



## TABLE OF CONTENTS

	<u>PAGE</u>
FACTUAL SUMMARY.....	2
LEGAL STANDARD.....	6
ARGUMENT.....	7
I.    YOUNGER ABSTENTION DOES NOT AND CANNOT APPLY TO PETRIE’S CLAIMS.....	7
A. <i>Younger</i> Abstention Does Not Apply to Federal Antitrust Claims Because Federal Courts Have Exclusive Jurisdiction Over Those Claims.....	7
B. <i>Younger</i> Abstention Does Not Apply Here Because the Board Members Are Financially Biased.....	9
C. <i>Younger</i> Abstention Does Not Apply Here Because the Claims Are Broader Than the Board Decision Against Petrie.....	10
D. <i>Younger</i> Abstention Does Not Apply to the Individual Defendants or the State Claims.....	11
E.    Even if <i>Younger</i> Abstention Were Permitted, It Would Not Apply to Petrie’s Petrie’s Claims for Prospective Relief and Damages. ....	11
F.    Defendants’ Mischaracterize Petrie’s Allegations.....	12
II.    BURFORD ABSTENTION DOES NOT AND CANNOT APPLY TO PETRIE’S CLAIMS.....	13
III.   QUASI-JUDICIAL IMMUNITY DOES NOT PROTECT DEFENDANTS HERE..	14
A.    Quasi-Judicial Immunity is Limited in Scope.....	14
B.    Quasi-Judicial Immunity Doesn’t Apply To Federal Antitrust Cases Because There Is No Adequate State Court or State Law Remedies.....	16

	<u>PAGE</u>
IV. PETRIE HAS PROPERLY ALLEGED A CONSPIRACY.....	17
A. Defendants’ Argument Misunderstands the Contract, Combination, or Conspiracy Element of Section 1 of the Sherman Act.....	17
B. Petrie Has Alleged Direct Evidence of an Unlawful Conspiracy.....	18
C. Petrie Has Alleged That Defendant William F. Harp Participated in the Unlawful Conspiracy.....	21
CONCLUSION.....	21
CERTIFICATE OF SERVICE.....	23

## TABLE OF AUTHORITIES

Page

### CASES

<i>American Telephone &amp; Telegraph Co. v. IMR Capital Corp.</i> , 888 F.Supp. 221, 243 (D. Mass. 1995).....	14
<i>Andrea Theatres, Inc. v. Theatre Confections, Inc.</i> , 787 F.2d 59, 62 (2d Cir. 1986).....	7, 9, 13
<i>Arizona v. San Carlos Apache Tribe of Arizona</i> , 463 U.S. 545, 559-60 (1983).....	8
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 678 (2009).....	6, 19
<i>Bell Atlantic v. Twombly</i> , 550 U.S. 544, 555 (2007).....	6, 19
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943).....	13 - 14
<i>Butz v. Economou</i> , 438 U.S. 478, 512-13 (1978).....	15, 16
<i>Colorado River Water Conservation District v. United States</i> , 424 U.S. 800, 817 (1976).....	12
<i>Erickson v. Pardus</i> , 551 U.S. 89, 94 (2007).....	6, 10
<i>Evergreen Partnering Group, Inc. v. Pactiv Corp.</i> , 720 F.3d 33, 45 (1st Cir. 2013).....	20
<i>Gibson v. Berryhill</i> , 411 U.S. 564, 575-77 (1973).....	9
<i>Gutstein v. McDermott</i> , 554 F.Supp. 966, 970 (M.D. Pa. 1983).....	7
<i>Horwitz v. State Bd. of Med. Exam'rs</i> , 822 F.2d 1508, 1513 (10th Cir. 1987).....	15, 16
<i>JTC Petroleum Co. v. Piasa Motor Fuels, Inc.</i> ,	

190 F.3d 775, 779 (7 <sup>th</sup> Cir. 1999).....	21
<i>Kentucky v. Graham</i> , 473 U.S. 159, 167 (1985).....	15
<i>Lee v. City of Los Angeles</i> , 250 F.3d 668, 690 (9 <sup>th</sup> Cir. 2001).....	6
<i>Lockheed Martin Corp. v. Boeing Co.</i> , 390 F.Supp.2d 1073, 1076, 1084 (M.D. Fla. 2005).....	6
<i>Metropolitan Hosp. v. Thornburgh</i> , 667 F.Supp.2d 208, 214 (E.D. Pa. 1987).....	7, 8
<i>Miller v. Granados</i> , 529 F.2d 393, 395 (5 <sup>th</sup> Cir. 1976).....	7
<i>Mireles v. Waco</i> , 502 U.S. 9, 11 (1991).....	15
<i>North Carolina State Board of Dental Examiners v. Federal Trade Commission</i> , 717 F.3d 359 (4 <sup>th</sup> Cir. 2013).....	12, 19
<i>Parker v. Brown</i> , 317 U.S. 341, 351 (1943).....	13
<i>Pulliam v. Allen</i> , 466 U.S. 522, 541-42 (1984).....	15 - 16
<i>Raitport v. Provident Nat'l Bank</i> , 451 F.Supp. 522, 526 & 538 (E.D. Pa. 1978).....	16
<i>Robertson v. Sea Pines Real Estate Companies</i> , 679 F.3d 278, 289 (4 <sup>th</sup> Cir. 2012).....	20
<i>Simopoulos v. Virginia State Board of Medicine</i> , 644 F.2d 321, 324 (1981).....	8 – 11
<i>Ticket Center, Inc. v. Banco Popular De Puerto Rico</i> , 399 F.Supp.2d 79, 85 (D. Puerto Rico 2005).....	8, 9, 13
<i>Turner v. Houma Mun. Fire and Police Civil Service Bd.</i> , 229 F.3d 478, 481 (5 <sup>th</sup> Cir. 2000).....	15
<i>United Broth. Of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott</i> , 463 U.S. 825, 827 (1983).....	21

<i>United States v. Blue Cross Blue Shield of Michigan</i> , 809 F.Supp.2d 665, 678 (E.D. Mich. 2011).....	13
<i>Vanhorn v. Oelschlager</i> , 502 F.3d 775, 778 (8th Cir. 2007).....	14
<i>Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia</i> , 624 F.2d 476, 485 (4 <sup>th</sup> Cir. 1980).....	19
<i>West Penn Allegheny Health System, Inc. v. UPMC</i> , 627 F.3d 85, 99 (3d Cir. 2010).....	19
<i>Wooley v. Maynard</i> , 430 U.S. 705, 710 (1977).....	11 – 12
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	7 – 12

## STATUTES

15 U.S.C. § 1.....	17
15 U.S.C. § 15.....	7, 16

## RULES

Fed. R. Civ. P. 8(a).....	6
Fed. R. Civ. P. 12(b)(6).....	6



**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

DR. YVOUNE KARA PETRIE, DC.,

Plaintiff,

v.

VIRGINIA BOARD OF MEDICINE, *et al.*

Defendants.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Civil Action No. 1:13-cv-1486

**PLAINTIFF'S MEMORANDUM IN RESPONSE TO  
DEFENDANTS' MOTION TO DISMISS**

This is a case about whether a group of medical doctors have the right—without regard to Virginia law—to shut out competitors like chiropractors from treating certain patients. The Virginia Board of Medicine (the “Board”) is dominated by medical doctors with their own private interests. The individual medical doctors satisfied these private interests by using their collective power on a board to exclude an entire category of competitor. Indeed, the Board members took several distinct actions to limit the ability of increasingly popular complimentary and alternative medicine practitioners from earning further market-share from traditional medical providers like medical doctors. The Board members and their like benefit, but Virginia patients face higher prices, lower quality and fewer choices.

Another victim of Defendants’ anticompetitive conduct is plaintiff Dr. Yvonne Kara Petrie, DC, a highly-educated Virginia doctor of chiropractic that takes a research-based functional approach to her patients’ well-being. She was, in a sense, caught in the cross-hairs of Defendants’ anticompetitive exclusion, and they made an example of her to deter others from competing for “their” patients. They confiscated her license, fined her \$25,000, and issued terms

to restore her license that are so draconian that she—as a doctor of chiropractic—can’t even treat “pain” by any means or method. These competitors harnessed their power to take these actions against her not because she harmed anyone or was any sort of threat, but because she treated patients in the same way that chiropractors in other states treat patients: by utilizing a low-level laser for certain treatments, by counseling patients on diet and lifestyle, and by ordering and interpreting medical tests. Petrie and those like her, in fact, threatened the pocketbooks of the traditional medical establishment. Facing competitors with increasing success and substantially lower costs, the medical doctors on the Virginia Board of Medicine fulfilled the long-standing mission of the American Medical Association to stamp out any competitive threats from chiropractors and others. (First Amended Complaint ¶¶ 24-31) (“FAC ¶ \_\_”)

Defendants inferentially acknowledge the strength of Petrie’s antitrust case by focusing almost entirely on trying to convince this Court not to hear it on the merits. That is because they know the case is rock-solid. This Court should reject their attempts to delay justice. Defendants’ primary arguments focus on two discrete forms of abstention doctrine: *Younger* and *Burford* abstention. The problem, however, is that neither of these doctrines apply to a federal antitrust claim because federal courts have exclusive jurisdiction over these claims. Their third argument—quasi-judicial immunity—on its own terms could apply at best to a minute portion of this case, and, in any event, similar to their abstention arguments, isn’t appropriate here. And their final argument is curious in that it attacks the conspiracy element of the antitrust claim in a case where the alleged agreements and collective action are public, not hidden. Each of these arguments fail.

### **FACTUAL SUMMARY**

Dr. Yvonne Kara Petrie, D.C. received her Virginia chiropractic license on July 12, 2006



and until recently offered her patients an alternative approach to health and well-being than traditional medical practice. (FAC ¶ 35). The form of chiropractic that she practices incorporates both functional neurology and functional medicine under the name “Virginia Functional Medicine” in Vienna, Fairfax County. (FAC ¶ 36).

Petrie truthfully advertised her practice through various media outlets in the fields of chiropractic functional medicine and neurology directed at alleviating the underlying causes of neuropathies, autoimmune conditions, Type II diabetes, thyroid and other debilitating health conditions in her patients. *Id.* She sought to address these underlying causes by counseling her patients on specific and targeted lifestyle changes and through the prescription of vitamins, minerals and other supplements in appropriate cases. Petrie also truthfully advertised a low-level laser device known as a *Zerona Laser* to prospective patients as an effective tool for body contouring, which is freely used by chiropractors in other states and is not prohibited under Virginia law. (FAC ¶¶ 74-77).

Petrie, like other Virginia chiropractors, has served as a primary-care physician, or as a patients’ point of primary care for their health insurers. Traditionally, medical doctors have served as primary-care physicians, and many of these medical doctors resent chiropractors and other types of doctors who have threatened their virtual monopoly on access to primary-care patients. *See* (FAC ¶¶ 1–9, 24–34).

Defendant Virginia Medical Board is a quasi-public and quasi-private agency that regulates the practice of Medicine, Podiatry, Osteopathy and Chiropractic, among other branches of the healing arts in Virginia. (FAC ¶ 11). Medical doctors and other chiropractic competitors

dominate the Board.<sup>1</sup> Petrie named these doctors as defendants in both their individual capacity as actual and potential competitors with each other and Petrie, and in their official capacity as Board members. (FAC ¶ 19).

Historically medical doctors throughout the United States have spearheaded attacks on chiropractors, or doctors of chiropractic, and any specialty medical practices that they deemed threatening, through the American Medical Association (“AMA”). (FAC ¶¶ 24 – 34). In fact, Petrie provides background as to why Defendants are in an ideal position to limit the scope of chiropractic, including the financial incentives for taking such anticompetitive actions. *Id.* She also explains why medical doctors view doctors of chiropractic as a competitive threat. *See* (FAC ¶¶ 81 – 89).

In Virginia, the Board and Individual Defendants are colluding to exclude doctors of chiropractic and other non-medical doctors from competing in several relevant product and geographic markets. (FAC ¶¶ 92-114). For example, Defendants conspired to restrain Petrie and other chiropractors from (1) using a Class II Low-Level Laser device, despite its ubiquitous use by chiropractors throughout the country; (2) treating—in any way—the underlying causes of Type II diabetes, thyroid disease, metabolic disease, and other conditions, even though nothing in Virginia law forbids this competition; and (3) ordering medical tests or conducting examinations, even though these are routine practices for chiropractors in other states. (FAC ¶¶ 99-114). Defendants, outside of adjudications of Petrie, have also forbidden chiropractors from performing physical examinations for commercial driver’s licenses (“Department of

---

<sup>1</sup> The competing doctors who participated in the Board’s anticompetitive conduct include individual defendants J. Randolph Clements, DPM (FAC ¶ 12), Kamlesh Dave, MD (FAC ¶ 13), Siobhan Dunnivant, MD (FAC ¶ 14), William Harp, MD (FAC ¶ 15), Jane Piness, MD (FAC ¶ 16), and Wayne Reynolds, DO (FAC ¶ 17) (hereafter “Individual Defendants”).

Transportation”) exams, even though these are routine practices by chiropractors in other states. (FAC ¶ 112). Defendants have conspired to interfere with and boycott Petrie and other chiropractors’ business by advising third-party clinical laboratories not to do business with Virginia Chiropractors, including plaintiff. (FAC ¶ 114). Defendants engaged in this conduct jointly and publicly as competitors with each other and competitors or potential competitors with Petrie.

After several years of providing primary-care physician services to an increasing number of patients, the Board sent Petrie a letter dated February 2, 2012 that directed her to attend an Informal Conference on March 22, 2012 to enable a special committee to inquire into allegations that she may have violated certain laws and regulations governing the practice of chiropractic within the Commonwealth. (FAC ¶ 37). Later, on February 22, 2013, the Board conducted a formal hearing, and issued an Order on February 28, 2013 suspending Petrie’s chiropractic license for a 6-month period and imposed on her a monetary penalty of \$25,000 among other punitive measures, including severe limitations on her practice following restoration of her license. (FAC ¶ 41-45). For example, she could no longer treat “pain” by any means or method. (FAC ¶ 44).

The Virginia Court of Appeals is reviewing the Board’s formal order through the highly deferential and limited in scope review provided by the Virginia Administrative Process Act. Va. Code § 54.1-2400. Petrie cannot and is not pursuing her claims of anticompetitive harm against Defendants in this limited Virginia Process Act review. Nor can she pursue any claims relating to the conduct separate from the Board’s adjudication that she raises here. She filed an original antitrust Complaint against The Virginia Board of Medicine on December 3, 2013. She then filed a First Amended Complaint on February 2, 2014, adding the Individual Defendants in their



individual and official capacities, and adding three separate claims for relief under Virginia law arising from Defendants' interference with her existing contracts, prospective contracts, and prospective economic advantage. Defendants do not challenge any of the state claims.

### **LEGAL STANDARD**

The Federal Rules of Civil Procedure require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a), that provides a defendant with "fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). The complaint need contain "only enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court "must accept as true all of the factual allegations in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Iqbal*, 556 U.S. at 679 ("When there are well-pleaded factual allegations, a court should assume their veracity . . ."). And a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556. Rule 12(b)(6) dismissals are disfavored in antitrust actions. *Lockheed Martin Corp. v. Boeing Co.*, 390 F.Supp.2d 1073, 1076, 1084 (M.D. Fla. 2005).

Finally, although certain public documents are subject to judicial notice, findings or statements within those documents are not subject to judicial notice: "When a court takes judicial notice of another court or agency's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9<sup>th</sup> Cir. 2001).

## ARGUMENT

### **I. *YOUNGER* ABSTENTION DOES NOT AND CANNOT APPLY TO PETRIE'S CLAIMS.**

#### **A. *Younger* Abstention Does Not Apply to Federal Antitrust Claims Because Federal Courts Have Exclusive Jurisdiction Over Those Claims.**

Defendants' primary argument suffers from a fatal flaw: *Younger* abstention simply doesn't apply to federal antitrust claims because federal courts have exclusive jurisdiction over these claims. 15 U.S.C. § 15; *Miller v. Granados*, 529 F.2d 393, 395 (5th Cir. 1976) (holding that "it is obvious" that *Younger* abstention cannot apply to a federal antitrust claim because federal antitrust relief "cannot be obtained in a state court"); *Metropolitan Hosp. v. Thornburgh*, 667 F.Supp.2d 208, 214 (E.D. Pa. 1987) (holding that *Younger* abstention cannot apply to federal antitrust claims because "plaintiffs could not raise these claims before the commonwealth court"). *Gutstein v. McDermott*, 554 F.Supp. 966, 970 (M.D. Pa. 1983) (explaining that defendants did not seek *Younger* abstention on "claim based upon federal antitrust law, which cannot be pursued in a state court").

Defendants' misunderstanding of *Younger* abstention likely arises from their focus on the typical case involving constitutional challenges in federal court. That is why Defendants describe one of the elements of a *Younger* defense as whether "Plaintiff has adequate opportunity to raise constitutional issues." (Defendants' MTD Brief 10) That certainly doesn't make sense here, where Petrie doesn't seek constitutional relief in federal court.

That aspect of the *Younger* test—and abstention more generally—is actually stated more broadly—"whether the state court has broad and comprehensive concurrent jurisdiction to adjudicate the claims asserted in the federal action." *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 62 (2d Cir. 1986). This explains why "abstention is clearly



improper when a federal suit alleges claims within the exclusive jurisdiction of the federal courts.” *Id.*; *Ticket Center, Inc. v. Banco Popular De Puerto Rico*, 399 F.Supp.2d 79, 85 (D. Puerto Rico 2005) (“[F]ederal courts do not have discretion to abstain from deciding federal antitrust issues pending resolution of a state suit between the same parties and involving the same transactions.”); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 559-60 (1983) (explaining that abstention “would have been improper if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits”); *see also Simopoulos v. Virginia State Board of Medicine*, 644 F.2d 321, 324 (1981) (explaining that *Younger* abstention applies “when relief sought by a plaintiff in a federal action is available” in a pending state proceeding).

Permitting abstention for exclusive federal claims would “run counter to Congress’ determination, reflected in grants of exclusive federal jurisdiction, that federal courts should be the primary fora for handling such claims.” *Andrea Theatres*, at 63. Indeed, *Younger* abstention is unavailable for federal antitrust claims even if a plaintiff presents claims in a state judicial proceeding “arguably arising from the same conduct.”<sup>2</sup> *Metropolitan Hosp.*, 667 F.Supp. 208, 214 (E.D. Pa. 1987). The Second Circuit explained, for example, that even though a state court may properly consider federal claims raised as defenses, “they may not grant affirmative relief

---

<sup>2</sup> Defendants assert that Petrie included restraint of trade arguments in her state appellate claims. (Defendants’ MTD Brief 9 n. 7). Petrie’s previous counsel incorrectly referenced a restraint of trade in Petrie’s Petition for Appeal in State Court, (Defendants’ MTD Brief, Exhibit C), but that is not within the scope of review under the Virginia Administrative Process Act, and the state trial court ignored it. (Defendants’ MTD Brief, Exhibit D). Petrie did not include any restraint of trade arguments in her State Appellant’s Brief. (Defendants’ MTD Brief, Exhibit G). In any event, even if Petrie had properly included an antitrust defense in the state action, *Younger* abstention is still unavailable because federal courts have exclusive jurisdiction over federal antitrust claims.

based on claims for which federal jurisdiction is exclusive,” so abstention is improper. *Andrea Theatres*, 787 F.2d at 63; *Ticket Center*, 399 F.Supp.2d at 86 (holding that even if “all the pending state and administrative proceedings somehow deal with exactly the same claims and issues brought in the present [antitrust] complaint, the prevailing party would still have to return to federal court to seek affirmative relief,” so abstention is unavailable).

**B. *Younger* Abstention Does Not Apply Here Because the Board Members Are Financially Biased.**

Even if *Younger* abstention could apply to federal antitrust claims, it would not apply here because Petrie alleges that the Board and Individual Defendants were biased in their dealings with her. See *Gibson v. Berryhill*, 411 U.S. 564, 575-77 (1973) (holding that *Younger* abstention does not apply where state proceeding involves review of licensing board determination and the board members were biased). In such a case, the “predicate for a *Younger v. Harris* dismissal [is] lacking.” *Id.* at 577. And it doesn’t matter if “judicial review, de novo or otherwise, [is] forthcoming at the conclusion of the administrative proceedings.” *Id.*; *Simopoulos*, 644 F.2d at 326 (acknowledging that Supreme Court precedent precluded *Younger* where the administrative board is biased, which thereby denies “plaintiff a fair state administrative tribunal”).

The *Gibson* Court explained that administrative remedies are inadequate “where the state administrative body was found to be biased or to have predetermined the issues before it.” *Id.* at 575 n.14. Petrie alleges that here: the majority of the Board that acted against her were competitors or potential competitors with pecuniary interests to limit the scope of chiropractic to avoid competition. (FAC ¶¶ 34, 48). As the Supreme Court explained in *Gibson*, it “is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.” *Id.* at 579. Defendants might try to argue in

their Reply brief that the Board members were not biased, but for purposes of a motion to dismiss, the factual allegations in the complaint control. *Erickson*, 551 U.S. at 94.

**C. *Younger* Abstention Does Not Apply Here Because the Claims Are Broader Than the Board Decision Against Petrie.**

Defendants' *Younger*-abstention argument presumes that Petrie's claims are based entirely upon the Board members' decision to sanction Petrie following a formal hearing. (Defendants' MTD Brief 1, 7). That, however, is just one component of Defendants' overall scheme to restrain trade in the relevant markets. For example, Petrie alleges that (1) Defendants also prohibited chiropractors from offering Department of Transportation Exams, even though chiropractors in other states do so, (2) Defendants interfered with her (and other chiropractors') ability to order appropriate and legally permitted tests for their business through third-party testing facilities; (3) and Defendants violated their own posting policies to hasten an avalanche of third-party claims against Petrie. (FAC ¶¶ 72, 112-14, 123, 128). *See Simopoulos*, 644 F.2d at 324 (*Younger* abstention doesn't apply where federal plaintiff's claim could not be resolved in pending state proceeding).

Petrie's antitrust and state-law claims, in fact, implicate Defendants' conduct before, after, and separate from the Board members' decision arising out of the formal hearing. The administrative hearing and its subsequent state review, of course, involve only the formal-hearing decision, and not Defendants' other restraints of trade, or interferences with Petrie's contracts, prospective contracts, and prospective economic advantages. (FAC ¶¶ 72, 112-14, 123, 128). Thus, if this Court decides to abstain, neither this Court nor the state courts will review this conduct.



**D. *Younger* Abstention Does Not Apply to the Individual Defendants or the State Claims.**

Even if *Younger* could apply to federal antitrust claims, or where plaintiff alleges the deciding board members were biased, or to conduct beyond that adjudicated and reviewed in a parallel state proceeding, it would have limited scope here anyway because Petrie alleges claims against doctors in their individual capacity as competitors, in addition to claims against the board itself and the board members in their official capacity.

That is, Petrie alleges that certain individual board members violated the antitrust laws not merely because they are members of a board that took illegal action—the typical scenario where a plaintiff names administrative board members as defendants. Instead, Petrie alleges that the Individual Defendants restrained trade and committed torts against her in their role as competitors and prospective competitors. What makes their conduct a violation of the antitrust laws is the fact that they are competitors not that they are board members. They merely used their position on the Board as a tool to help them restrain trade. Thus, even if *Younger* abstention could apply, the lawsuit against the individual board members, in their individual capacity, would survive.

In addition, Petrie’s state law claims against the Individual Defendants involve conduct that is separate and apart from the Board activity that is on review in state court. So those claims would additionally survive any abstention stay.

**E. *Even if Younger* Abstention Were Permitted, It Would Not Apply to Petrie’s Claims for Prospective Relief and Damages.**

*Younger* abstention—when it can apply—is limited to injunctive relief and certain declaratory relief. *Wooley v. Maynard*, 430 U.S. 705, 710 (1977) (*Younger* precludes federal courts from exercising certain “equitable jurisdiction to enjoin ongoing state prosecutions”); *Simopoulos*, 644 F.2d at 331. But the Supreme Court specifically held in *Wooley* that *Younger*

abstention does not extend to federal requests for prospective equitable relief to, for example, “preclude further prosecution” that violates a plaintiff’s rights. *Id. Wooley*, 430 U.S. at 712.

Here, Petrie specifically seeks prospective relief unrelated to the proceedings reviewed by the state court, as well as damages resulting from Defendants’ anticompetitive and tortious conduct. For example, Petrie requests that this Court “enjoin Defendants from limiting the scope of chiropractic practice beyond the limitations provided under Virginia law,” and from “taking further action, outside of their adjudicatory role, from deterring and preventing chiropractors from practicing chiropractic as permitted by Virginia law.” (FAC, Prayer for Relief ¶¶ 2-6). Thus, even if this Court could apply *Younger* abstention, it would only serve to stay a small portion of this case.

**F. Defendants’ Mischaracterize Petrie’s Allegations.**

Finally, Defendants craft certain mischaracterizations of Petrie’s allegations into their abstention arguments. For example, Defendants’ assert, without support, that Petrie’s antitrust claim is a “mere façade for a collateral attack on the Board’s Order.” (Defendants’ MTD Brief at 11). This argument is incorrect.

Here, Petrie presents strong and serious federal antitrust claims with great similarity to claims affirmed less than a year ago by the Fourth Circuit in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359 (4<sup>th</sup> Cir. 2013). Indeed, with the exception of a throw-in last argument that misunderstands antitrust-conspiracy requirements, Defendants do not challenge the substance of Petrie’s claims. (Defendants’ MTD Brief 15-18). Federal courts have a “virtually unflagging obligation” to “exercise the jurisdiction given them.” *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Thus, Defendants’ unsupported rhetoric is insufficient to permit abstention in these circumstances.



Defendants also incorrectly assert that Petrie attacks the statutes that govern the practice of chiropractic and that “Plaintiff does not agree with the scope of practice enacted by the General Assembly.” (Defendants’ MTD Brief at 11, 13). But, in fact, Petrie alleges that the Defendants’ actions and agreement have no grounding in Virginia law; instead, Individual Defendant competitors are utilizing their power on the Board to artificially and illegally limit the jurisdictional scope of competitors like chiropractors, without regard to actual Virginia law. (FAC ¶¶ 99-114).

## **II. *BURFORD* ABSTENTION DOES NOT AND CANNOT APPLY TO PETRIE’S CLAIMS.**

Defendants’ second argument asks this Court to apply the “narrowly circumscribed” *Burford* abstention doctrine to stay this case. (Defendants’ MTD Brief 12-14); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Ticket Center*, 399 F.Supp.2d at 84.

Just like *Younger* abstention, *Burford* abstention cannot apply to federal antitrust claims, as federal courts have exclusive jurisdiction over those claims. *United States v. Blue Cross Blue Shield of Michigan*, 809 F.Supp.2d 665, 678 (E.D. Mich. 2011) (“The United States’ only forum for enforcing federal antitrust laws is in the federal district court, which has exclusive jurisdiction under Sherman Act claims. [ ] This section precludes *Burford* abstention.”) (citing *Andrea Theatres*, 787 F.2d at 63); *Ticket Center*, 399 F.Supp.2d at 85 (“[F]ederal district courts do not have discretion to abstain from deciding federal antitrust issues pending resolution of a state suit between the same parties and involving the same transactions” because “federal district courts have exclusive jurisdiction over private federal antitrust cases.”).

Indeed, a separate doctrine developed in 1943 called the state-action immunity doctrine to balance the state-sovereignty issues with the federal antitrust laws. See *Parker v. Brown*, 317 U.S. 341, 351 (1943). Defendants, of course, sensibly do not assert state-action immunity here.

In any event, the existence of “the state action doctrine” makes “application of the *Burford* abstention doctrine superfluous” in an antitrust case. *American Telephone & Telegraph Co. v. IMR Capital Corp.*, 888 F.Supp. 221, 243 (D. Mass. 1995).

Finally, although not relevant in light of *Burford* abstention’s inapplicability to federal antitrust claims, Defendants overstate the implications of this case on the Board’s ability to regulate licenses. (Defendants’ MTD Brief at 13-14). Petrie’s antitrust claims are actually quite narrow: they challenge the ability of a group of competitors to implement agreements outside of law to restrain their competitors—like chiropractors in this case—from competing with them. (FAC ¶¶ 99-114). Cases, for example, that involve violations of existing law or standards within a profession are unaffected. It is only when individual competitors combine to exclude competition that federal antitrust policy intercedes.

### **III. QUASI-JUDICIAL IMMUNITY DOES NOT PROTECT DEFENDANTS HERE.**

#### **A. Quasi-Judicial Immunity is Limited in Scope.**

Defendants’ overstate the possible scope of quasi-judicial immunity by stating—without reservation—that it applies to “The Board, its members, and employees.” (Defendants’ MTD Brief 14). But—even in the best case scenario for Defendants—it cannot apply to (1) claims against Board members in their official capacity; (2) claims against the Board itself; (3) claims for injunctive relief; (4) claims unrelated to board-member adjudicatory functions, and (5) attorneys’ fees.

Petrie sued Individual Defendants in both their individual capacities as competitors and their capacities as members of the Virginia Medical Board. Even if quasi-judicial immunity did apply here, it is unavailable as a matter of law to Defendants in their official capacities. *See, e.g., Vanhorn v. Oelschlager*, 502 F.3d 775, 778 (8th Cir. 2007) (“[T]his court’s precedent, Supreme Court precedent, and case law from our sister circuits make clear that absolute, quasi-judicial

immunity is not available for defendants sued in their official capacities.”); *see also Kentucky v. Graham*, 473 U.S. 159, 167 (1985).

Similarly, the Board itself cannot assert quasi-judicial immunity. *Turner v. Houma Mun. Fire and Police Civil Service Bd.*, 229 F.3d 478, 481 (5th Cir. 2000) (explaining that “there is no absolute quasi-judicial immunity defense available to the Board or its members sued in their official capacity”).

Quasi-judicial immunity also only applies to actions for damages; it is “not a bar to injunctive relief” against Defendants “for actions taken” in their official capacities. *Horwitz v. State Bd. of Med. Exam’rs*, 822 F.2d 1508, 1513 (10th Cir. 1987); *see also Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984) (“[J]udicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.”).

Quasi-judicial immunity also does not, of course, apply to aspects of Petrie’s antitrust claims—and state claims—that reach beyond the Board’s quasi-judicial functions. *Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (quasi-judicial immunity applies when state officials are functionally performing adjudicatory functions); *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (“[A] judge is not immune from liability for non-judicial actions.”). Petrie, for example, alleges the following non-adjudicatory conduct: (1) Defendants prohibited chiropractors from offering Department of Transportation Exams, even though chiropractors in other states do so, (2) Defendants interfered with her (and other chiropractors’) ability to order appropriate and legally permitted tests for their business through third-party testing facilities; (3) and Defendants violated their own posting policies to hasten an avalanche of third-party claims against Petrie. (FAC ¶¶ 72, 112-14, 123, 128).



Finally, quasi-judicial immunity is not a bar to Petrie recovering attorneys' fees against Defendants. *Pulliam*, 466 U.S. at 543-44 (explaining that absent contrary legislative language, judicial immunity does not bar statutory attorneys' fees). The federal antitrust laws expressly permit Petrie to recover reasonable attorneys' fees. 15 U.S.C. § 15(a).

In conclusion, even if quasi-judicial immunity could apply in this case, the application would be so narrow that it wouldn't have any effect until later in the proceedings when this Court is determining the appropriate remedy. Thus, granting any sort of dismissal based upon quasi-judicial immunity at this stage is improper.

**B. Quasi-Judicial Immunity Doesn't Apply To Federal Antitrust Cases Because There Is No Adequate State Court or State Law Remedies.**

Similar to abstention, quasi-judicial immunity doesn't apply to Petrie's antitrust claims here. *See Raitport v. Provident Nat'l Bank*, 451 F.Supp. 522, 526 & 538 (E.D. Pa. 1978) (analyzing application of quasi-judicial immunity to civil-rights claims, but not antitrust claims). This immunity developed to protect judges and those performing judge-like functions from federal constitutional claims arising out of the "process" of judging. *Butz*, 438 U.S. at 511-12. The Supreme Court explained that the doctrine is supported by "safeguards built into the judicial process [that] tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Id.* at 512 (emphasis added); *see also Horwitz*, 822 F.2d at 1515 ("There exist adequate due process safeguards under Colorado law to protect against unconstitutional conduct without reliance upon private damages lawsuits.") (emphasis added). Once again, Petrie is not alleging federal constitutional claims, but federal antitrust claims that she must file in federal court. Unlike a federal constitutional claim, the state process does not contain adequate safeguards to protect against violations of federal antitrust law.

Moreover, in this case, Petrie sued the Individual Defendants in their individual capacity—the only capacity that is even relevant to the quasi-judicial immunity question—because they are competitors or potential competitors that combined to restrain trade. (FAC ¶¶ 12-19). This is not the typical constitutional case where a disappointed party sues the members of an administrative board—merely because they are on the board—for violating procedures in deciding against her. Instead, this is a case where horizontal competitors utilized market power to combine to restrain trade, which injured Petrie. State adjudicatory procedures do not protect against that harm that is the province of the federal antitrust laws, which federal courts exclusively enforce.

#### **IV. PETRIE HAS PROPERLY ALLEGED A CONSPIRACY.**

##### **A. Defendants’ Argument Misunderstands the Contract, Combination, or Conspiracy Element of Section 1 of the Sherman Act.**

Section 1 of the Sherman Act provides that “[e]very 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. Defendants’ sole argument challenging Petrie’s antitrust claim<sup>3</sup> is that Petrie has failed to allege a contract, combination, or conspiracy among Defendants. But Defendants support that conclusion with a number of premises that are unrelated to conspiracy-pleading requirements. (Defendants’ MTD Brief 15-18). Indeed, Defendants focus more on debating certain facts Petrie pleads than addressing whether Petrie has alleged a contract, combination, or conspiracy among Defendants.

Defendants, for example, build a straw-man argument of four categories of allegations that they claim Petrie alleges to support the conspiracy element of her antitrust claim.

---

<sup>3</sup> Defendants do not dispute that Petrie has sufficiently alleged tort claims against Defendants.



(Defendants' MTD Brief 16-17). But these categories are not necessary (or in many instances even relevant) to satisfying the conspiracy element. They are non-sequiturs. For example, Defendants state that Petrie claims "(1) that by virtue of simply practicing their professions, medical doctors, osteopaths, and doctors of podiatry have an interest in conspiring against chiropractors," and (3) that these same doctors "have a financial interest in regulating chiropractors." (Defendants MTD Brief 16).

Neither of these allegations, however, matter to the question of whether Petrie has alleged a contract, combination or conspiracy among Defendants. Individual Defendants have a horizontal relationship as competitors, and are competitors or potential competitors with Petrie, but that is relevant to the per se nature of the antitrust violation, which Defendants do not (for good reason) dispute. Indeed, for that issue, it doesn't even matter whether they have any bias. What matters is that they entered an agreement, jointly, which restrained trade.

The other two categories are equally curious: it doesn't matter, for example, to the antitrust claim's conspiracy element whether the Board (or conspiracy) included one or more chiropractic or public members. (Defendants' MTD Brief 16-17). Horizontal conspirators cannot immunize themselves from antitrust liability by including one or more non-competitors in their scheme. So whether one or more citizen members went along with the competitors on the Board is irrelevant to whether the Individual Defendants participated in a contract, combination or conspiracy. That, in fact, is a simple question in this case.

**B. Petrie Has Alleged Direct Evidence of an Unlawful Conspiracy.**

Petrie alleges direct evidence that Defendants entered into a "contract, combination, or conspiracy." In fact, Defendants themselves attached one of the agreements to their motion to dismiss—the Board's February 28, 2013 Order (consented to by Individual Defendants and the Board itself). (Defendants' MTD Brief, Exhibit A). Individual Defendants participated in the

hearing and following the hearing entered an undisputed agreement to restrict Petrie and other chiropractors from competing with medical doctors and others in the alleged relevant markets. (FAC ¶¶ 41-45, 99-114). Petrie also alleges other acts that were implemented by the Board itself through the Individual Defendants. (FAC ¶¶ 72, 112-14, 123, 128)

The Fourth Circuit, in a similar case, held that state professional-board action to restrict competition is direct evidence of conspiracy. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359, 373 (4<sup>th</sup> Cir. 2013) (concluding that the following is direct evidence of conspiracy: “the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services.”). Similarly, Petrie here alleges that several competitors joined together and took collective action to limit the ability of would-be competitors—chiropractors—from competing for certain business. Regardless of whether defendants view their actions as justified, Petrie has alleged direct evidence of a “contract, combination, or conspiracy” among Defendants. Summary judgment and trial will test the legality of the actions. *See Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 485 (4<sup>th</sup> Cir. 1980) (explaining that the Fourth Circuit is “not inclined to condone anticompetitive conduct upon an incantation of ‘good medical practice.’”).

Defendants assert *Twombly/Iqbal* objections that seem to assume Petrie is alleging a conspiracy based upon mere parallel conduct or circumstantial evidence. (Defendants’ MTD Brief 15-18). But that analysis is superfluous when an antitrust plaintiff included direct evidence of agreement: “If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled.” *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010).

Defendants' motive for challenging this element of the antitrust claim is unclear, as the Individual Defendants (and the Board) publicly acted together. The *Twombly/Iqbal* analysis is typically reserved for the situations where competitors secretly coordinated their pricing or other behavior, and the actual agreements are hidden, and certainly not—like here—public documents. *Robertson v. Sea Pines Real Estate Companies*, 679 F.3d 278, 289 (4<sup>th</sup> Cir. 2012) (explaining that the circumstantial evidence test is superfluous in light of direct evidence of the agreement itself). In *Robertson*, the Fourth Circuit faced a similar inquiry, where defendants that made up the board of a multiple listing service argued under *Twombly* and *Iqbal* that plaintiffs failed to allege a conspiracy, even though—like here—there is “no such uncertainty [] about the terms of the agreement, let alone whether one was made.” The Fourth Circuit quickly dismissed defendants' arguments, explaining that “Conspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating resort to circumstantial evidence . . . , [but] [h]ere, by contrast, the concerted conduct is both plainly documented and readily available so that plaintiffs can describe the factual content of the agreement without the benefit of extended discovery.” *Id.* at 289-90. The same is true in this case.

In any event, Petrie has additionally met the circumstantial-pleading standard, which merely requires sufficient facts to show that it is “plausible” that Defendants entered a “contract, combination, or conspiracy.” *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013) (detailed discussion of the present state of antitrust pleading standards). Individual Defendants here are horizontal competitors or potential competitors that directly control the Board's actions. (FAC ¶¶ 12-19) Petrie alleges that the Board, through the Individual Defendants, engaged in certain conduct that restrained trade. Indeed, Petrie alleges that these Defendants specifically and publicly not only participated in the Board, which took these actions,



but additionally voted for them. (FAC ¶ 48). It is thus plausible that Individual Defendants and the Board entered into a “contract, combination, or conspiracy.”

**C. Petrie Has Alleged That Defendant William F. Harp Participated in the Unlawful Conspiracy.**

Defendants argue that Petrie has failed to state a claim against Dr. William F. Harp, MD because he is Executive Director of the Board rather than a voting member of the Board. (Defendants’ MTD Brief 18). Dr. Harp, however, is a horizontal competitor of other Individual Defendants—and a competitor or potential competitor of Petrie—that participated in the conspiracy in his capacity as Executive Director. (FAC ¶¶ 15, 18) Indeed, he played a crucial role in implementing the conspiracy, and even signed the February 28, 2013 Agreement/Order on behalf of the Board. (Defendants’ MTD Brief Exhibit A, p.9). *See JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 779 (7<sup>th</sup> Cir. 1999) (discussing different roles of conspirators and explaining that they “would be culpable under elementary principles of both conspiracy law and agency law”); *see also United Broth. Of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 827 (1983) (elements of conspiracy met where “one or more” conspirators do or cause to be done “any act in furtherance of the object of such conspiracy”). Thus, Petrie sufficiently alleged that Dr. Harp participated in Defendants’ antitrust conspiracy.

**CONCLUSION**

Defendants’ motion seeks stays or dismissals based upon two abstention arguments that don’t apply to federal antitrust claims, one limited immunity argument that isn’t applicable here, and an assertion that Petrie has not alleged a conspiracy, even though the relevant agreements and conduct are substantially public. These arguments fail, for the reasons described above. Dr. Yvonne Kara Petrie, D.C. thus respectfully requests that this Court reject Defendants’ motion to

dismiss in its entirety.

In any event, each of Defendants' arguments address only a limited portion of this case or the relief sought. Defendants' abstention arguments and immunity arguments, for example, only apply to some of the conduct Petrie alleges. Meanwhile, Defendants do not dispute Petrie's tort claims at all. Thus, regardless of how this Court resolves the issues in Defendants' motion to dismiss, the case should survive in some form. So many of the issues that Defendants address—like permissible remedies—can be decided later in the proceedings, with a full-factual record.

Dated: March 4, 2104

Respectfully submitted,

**DR. YVOUNE KARA PETRIE, DC**

/s/ Vincent M. Amberly  
Vincent M. Amberly, Esq. (VA 48050)  
AMBERLY LAW  
129 Harrison Street, NE  
Leesburg, VA 20176  
Tel: 703-737-3545 Fax: 703-991-0770  
Email: [vinceamberly@yahoo.com](mailto:vinceamberly@yahoo.com)

*Attorney for Plaintiff  
Dr. Yvonne Kara Petrie, DC.*



### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4<sup>th</sup> of March 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

Erin L. Barrett (VSB No. 74928)  
Office of the Virginia Attorney General  
Health Services Section  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-1840  
(804) 371-8718 (fax)  
ebarrett@oag.state.va.us

/s/ Vincent M. Amberly  
Vincent M. Amberly (VA 48050)  
AMBERLY LAW  
129 Harrison Street, NE  
Leesburg, VA 20176  
Tel: 703-737-3545 Fax: 703-991-0770  
Email: [vinccamberly@yahoo.com](mailto:vinccamberly@yahoo.com)

*Attorney for Plaintiff*  
*Dr. Yvonne Kara Petrie, DC.*