

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ELIZABETH HENRY, AART)
SCHULENKLOPPER, EILEEN)
CARTER, SHONDELL JONES, JAN)
BURKHARD-CATLIN, and)
LINDSAY PURRINGTON,)

Plaintiffs,)

v.)

1:15-CV-831

NORTH CAROLINA)
ACUPUNCTURE LICENSING)
BOARD, EMMYLOU NORFLEET,)
M. CISSY MAJEBE, KAREN)
VAUGHN, VIKKI ANDREWS,)
CHESTER PHILLIPS, and MARC)
CUTLER,)

Defendants.)

ORDER

In their amended complaint, the plaintiffs asserted two claims: an antitrust claim under the Sherman Act and a substantive due process claim pursuant to 42 U.S.C. § 1983. After the Court granted the defendants' motion to dismiss as to the § 1983 claim and denied the motion to dismiss as to the Sherman Act claim, the defendants moved for reconsideration as to the Court's implicit conclusion that the plaintiffs plausibly alleged standing to assert a Sherman Act claim. The defendants contend that as a matter of law, physical therapists in North Carolina cannot lawfully treat patients with dry needling and that therefore, under *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 236

(3rd Cir. 2013), the plaintiffs lack antitrust standing.¹ The Court has considered the briefing on the motion to reconsider as well as the briefing on the motion to dismiss.

While the defendants appear to contend that whether a physical therapy license authorizes physical therapists to treat patients with dry needling is a legal question, they have treated it more like a factual question.² They rely on several documents, such as a 2010 letter from the Attorney General and a one page letter from the Rules Review Commission to assert that “it has been conclusively established that a North Carolina physical therapy license does not authorize the practice of dry needling.” Doc. 23 at 18; Doc 39 at 19. Yet these cited materials do not, at least on their face, establish that it is outside the scope of a physical therapy license for physical therapists to treat patients with dry needling. Moreover, there are other documents and allegations in the record which tend to indicate that this is not the case and that the North Carolina Physical Therapy Board believes and has “determined” that dry needling is within the scope of practice of physical therapists.

At this point, the Court need not determine whether this issue is a legal question, a factual question, or a mixed question of law and fact, nor need the Court determine what

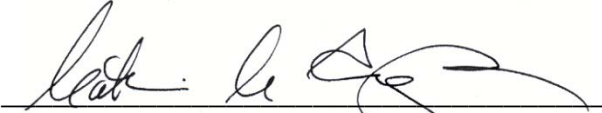
¹ The defendants do not contend that the plaintiffs lack constitutional standing under Article III, but base their motion on a lack of statutory standing under the Sherman Act.

² The defendants’ one-paragraph “explanation” of why dry needling is not authorized by law in North Carolina is devoid of citation to any statute or case. *See* Doc. 39 at 10. While the defendants gave a more detailed explanation at oral argument for the proposition that the scope of physical therapy is limited by statute, that dry needling is not covered by that statutory definition, and that the Physical Therapy Board cannot expand the practice beyond the statutory definition, the Court does not find that question to have been adequately addressed by the briefing.

degree of deference, if any, is due the apparently conflicting determinations of the Acupuncture Board and the Physical Therapy Board. The court also need not evaluate the scope of the Third Circuit's decision in *Ethypharm*, which concerned whether an entity that was "forbidden to compete in the relevant market" could be a competitor in the market for antitrust standing purposes. It is enough to conclude at this stage that the plaintiffs have adequately alleged antitrust standing for Rule 12(b)(6) purposes.

Accordingly, it is **ORDERED** that the defendants' motion for reconsideration, Doc. 38, is **DENIED**.

This the 19th day of April, 2017.



UNITED STATES DISTRICT JUDGE