at restraining price competition).

Here, unlike in those cases imposing *per se* liability, Defendants allege legitimate pro-competitive justifications for advocating that third-party payors adopt certain reimbursement policies. Defendants allege that they advocate for a "minimum standard of allergy care" that practitioners should follow for patient safety. *See e.g.*, Resp., at 2, Docket No. 26. If adopted as a prerequisite for reimbursement, this "standard of care" could effectively preclude some primary care physicians from being reimbursed by third-party payors. Moreover, if certain standards advocated by Defendants were adopted by third-party payors, physicians could be precluded from utilizing the services offered by UAS.

In a line of cases stretching back to at least the 1970s, the Supreme Court has been hesitant to impose antitrust liability on professional organizations without at least some investigation into asserted pro-competitive or competitive neutral justifications, unless the restraint directly controls prices. *See e.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975); *Nat'l Soc. of Prof'l Engineers v. U. S.*, 435 U.S. 679, 687 (1978); *Arizona v. Maricopa*

Cnty. Med. Soc., 457 U.S. 332, 348–49 (1982); *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986); *Cal. Dental*, 526 U.S. at 771 n.10.

For example, in *California Dental*, a voluntary association of local dental societies in California imposed rules on its members restricting price-discount advertising. *Cal. Dental*, 526 U.S. at 760–61. The Federal Trade Commission brought a complaint against the dental association asserting that the rule was an unreasonable restraint on competition. *Id.* at 762. The Commission treated the restriction on discount advertising as *per se* illegal or alternatively illegal under an abbreviated rule of reason analysis. *Id.* at 762–63. The Ninth Circuit affirmed the Commission's conclusions under an abbreviated rule of reason analysis. *Id.* at 763–64. The Ninth Circuit refused to conduct a full rule of reason analysis noting, among other things, that the dental association's rule "amounted in practice to a fairly 'naked' restraint on price competition itself." *Id.*

On appeal, the Supreme Court vacated the Ninth Circuit's judgment and remanded the case. *Id.* at 765. Without considering the evidence, the Supreme Court noted that the abbreviated rule of reason analysis, or "quick-look analysis," was inappropriate. *Id.* at 769. The Court stated that a quick-look analysis is only appropriate "when the great likelihood of anticompetitive effects can easily be ascertained." *Id.* at 770. The likelihood of anticompetitive effects from the dental association's restriction on discount advertising, however, was not obvious. *Id.* at 771. The Supreme Court observed that the dental association's "restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient." *Id.* Moreover, "the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the

specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services . . . or to something else." *Id.* at 772.

Ultimately, the Court in *California Dental* did not rule on whether the evidence supported a finding of an antitrust violation. Instead, the Court remanded the case for something more than a quick-look analysis. *Id.* at 779–81.[11] While *California Dental* is not directly on-point to this case, the Supreme Court's acknowledgement of the difficulty in discerning anticompetitive and procompetitive effects of rules designed by professional organizations is instructive. Here, where the competitive effects of Defendants' advocacy for heightened "medical standards" is unclear, this Court cannot find that Plaintiffs will likely succeed on the merits of their Sherman Act claim without a more detailed analysis into the "circumstance, details, and logic of the restraint." *Id.* at 781.[12] Among other things, this more detailed analysis will allow the Court (or jury at trial) to determine whether the standards being advocated are in fact medically justified, or are instead merely a pretext to restrain competition. At this time, however, the Court does not have sufficient evidence to assess the true impact of the alleged restraint. Accordingly, the Court

[11] The Court did not fit the analysis into a specific analytic category. Instead, the Court stated:

> there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Id. at 780–81. Additionally, the Court noted that categories of analysis such as "*per se*," "quick-look," and "rule of reason" are less fixed than they tend to appear. *Id.* at 779.

[12] Additionally, this Court notes that "the essential [antitrust] inquiry" is "whether or not the challenged restraint enhances competition." *Cal. Dental*, 526 U.S. at 779–80. Defendants' intentions may inform this investigation, but their intentions are not ultimately dispositive. *See Bd. of Trade of Chicago*, 246 U.S. at 238; *Levine v. Cent. Florida Med. Affiliates, Inc.*, 72 F.3d 1538, 1552 (11th Cir. 1996).

finds that Plaintiffs have not shown that they are likely to succeed on the merits of their Sherman Act group boycott claim.

This Court's conclusion is reinforced by the Supreme Court's refusal in *California Dental* to shift the burden of showing a procompetitive justification to the alleged antitrust violator. *Id.* at 771, 775 n.12, 776. The Supreme Court noted:

> before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

Id. at 775 n.12.

This Court's finding does not imply that Plaintiffs cannot ultimately prevail on their Sherman Act claim. In fact, courts and juries considering rules and standards developed by professional associations have both found and denied antitrust liability. *Compare e.g.*, *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989) (dismissing a Sherman Act § 1 claim against an association of ophthalmologists, which issued a press release stating that a medical procedure was "experimental") with *Wilk v. Am. Med. Ass'n*, 895 F.2d 352 (7th Cir. 1990) (upholding a district court finding that the American Medical Association violated § 1 of the Sherman Act by writing an ethical rule which prohibited medical physicians from associating professionally with allegedly "unscientific" chiropractors); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 497–98, 499 n.3 (1988) (noting that a jury found that the defendant violated the Sherman Act by subverting the consensus standard-making process of a professional association, but withdrawing certiorari on the issue of whether the evidence supported this finding); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir.

2004) (vacating a jury verdict after finding that the district court should have instructed a rule of reason analysis, rather than *per se* liability, where the defendants asserted that their alleged anticompetitive restriction addressed vehicle safety concerns); *Consol. Metal*, 846 F.2d 284 (upholding summary judgment on a Sherman Act § 1 claim in favor of a trade association defendant, which delayed product certification for an equipment manufacturer).

iii. Relevant Market

Finally, the Court notes that Plaintiffs must establish the relevant market in which to analyze their Sherman Act claim. *See Tunica*, 496 F.3d at 409. At this point, Plaintiffs have not defined a market with specificity. *See e.g.*, Mot. for Prelim. Inj. at 15 (stating that Defendants' actions will affect "the provision of allergy services in both the national and local markets").

Moreover, Plaintiffs have noted that some third-party payors in certain markets have adopted standards recommended by Defendants, while others have rejected them. *See e.g.*, Hr'g Tr. 71:5–16 (Mr. DelVacchio testifying that Blue Cross Blue Shield of Kansas has stopped reimbursing primary care physicians for allergen immunotherapy); *id.* 78:14–79:3 (Mr. DelVacchio testifying that Blue Cross Blue Shield of Kentucky has decided to continue reimbursing primary care physicians for allergen immunotherapy). The third-party payors' inconsistent decisions on reimbursing allergy care performed by primary care physicians suggest that the market definition must be refined and that Defendants' alleged market power may vary by location. *See Ind. Fed'n of Dentist*, 476 U.S. at 460–61 (noting that the market for dental services tends to be relatively localized); *Cal. Dental*, 526 U.S. at 782 (Breyer, J. concurring in part and dissenting in part) (noting that one of the classical, subsidiary rule of reason questions is whether "the parties have sufficient market power to make a difference").

iv. Sherman Act § 1 Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have not shown a likelihood of success on the merits of their Sherman Act § 1 claim.

B. Additional Claims

Plaintiffs also allege that Defendants violated the Texas Free Enterprise and Antitrust Act, TEX. BUS. & COMM. CODE §§ 15.01–15.51. Section 15.04 of the Act instructs courts to construe the act "in harmony with federal judicial interpretations of comparable federal antitrust statutes." *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 687 (Tex. 1990) ("[W]e look to federal judicial interpretations of section 1 of the Sherman Act in applying section 15.05(a) of our state antitrust law.") Accordingly, for the reasons discussed above, Plaintiffs have not shown a likelihood of success on the merits of their Texas Free Enterprise and Antitrust Act claim.

Additionally, Plaintiffs allege claims for tortious interference with existing contracts and business relations and tortious interference with prospective business relations. Both claims require Plaintiffs to prove that Defendants' conduct was either independently tortious or unlawful. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 599 F. Supp. 2d 809, 846 (S.D. Tex. 2008) *aff'd,* 567 F.3d 754 (5th Cir. 2009); *Wal–Mart Stores, Inc. v. Sturges,* 52 S.W.3d 711, 713 (Tex. 2001). Since Plaintiffs have not shown that Defendants' conduct was likely unlawful or independently tortious, Plaintiffs have also not shown that they are likely to prevail on the merits of their tortious interference claims.

Finally, Plaintiffs allege that Defendants committed civil conspiracy. Civil conspiracy requires, among other things, that two or more persons commit one or more unlawful, overt acts. *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 553 (5th Cir. 2012). Since Plaintiffs have not shown

that Defendants likely committed one or more unlawful, overt acts, Plaintiffs have also not shown that they are likely to prevail on the merits of their civil conspiracy claim.

C. Likelihood of Success Conclusion

For the foregoing reasons, Plaintiffs have not shown a likelihood of success on the merits of their claims as required for a preliminary injunction. *See Miss. Power & Light*, 760 F.2d at 621 (requiring that a preliminary injunction movant carry the burden of persuasion on all four of the preliminary injunction elements).

2. Additional Preliminary Injunction Factors

In addition to showing a likelihood of success on the merits of their claims, Plaintiffs must also show that they face a substantial threat of irreparable injury if the injunction is not issued. *Paulsson Geophysical Services*, 529 F.3d at 309. To make this showing, Plaintiffs must show a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm. *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986).

Plaintiffs allege that Defendants are orchestrating a boycott, which is carried out by third-party payors refusing to reimburse primary care physicians and UAS. As already noted, Plaintiffs allege a conspiracy among board-certified physicians. It is unclear whether Plaintiffs also allege that this conspiracy extends vertically from board-certified physicians to third-party payors.[13] Regardless, Plaintiffs have not shown that Defendants have the ability to entice, persuade, coerce, or otherwise convince third-party payors to adopt the standards which

[13] Plaintiffs can still state a claim for an illegal boycott even if they do not allege this vertical conspiracy. *See TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 808 (C.D. Cal. 2010) (noting that the Supreme Court in *Am. Soc. of Mech. Eng'rs Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), "had recognized a species of Section 1 conspiracies involving a market participant and an ostensibly neutral party"); *see also Allied Tube*, 486 U.S. at 501 n.6 ("Concerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny.") (emphasis in the original).

Plaintiffs allege effectively prohibits primary care physicians and UAS from practicing allergy care.

Plaintiffs request an injunction that prohibits Defendants from advocating for restrictions on the practice of allergy care to third-party payors. Since Plaintiffs have not shown that Defendants' advocacy has actually had an impact on the reimbursement practices of third-party payors, Plaintiffs have not shown how the issuance of an injunction will save Plaintiffs from suffering irreparable injury caused by Defendants' actions. Accordingly, the Court finds that Plaintiffs have not established that they face a substantial threat of irreparable injury if the injunction is not issued.

Finally, Plaintiffs must also show that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and that the grant of an injunction will not disserve the public interest. *Paulsson Geophysical Services*, 529 F.3d at 309. Since, as just explained, it is unclear what, if any, effect the injunction will have, Plaintiffs cannot establish either of these required elements for a preliminary injunction.

IV. Conclusion

To succeed on a request for a preliminary injunction, a movant must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Paulsson Geophysical Services*, 529 F.3d at 309. Plaintiffs have not carried their cumulative burden of proving each of these elements. *See Miss. Power & Light*, 760

F.2d at 621 (5th Cir. 1985). Accordingly, Plaintiffs' request for a preliminary injunction, Docket No. 12, is DENIED.[14]

It is so ORDERED.

SIGNED this 6 day of May, 2014.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

[14] Nothing in this Order should be construed as a comment on the merits of this case as this litigation is still in its infancy and discovery has not been conducted.