UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

LINCOLN MEMORIAL UNIVERSITY, DUNCAN SCHOOL OF LAW,	)	**Case No. 3:11-cv-608**
Plaintiff,	)	**Judge Varlan**
v.	)	**Magistrate Judge Shirley**
THE AMERICAN BAR ASSOCIATION,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Lincoln Memorial University, Duncan School of Law ("DSOL") submits this Memorandum in Opposition to the Motion to Dismiss and Memorandum in Support of Motion to Dismiss filed on March 8, 2012, by Defendant the American Bar Association ("ABA"). (Docs. 43, 44). The ABA seeks dismissal of the Complaint in its entirety. Defendant argues that Plaintiff's federal due process claims should be dismissed because the administrative record "establishes as a matter of law that the Council did not abuse its discretion or reach a decision that was arbitrary and unreasonable." (Doc. 44, Memorandum in Support of Defendant's Motion to Dismiss, ("ABA Memo."), p. 2). This argument essentially asks the Court to adjudicate the merits of Plaintiff's federal due process claims, under the guise of ruling on Defendant's 12(b)(6) motion. With respect to Plaintiff's antitrust claims Defendant argues that Plaintiff has failed to comply with Fed. R. Civ. P. 8, and has failed to allege facts sufficient to state any claim upon which relief can be granted. Contrary to Defendant's assertions, Plaintiff's 40-page and 126-

paragraph Verified Complaint sets forth with detail both facts and circumstances which give rise to the claims alleged therein, providing more than sufficient factual matter to state a claim to relief that is plausible on its face. Rather, it is the ABA who has failed to satisfy its burden of proving that DSOL's claims lack facial plausibility. Consequently, DSOL's claims are not subject to dismissal pursuant to Rule 12(b)(6). For these reasons and as set forth more fully below, Defendant's motion should be denied.

The facts of this case are well-established in the filings before this Court, including the Verified Complaint, Plaintiff's Motion for Temporary Restraining Order and for Preliminary and Permanent Injunction, Defendant's Notice of Supplementation of the Record, Plaintiff's Motion for Reconsideration, and memoranda in support. (See Docs. 1, 2, 5, 37, 38, 39). It bears noting, however, that the ABA repeatedly overstates the factual basis for Council's decision to deny DSOL's application for provisional approval. For example, with respect to Standard 203, the ABA argues that the finding of non-compliance was based on no less that "six findings of fact that identified specific deficiencies in the school's strategic planning and assessment." (Doc. 44, ABA Memo., p. 6). This argument takes one alleged fact—the DSOL's alleged failure to revisit and plan around changes in the market place—and conflates it into six "facts" or "reasons" for the denial decision. These "six facts" simply restate in other words the ABA's same single "fact", which itself is belied by the uncontroverted evidence on the record. This conflation exposes the weaknesses in the Council's decision-making. The Council's reliance on illogical and unreasonable inferences drawn from the record, its reliance on facts and assumptions outside the administrative record, its failure to explain its reasoning, and its failure to articulate the evidence it relied upon as well as the evidence it rejected or ignored are at the heart of its

arbitrary and capricious decision-making with respect to its denial of DSOL's application for provisional approval.

LEGAL STANDARD

The Court must "'construe the complaint in the light most favorable to [DSOL], accept its allegations as true, and draw all reasonable inferences in favor of [DSOL]'." *Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452, 456 (6th Cir. 2011) (quoting *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009), *cert denied*, *TAM Travel, Inc. v. American Airlines, Inc.*, ___ U.S. ___, 131 S.Ct. 896, 178 L.Ed.2d 746 (2011)). The Court must determine for itself "whether the Complaint 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face'." *Pulte Homes v. Laborers' Int'l Union of North America*, 648 F.3d 295, 301 (6th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 566 U.S. 662, 129 S.Ct. 1937, 1949 (2009)). "A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "It is well-established that defendants bear the burden of proving that plaintiffs' claims fail as a matter of law." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir. 2010) (citing *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 443 (6th Cir. 2007)). Thus, because the ABA has failed to establish that DSOL's claims lack facial plausibility, DSOL's Verified Complaint cannot properly be dismissed. *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 556-58.

FEDERAL DUE PROCESS CLAIMS

The DSOL's Verified Complaint clearly alleges violations of Plaintiff's federal common law due process rights, based both on an administrative decision to deny the DSOL's application

for provisional accreditation which was arbitrary and capricious, and based on procedural irregularities which denied Plaintiff an opportunity for a fair and impartial hearing in the course of the administrative proceedings below. In weighing a motion to dismiss, the District Court asks "'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim'." *Twombly,* 550 U.S. at 563 n.8 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)).[1]

The Court should reject Defendant's efforts to seek an adjudication on the merits of Plaintiff's due process claims at this stage of the litigation. While the Court may look to documents attached to the pleadings and filed in the case to determine whether Plaintiff has stated a plausible claim for relief, Defendant's efforts to obtain judicial review of the agency decision at this stage, in effect converts Defendant's 12(b)(6) motion from a motion to dismiss to a motion for summary judgment. In a footnote, Defendant cites cases in support of its contention that the Court can review the administrative record, conclude that the ABA's decision was neither arbitrary nor capricious, and thereby dismiss Plaintiff's due process claims under Rule 12(b)(6). (*See* Doc. 44, ABA Memo., n.2, pp. 2-3). However, Sixth Circuit case law makes clear that on a motion to dismiss, the court considers public records, items in the case record, and exhibits attached to a defendant's motion for the purpose of determining whether the plaintiff has set forth allegations sufficient to state a plausible claim for relief. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (citing *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001)). *See*

[1] The Court's decision to deny Plaintiff's request for a preliminary injunction does not provide a basis for concluding that the Verified Complaint fails to properly state claims upon which relief can be granted. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981))(any findings of fact and conclusions of law made by Court with respect to Plaintiff's previous request for injunctive relief are not binding at a trial on the merits); *111 Debt Acquisition LLC v. Six Ventures, Ltd.*, 2008 U.S. Dist. LEXIS *85431 (S. D. Ohio Aug. 15, 2008) (same); *Smith Wholesale Co. v. R. J. Reynolds Tobacco Co.*, 2005 U.S. Dist. LEXIS 25183, 11-12 (E.D. Tenn. June 3, 2005)(Greer, J.)(same).

also Nieman v. NLO, Inc., 108 F.3d 1546, 1554 (6th Cir. 1997)("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken in account."). These cases do not support the ABA's argument that an adjudication on the merits of Plaintiff's claim for judicial review is appropriate at this stage of the litigation.

Similarly, Defendant's reliance on *Youseffi v. Renaud*, 794 F. Supp. 2d 585 (D. Md. 2011), should be rejected for two reasons. First, the case is non-binding authority from a district court in Maryland. Second, in *Youseffi* the Defendant moved to dismiss, or in the alternative for summary judgment, and the court determined that because Plaintiff's complaint had relied extensively on the administrative record the court could review the record. As discussed below, the DSOL is entitled to supplement the administrative record because the ABA failed to consider all the relevant factors in rendering its adverse decision and because the ABA's failure to adhere to its own Rules of Procedure shows bad faith. Given the particular facts of this case, including facts which have come to light since the Verified Complaint was filed, Plaintiff must be afforded an opportunity to pursue discovery to supplement the administrative record before the Court can fully adjudicate the due process claims presented. *See Norwich Eaton Pharmaceuticals, Inc. v. Bowen*, 808 F.2d 486, 489 (6th Cir. 1987)(enumerating circumstances warranting expansion or supplementation of administrative record); *Cooper v. Life Ins. Co. of N. Am.*, 486 F.3d 157, 171 (6th Cir. 2007)(evidence in addition to administrative record may be offered to support due process claims or claims of alleged bias on part of decision-maker).

Procedural Due Process

The DSOL's Verified Complaint alleges both that Plaintiff was denied a full and fair opportunity to be heard and that Defendant ABA violated DSOL's due process rights by failing to follow its own Rules of Procedure. (*See* Doc. 1, Verified Complaint, (hereinafter "Compl.") at ¶¶ 37, 91). The Verified Complaint alleges that in reviewing the DSOL's application for provisional approval, the ABA considered facts not in evidence and applied requirements which are neither set forth in nor encompassed by the ABA's published Standards for Approval of Law Schools, thereby violating its own Rules of Procedure. (Compl. at ¶¶ 34-40, 51-53, 56-62, 72, 87-91). These allegations include the fact that the ABA permitted presiding members of the Accreditation Committee to be present for the Council proceedings, thwarting a *de novo* review and denying the Law School an impartial hearing. As set forth in the Verified Complaint, "the Council Hearing was also procedurally defective because members of the Accreditation Committee were present during the entire hearing and during the Council's deliberation after the Hearing." (Compl. at ¶ 37). The presence at the Council Hearing of Accreditation Committee members who recommended the denial of DSOL's application for provisional accreditation clearly supports DSOL's claim that the hearing was neither fair nor impartial and that Defendant ABA violated its own Rules of Procedure. This conduct clearly violated the Law School's due process rights.

The ABA's procedural violations include violations of ABA Rule of Procedure 6 which provides for attendance by the chairperson or member of the Site Evaluation Team at a Committee or Council meeting, but does not provide for members of the Accreditation Committee to attend the Council Hearing. Indeed, the presence of the Accreditation Committee members is a violation of basic fairness and due process given that it was their decision that was

under review at the Council Hearing. This unfair anomaly is akin to having a trial judge whose decision is on appeal in the Circuit Court attend the argument and decision conference immediately thereafter.

Similarly, ABA Internal Operating Practice ("IOP") 2 establishes that but for limited exceptions set forth in Rules 6 and 26, all matters relating to accreditation of a law school shall be confidential. IOP 19 governs the avoidance of any actual or perceived conflict of interest, and sets forth standards for recusal where a Council Member participated in any decision as a member of the Accreditation Committee. *See* IOP 19(d)-(f). The presence of Accreditation Committee members at the Council Hearing violated Rule 6 and IOP 2 and 19. These procedural irregularities are more than conclusory allegations and are clearly sufficient to state a plausible claim for relief.

Similarly, pursuant to the Notice of Supplementation of the Record and Supplemental Declaration of Hulett H. Askew filed by the ABA on January 31, 2012, (Docs. 37, 37-1), the ABA has admitted that it failed to follow its own procedures for the appointment of an Appeals Panel pursuant to the ABA's own Rule 10(g). The ABA Rules of Procedure for Approval of Law Schools provide in pertinent part:

> The Appeals Panel shall consist of three people appointed by the Chair of the Council to serve a one year term beginning at the end of the Annual Meeting of the Section and continuing to the end of the next Annual Meeting of the Section. The Chair of the Council shall also appoint, at the same time and for the same term, three alternates to the Appeals Panel.

Rule 10(g). Nevertheless, by the ABA's own admission, the current Appeals Panel was neither fully constituted nor prepared to undertake any appeal until **six days after the deadline** for DSOL to file its appeal in this case and almost **five months after the Chair of the Council was**

required to appoint the members of the Appeals Panel. This *post hoc* appointment process clearly violates the ABA's own Rules of Procedure. In addition, this *post hoc* appointment process and the presence of the Accreditation Committee members at the Council Hearing violate the due process provisions of the federal statute and regulations which govern the ABA's conduct as an accrediting agency: 34 C.F.R. § 602.25(f)(1)(i) (2011); 20 U.S.C. § 1099b (2011). (*See* Compl., ¶ 71- 72, 91). These facts clearly demonstrate that the ABA ignored its own Rules of Procedure and the governing statutory and regulatory requirements, thereby violating the DSOL's due process rights. *See Escuela De Medicina San Juan Bautista, Inc. v. Liaison Comm. on Med. Educ.*, 2011 WL 5114872 (D. P. R. Oct. 28, 2011). Consequently, the DSOL's claims that the ABA's decision was neither fair nor impartial and that the procedural irregularities engaged in by the ABA denied the DSOL a meaningful opportunity to be heard are more than speculative. The ABA itself concedes in its own motion papers that "the Council is designated by the DOE as the national accrediting agency for law schools **and must perform its duties consistent with its own standards and rules**." (Doc. 44, ABA Memo. p. 16) (emphasis added). Because the Plaintiff has clearly set forth facts and allegations demonstrating that the ABA has failed to do precisely what it acknowledges it must, the DSOL has stated a plausible due process claim and Defendant's Motion to Dismiss should be denied.

In cases seeking judicial review of an administrative agency's decision, the administrative record includes all the materials that were before the agency at the time the administrative decision was made. *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997). Generally speaking, judicial review is confined to the administrative record presented to the court and the court's task is to apply the standard of review to the agency's decision based on that record. *Kroger Co. v. Reg'l Airport Auth. of Louisville and Jefferson*, 286 F.3d 382, 387 (6th

Cir. 2002). *See also Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1973). However, the general prohibition against admission and discovery of evidence outside the administrative record is not absolute. Rather, under some circumstances, the reviewing court may exercise its discretion to expand or supplement the administrative record. *Charter Twp. Van Buren v. Adamkus*, 1999 U.S. App. LEXIS 21037 at *14 (6th Cir. Aug. 30, 1999).

The Sixth Circuit has found that consideration of evidence outside the administrative record is proper for purposes of "ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds for decision." *Norwich Eaton Pharmaceuticals, Inc. v. Bowen*, 808 F.2d 486, 489 (6th Cir. 1987). Thus, the Sixth Circuit has identified three circumstances that warrant supplementation of the administrative record: (1) when the agency has deliberately or negligently excluded documents; (2) when the court needs to obtain "background information" in order to determine whether the agency considered all the relevant factors; and (3) where there is a strong showing of bad faith. *Slater*, 120 F.3d at 638 (quoting *James Madison Ltd by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996))(internal quotations omitted). Both circumstances (2) and (3) warranting an expansion of the record are present here.

The facts and allegations already established on the record demonstrate that Plaintiff has sufficiently set forth due process claims that are plausible on their face. Nevertheless, under the particular circumstances of this case, Plaintiff should be afforded an opportunity to undertake discovery because as the Verified Complaint and Hearing Brief attached thereto demonstrate, the ABA failed to consider all the relevant factors in rendering its adverse decision. This failure of the Council to explain or even mention significant facts that contradict its "findings" is a serious

due process violation. *Eaton Pharmaceuticals*, 808 F.2d at 489. In addition, as discussed above and as set forth fully in Plaintiff's Motion for Reconsideration filed on February 8, 2012, (Doc. 38), the ABA failed to follow its own Rules of Procedure and this admitted violation has severely prejudiced Plaintiff's right to a fair, meaningful, and impartial review of the ABA decision before the Appeals Council. The ABA's failure to adhere to its own Rules of Procedure and its appointment of the Appeals Panel **after** its decision to deny DSOL provisional accreditation shows bad faith warranting discovery beyond the current administrative record. *Slater*, 120 F.3d at 638. Discovery will likely adduce even more facts concerning the ABA's failure to consider all the relevant factors and facts which support a showing of bad faith, thereby ultimately demonstrating the arbitrary and capricious nature of the ABA's accreditation decision.

The ABA faulted the DSOL for failing to satisfy requirements and criteria that are not part of the published ABA Standards. Such a failure to follow its own Rules of Procedure violates due process. (Compl., ¶¶ 10, 34-36, 41-50). *See Auburn University v. Southern Ass'n of Colleges and Schools, Inc.*, 489 F. Supp. 2d 1362, 1378-79 (N.D. Ga. 2002); *Hampton University v. Accreditation Council for Pharmacy Educ.*, 611 F. Supp. 2d 557, 567 (E. D. Va. 2009). The DSOL has also alleged that the ABA decision fails to set forth the grounds for its denial decision with reference to the facts set forth in the record and fails to make clear what favorable evidence it discounted or rejected and the basis for its accreditation decision. (Compl. ¶¶ 90-91). *See Norwich*, 808 F.2d at 489. The Verified Complaint clearly alleges violations by the ABA of its Rules of Procedure, including the improper attendance at and participation in the Council Hearing by members of the Accreditation Committee. (Compl. ¶ 37).

The DSOL should be permitted to inquire into the ABA's violations of its own Rules of Procedure and the explication of the ABA's course of conduct and the basis of its denial decision. *See City of Mount Clemens v. U.S. EPA*, 917 F.2d 908, 918 (6th Cir. 1990)(court permitted discovery into whether agency considered a particular factor not contained in the record, or whether it violated its own regulations); *City of Lorain, Ohio v. Administrator, U.S. EPA*, 1992 U.S. Dist. LEXIS 22665 at *6-7 (N.D. Ohio Apr. 24, 1992)(supplementation of administrative record permitted as to explanations of agency statements or conclusions to determine basis for decision; whether agency did or did not consider a particular factor submitted by plaintiff prior to final decision but not contained in record; and whether the agency violated its own regulations in effect at the time the final decision was made). The ABA's failure to adhere to its own Rules of Procedure including the presence of Accreditation Committee members at the Council hearing; the attendant appearance of impropriety occasioned thereby; the ABA's failure to properly constitute the Appeals Panel until after the DSOL filed its administrative appeal; and the antitrust conduct discussed further below, constitute a showing of bad faith requiring supplementation of the record prior to any ruling on the merits of Plaintiff's due process claims. *Slater*, 120 F.3d at 638

Substantive Due Process

In order to prevail on its substantive due process claims, Plaintiff must demonstrate that the ABA's decision to deny the DSOL's application for provisional accreditation was arbitrary and capricious or contrary to law. Plaintiff's Verified Complaint sets forth facts demonstrating just that. "While the arbitrary and capricious standard is deferential, it is not . . . without some teeth." *Evans v. UnumProvident Corp.*, 434 F.3d 866, 876 (6th Cir. 2006). An agency's decision may be entitled to a presumption of regularity, but that presumption "is not to shield [the] action

from a thorough, probing, in-depth review." *Simms v. NHTSA*, 45 F.3d 999, 1003 (6th Cir. 1995) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971)). As this Court has recognized, "federal courts do not sit in review of the administrator's decisions only for the purpose of rubber stamping those decisions." *Grisham v. Life Ins. Co. of No. Am.*, 2007 U.S. Dist. LEXIS 79310 at *13 (E. D. Tenn. Oct. 25, 2007)(Collier, C.J.) (quoting *Evans*, 434 F.3d at 876). Rather, the court is obligated under the arbitrary and capricious standard to review the quality and quantity of the evidence and opinions on both sides of the issue. *Id.*

The ABA's decision to deny provisional approval to DSOL was arbitrary and capricious for multiple reasons as set forth in the allegations in the Verified Complaint. First, the decision is wholly disconnected from the factual record which was before the ABA. (*See e.g.* Compl. ¶¶ 3,). Second, the decision is contradicted by the findings and decisions of two other accrediting agencies. (*See e.g.* Compl. ¶¶ 8-9, 21-27). Third, the ABA has failed to articulate any rational basis between the facts found and the choice made to deny DSOL's application for provisional approval. *Cincinnati Bell Telephone Co. v. Federal Communications Comm'n*, 69 F.3d 752 (6th Cir. 1995). (*See e.g.* Compl. ¶¶ 34-35, 39-40). Fourth, the ABA has failed to articulate its reasons, if any, for accepting certain evidence while rejecting or completely ignoring other evidence. The ABA's decision does not set forth reasons to "build an accurate and logical bridge between the evidence and the result" such that this reviewing court cannot uphold the decision. *McHugh v. Astrue*, 2011 U.S. Dist. LEXIS 141342 at * 12 (S. D. Ohio Nov. 15, 2011); *Reinholt v. Astrue*, 617 F. Supp. 2d 733 (E. D. Tenn. 2009). (*See e.g.* Compl. ¶¶ 10). Indeed, the Council's findings do not even mention, let alone explain, substantial evidence found by its own Site Evaluation Team that is contrary to its decision.

With respect to Standard 203 in particular, the DSOL's allegations set out in detail the overwhelming credible evidence of compliance and the ABA's failure to articulate why this supportive evidence was rejected or ignored. In addition, the ABA's articulated reasons for finding the DSOL was not in substantial compliance with this Standard are based on requirements and criteria that extend beyond and are not encompassed in the published Standard. (See Compl. ¶¶ 8-10, 23-24, 26-27, 34-50, 89-91). These facts state a claim for relief that is plausible on its face, thereby precluding dismissal pursuant to Rule 12(b)(6).

The ABA Council asserts "six facts" as the basis for determining that DSOL was not in substantial compliance with Standard 203. As discussed *supra* at page 2, each alleged deficiency is merely a variation on a single theme: that DSOL had not engaged in a review of the market conditions and goals contained in its feasibility study. However, Standard 203 does not require review of a feasibility study as a component of the Standard. The Council so admits. (*See* Transcript of December 2, 2011 Council Hearing, (hereinafter "Council Hearing Tr."), The Honorable Durham, p. 44, ln. 13-15)("You correctly observed, I think, that the Standards do not require more than one feasibility study. . . ."). Moreover, even if Standard 203 could be read to encompass such a requirement, the facts that were before the ABA demonstrate that DSOL engaged in continual re-evaluation of "market conditions," including DSOL's self-study and Strategic Planning Retreat. The ABA Site Team found that "DSOL's self-study process and strategic planning process have occurred simultaneously" and that "[t]he DSOL self-study process and its strategic planning process have been merged … and are only now [in February 2011] diverging. Undergirding both processes has been LMU's strategic planning process." (ABA Site Team Report, pp. 5-6). The DSOL strategic planning process occurs daily, weekly, monthly and annually. (Hearing Brief, pp. 17-23.). In the course of this strategic planning,

DSOL has reviewed changing market conditions and evaluated their effects on DSOL's ability to achieve its mission. As set forth in the Verified Complaint:

> Moreover, **a culture of assessment at every level**—institutional, programmatic, curricular, teaching, student --(indeed every aspect of the law school operation)—appears to place DSOL, in its very short lifetime, **at the forefront of outcomes-based and assessment-driven legal education, using methods of evaluation that in the near future will likely become an integral part of ABA accreditation standards.**

(Compl. ¶ 41, citing ABA Site Team Report, p. 6). There simply is no evidence to the contrary.

At the December 2-3, 2011 hearing, DSOL presented evidence and testimony that it has consistently revised its program projections and undertaken strategic planning to address the impact of lower enrollments, a longer time frame to fiscal independence, and the other concerns raised by the ABA under the guise of Standard 203. (*See* Council Hearing Tr., pp. 40-43). Nowhere does the ABA explain why this evidence was ignored and disregarded, especially given the fact that no contrary evidence was presented at the Hearing.

All of this evidence was in the record and was readily available to the ABA. Nevertheless, the ABA failed to consider it or, at a minimum, failed to articulate why it was rejected. DSOL is entitled to discovery to determine if and how the Council attempted to "connect the dots" in its decision-making. How can the facts as set forth above be reconciled with the ABA's conclusions? Did the Council consider and properly weigh the facts set forth in the Council Hearing Transcript and if so, why doesn't the Council decision explicate its reasoning? "This lack of explanation itself renders the decision arbitrary and capricious." *Karce v. Building Service 32B-J Pension Fund*, 2006 U.S. Dist. LEXIS 79818, *22 (S.D. N.Y. Nov. 1, 2006). Thus Plaintiff has stated a claim for relief with respect to the ABA's arbitrary and capricious determination that the DSOL was not in substantial compliance with Standard 203.

The ABA 's finding of non-compliance with Standard 303 was essentially premised on the readmission of six students, an alleged "decline" in LSAT scores and UGPAs from the Law School's inaugural class, and the irrational conclusion that because the Director of Academic Success had never held that title previously, he was automatically unqualified to lead the DSOL Academic Success Program. At a minimum, due process requires the Council to examine Professor Walker's actual background and explain why that background did not qualify him to be Director of the Academic Success Program. At a minimum, DSOL is entitled to inquire into these reasons through discovery. Before he was elected, Howard Baker had no prior experience as a United States Senator. Nevertheless, if we were to examine his background and skills as the voters of Tennessee did, he would have been found well-qualified for the U.S. Senate, even though he had never previously served as a Senator. Similarly, upon examining all the relevant facts, it is clear that Professor Walker is qualified by virtue of his skill, knowledge, and background to be Director of the DSOL Academic Success Program.

Furthermore, the ABA ignored additional evidence attesting to the quality of the Academic Success Program: the program is taught in small sections, required of all first year students and those students in subsequent years who are on academic probation; a Bar Examination Course is required of students with a GPA of 2.5 or below; DSOL utilizes an interactive computer software program, TurningPoint, and midterm exams to identify potentially at-risk students prior to the end of the term so that academic support may be begun; and counseling is given to at-risk students which includes sessions with writing tutors. The ABA gave no reasons for ignoring or rejecting this favorable evidence which was before the Council when it reached its decision. *See Reinholt v. Astrue*, 617 F. Supp. 2d 733 (E. D. Tenn. 2009).

Similarly, there is no discussion or explanation by the Council as to why the *de minimus* decline in LSAT scores and/or UGPAs is significant or determinative. Nor is there evidence that the Standards require a law school seeking approval to show an increased or fixed LSAT score or UGPA. Common sense suggests that the LSAT scores and UGPAs for approved law schools fluctuate as a result of multiple variables, including the number of LSAT takers, the school ranking, and other factors. There is no reliable data in the present record to connect the *de minimus* fluctuation in DSOL's LSAT scores and UGPAs with the conclusion that the DSOL students are incapable of doing satisfactory work. Under *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995), the agency decision-maker is required to articulate a "rational connection" or "bridge" between the facts on the record and its decision. 69 F.3d at 758.

DSOL dismissed eighteen students for academic underachievement, six of whom were readmitted because their poor performance was attributed to "extraordinary circumstances." The ABA points to these bare facts as evidence that DSOL does not adhere to sound academic standards and fails to provide proper academic support. However, the ABA's decision fails to recognize that DSOL properly readmitted five students, and focuses on a single student who was unsuccessful on readmission. The ABA irrationally discounted or ignored without comment evidence favorable to DSOL and then relied on a single negative inference to support its conclusion. When fully and rationally evaluated this empirical evidence supports the conclusion that DSOL's re-admission policy is successful 85% of the time. This empirical evidence is totally consistent with the facts found by the Site Evaluation Team (Compl. ¶ 51).

The arbitrary and capricious nature of the ABA's decision with respect to Standard 303 and Interpretations 303-3 is apparent from the overwhelming evidence of DSOL's compliance

and the ABA's utter failure to articulate why the evidence in support of the Law School on this issue was either rejected or wholly ignored in favor of the ABA's irrational and arbitrary conclusions and interpretations. The DSOL has clearly stated a claim for relief with respect to the ABA's determination that the Law School was not in substantial compliance with Standard 303(a) and 303(c) and Interpretation 303-3. The Verified Complaint sets forth allegations and facts demonstrating that the ABA's decision with respect to this Standard and Interpretation is clearly arbitrary and capricious. (Compl. ¶¶ 51-56).

The ABA's finding that DSOL is not in substantial compliance with Standard 501(b) and Interpretation 501-3 is likewise arbitrary and capricious and DSOL has clearly stated a plausible claim for relief. (Compl. ¶¶ 57-64). As acknowledged by the ABA, (*see* Doc. 44, ABA Memo., p. 2), a decision by an accrediting agency must "conform … to fundamental principles of fairness" to avoid being deemed an arbitrary and capricious abuse of discretion. *Thomas M. Cooley Law Sch. v. ABA*, 459 F.3d 705, 713 (6th Cir. 2006). DSOL's claim as to Standard 501 demonstrates that the ABA's findings lack the consistency, uniformity, and logical inference required of rational decision-making. *Russell v. Gardner*, 2012 U.S. Dist. LEXIS 6694, at *2-3 (E.D. Tenn. Jan. 18, 2012)(Varlan, J.)(claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged).

Standard 501(b) requires that DSOL "not admit applicants who do not appear capable of satisfactorily completing the educational program and being admitted to the bar." Interpretation 501-3 requires that, "[a]mong the factors [Defendant ABA] … consider[s] in assessing compliance with Standard 501(b) are the academic and admission test credentials of the law

school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program." The ABA illogically interpreted statistics concerning DSOL student attrition rates in a manner that led to the irrational conclusion that DSOL was admitting students incapable of achieving academically and that its Academic Success Program lacked effectiveness. The ABA argues that its conclusion is reinforced by the *de minimus* declines in the entering LSAT scores and UGPAs of DSOL students.

The Council stated that DSOL's noncompliance with Standard 501 was evident in the "**comparatively low** entering academic credentials of a significant percentage of [DSOL's] … students. (Council Letter of December 20, 2012, p. 4, (emphasis added)); (Doc. 44, ABA Memo., p. 9). By this statement the ABA expressly admits to a relative and comparative analysis of LSAT scores and UGPAs in evaluation of law school accreditation applications. Nowhere, however, does the ABA define the standard of entering student credentials to which a law school applying for accreditation will be held. The ABA must be required to define the factors subject to its analysis with consistency and uniformity. Otherwise, "in the absence of an explanation the totality of the circumstances can become simply a cloak for agency whim – or worse." *PDK Laboratories, Inc. v. U.S. Drug Enforcement Administration*, 438 F.3d 1184, 1194 (D.C. Cir. 2006) (internal quotations omitted). DSOL presents entering LSAT scores and UGPAs that are higher than eight law schools that Defendant ABA has deemed worthy of **full** accreditation. (*See* Compl. ¶61). The ABA argues that the Court should dismiss DSOL's claim to the extent it alleges disparate treatment because DSOL is merely asking the Court to substitute its decision for that of the accrediting entity. (ABA Memo., p. 14). Contrary to the ABA's characterization, a totality of the circumstances analysis requires that the ABA be held to standards of consistent

decision making. *Id.* ("A thorough, careful, and consistent application of a multi-factor test is important to allow relevant distinctions between different factual configurations to emerge, and … appellate courts depend on it for the performance of their assigned task of review."). The undisputed fact that DSOL's entering student credentials are higher than those of students at eight fully accredited law schools demonstrates that DSOL's claim of an arbitrary and capricious decision is plausible on its face.

The ABA also argues that the relative merit of DSOL's entering student credentials is undermined by DSOL's attrition rates and a lack of demonstrated success of its Academic Success Program. However, the ABA failed to evaluate the evidence in a rational manner and failed to articulate its reasons for dismissing or ignoring the evidence favorable to DSOL. The ABA noted that six of eighteen students DSOL dismissed for academic underachievement were readmitted. The ABA concludes from this fact alone that DSOL is not "rigorous" in enforcing its academic policies. (Council Letter of December 20, 2012, p. 4). However, the ABA ignores the undisputed fact that five of these six students were successful on readmission and that such success demonstrates the effectiveness of the Academic Success Program. The ABA's conclusion that DSOL is deficient with respect to entering student credentials, attrition rates and the effectiveness of its Academic Success Program is wholly illogical.

DSOL is not asking the Court to substitute its judgment for that of the ABA. Rather, DSOL asks the Court to evaluate the rationality of the conclusions reached by the ABA and hold the ABA accountable for fully articulating the basis for its decision. Where the agency decision-maker fails to mention relevant evidence in his or her decision, a reviewing court cannot tell if significant probative evidence was not credited or simply ignored. *Reinholt*, *supra*; *McHugh v.*

Astrue, 2011 U.S. Dist. Lexis 141342 at *11-12 (S. D. Ohio Nov. 15, 2011). The Court cannot uphold an agency decision, even where there may be sufficient evidence to support it, "if the reasons given by the [fact finder] do not build **an accurate and logical bridge between the evidence and the result**." *McHugh*, 2011 U.S. Dist. LEXIS 141342 at *12 (emphasis added). The Court simply cannot reach any decision on the merits of DSOL's claims for judicial review until it knows how and why the Council reached its decision. *Reinholt*, 617 F. Supp. 2d at 744-45 (the decision-maker must discuss the evidence he chooses not to rely upon as well as the significantly probative evidence he rejects).

There is no logic in the ABA's interpretation of DSOL's dismissal statistics or its characterization of DSOL's LSAT scores and UGPAs as "low" when they are higher than those of at least eight other fully accredited law schools. The ABA did not reach its decision with respect to Standard 501 through a reasonable analysis of the evidence, and failed to articulate any basis for rejecting, ignoring, or overlooking the evidence that contradicts its conclusions. The lack of reasoned decision-making and the failure to articulate or explicate its reasoning is the very essence of arbitrary and capricious agency conduct as alleged in the Verified Complaint. DSOL's due process claims are clearly facially plausible and may not be dismissed.

SHERMAN ACT ANTITRUST CLAIMS

The ABA raises two principal arguments against DSOL's federal antitrust claims – first, that DSOL has failed to allege a sufficient "antitrust injury" to support its claims; and second; that the other allegations in support of its antitrust claims are inadequately pleaded under the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (and, by extension, in its

predecessor case, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).[2] The first argument disingenuously fails to acknowledge the injuries DSOL has, in fact, pleaded and the extent to which prior courts have recognized that such injuries are actionable under the antitrust laws. The second argument similarly refuses to apprehend the detail-laden Verified Complaint and attempts to foist upon DSOL a pleading burden greater than that required by the Supreme Court and the Sixth Circuit. Both arguments should be rejected.

To be clear, in its Verified Complaint, DSOL has alleged two species of federal antitrust claims: (i) a claim that the ABA, in concert with certain Competitor Law Schools of DSOL's that have an economic interest in ensuring that DSOL specifically is not allowed to enter the market, conspired to misapply the ABA Standards and Rules to wrongfully deny DSOL provisional accreditation in violation of section 1 of the Sherman Act; and (ii) a claim that the ABA itself has abused its monopoly power as the "gatekeeper" over law school accreditation to wrongfully deny DSOL provisional accreditation in violation of section 2 of the Sherman Act. These claims are supported by dozens of paragraphs and details concerning DSOL's compliance with the ABA's Standards, the degree to which other law schools not in compliance with the Standards or otherwise characterized by having lower admitted student credentials than DSOL's are nevertheless accredited, and the conspiracy that DSOL believes has resulted in the denial to it of provisional accreditation. Unlike in *Twombly*¸ *Iqbal*, and the other authorities highlighted by

[2] The ABA also suggests that that the Verified Complaint should be dismissed simply because other courts in other circumstances have rejected antitrust claims in other accreditation-related cases. (*See* ABA Memo., p. 19-20.) Obviously, the fact that other plaintiffs have not been successful before cannot axiomatically doom DSOL's claims here. The cases cited by the ABA are all distinguishable, significantly because each lacked the type of specific allegations of anticompetitive conduct raised by DSOL here. Furthermore, DSOL has already implicitly acknowledged that claims involving anticompetitive conduct related to accreditation processes are different than many other type of section 1 claims, because DSOL otherwise would have pleaded that the ABA's conduct constituted a *per se* violation of section 1 instead of invalidity under the rule of reason. *See, e.g., Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521, 529 (6th Cir. 2001). But even under the rule of reason, the ABA's conduct contravenes the law.

the ABA, in the Verified Complaint DSOL has alleged all the facts needed to support a claim under section 1 of the Sherman Act. *Cf. Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F. 3d 430, 437 (6th Cir. 2008) (dismissing complaint that failed to allege the "who, what, where, when, how or why" regarding the alleged anticompetitive conduct).

Who Conspired? The ABA itself, in tandem with Competitor Law Schools that "compete with DSOL for law student applicants, faculty, donations, internships and other employment opportunities for students, retentions in connection with special studies and expert engagements, goodwill, and other economic opportunities" (Compl. ¶ 98), either in the southern Appalachian region (Compl. ¶ 99), or, alternatively, in a national market consisting of law schools with similar applicant pools and similar institutional reputation. (Compl. ¶ 100).[3]

When Did The Conspiracy Occur? As alleged throughout the 126-paragraph Verified Complaint, the crux of the ABA's anticompetitive conduct is centered around the ABA's denial of DSOL's accreditation application for provisional approval on December 20, 2011. (Compl. ¶ 7). But the conspiracy reaches back several months prior to that meeting, including the Accreditation Committee's meeting on September 29 and 30, 2011, as DSOL's provisional accreditation and the Site Team visit was discussed, and October 2011, when Consultant Askew communicated the Committee's negative recommendation to DSOL. (Compl. ¶¶ 31-34). Proof

[3] Indeed, one of the Competitor Law Schools interested in seeing DSOL fail is the Appalachian School of Law ("ASL") in Grundy, Virginia, only 180 miles from Knoxville, and a school that competes for the same types of students and opportunities as does DSOL. Shortly after the ABA denied DSOL provisional accreditation, ASL amended its website to specifically poach current DSOL students with special transfer application terms. "**NEW**: ASL is offering application fee waivers for transfer students in good academic standing from Lincoln Memorial's Duncan School of Law. Contact an admissions counselor to get your fee waiver today at **admissions@asl.edu** or (276) 935-4349. Applicants from Duncan can expect a quick decision and can potentially transfer up to 30 Duncan credit hours earned with a 2.0 or higher GPA in the last four years." (Available as of February 29, 2012, at http://www.asl.edu/Admissions/Transfer-to-ASL.html.)

of the ABA's and the Competitor Law Schools' anticompetitive motive and actions runs back to at least the mid-1990s, to the present.

How? The Competitor Law Schools, through their respective staffs and faculties, have infiltrated the ABA's Accreditation Committee and the Council, and are in a position to control or influence their decisions. (Compl. ¶ 98.) The Chair of the Council is a Dean of a Competitor Law School. The Vice Chair of the Council is the Dean of a Competitor Law School. And 10 of 21 members of the Council present and voting at the Council Hearing were deans or professors at Competitor Law Schools. Competitor Law Schools do not just control the Council -- they *dominate* the Council. By way of comparison, membership deemed control of a corporation is typically placed at 10-20%. The ABA reflects domination by academics of nearly 50%. These members of the Council have used their influence to improve the relative position of their own law schools.

Such anti-competitive conduct by Defendant ABA is not new. The ABA, in 1995, was the subject of an action by the United States Department of Justice ("DOJ"). DOJ filed a complaint against the ABA and various unnamed co-conspirators alleging anti-competitive action restraining trade "among professional law school personnel in delivering legal educational services" in violation of section 1 of the Sherman Act. (1995 ABA Comp. ¶ 36, Civil Action No. 95-1211 (D.D.C.)) (Compl. ¶ 76). DOJ stated that the ABA and its co-conspirators acted in a way that fixed the compensation and benefits of law school faculty and staff. (1995 ABA Comp. ¶ 37) (Compl. ¶ 77). The membership of various ABA governing bodies, including the Council and the Accreditation Committee, were the subject of the Consent Decree entered into between the ABA and DOJ in this matter. In the Consent Decree, the ABA agreed to reduce the number

of deans and faculty members participating in the governing bodies. (Final Judgment, at VI, VIII Civil Action No. 95-1211 (June 25, 1996 D. D.C.)). (Compl. ¶ 81). It would appear, however, that Defendant ABA was not then ready, as it is not ready now, to fundamentally reform the membership of its Council, and the Competitor Law Schools still hold sway.

For, as the Final Judgment was due to expire – June 23, 2006 – approximately 10 years from its entry date, the ABA consented to a Stipulation Entry of an Order in which the ABA admitted that it did not reduced the participation of law school deans and faculty in the accreditation process to the extent required by the 1995 Consent Decree, and that it was in violation of the Final Judgment. The ABA also admitted that it had not given DOJ notice of proposed and adopted changes to its standards and rules governing accreditation. (2006 Stipulation) (Compl. ¶ 84). In the end, the ABA paid the United States a fine of $185,000 to cover the cost of the governmental investigation of these violations. (Compl. ¶ 85). In this case, the ABA continues its anti-competitive practices utilizing the same methods. By denying accreditation to DSOL, the Competitor Law Schools keep a new competitor out of their respective markets, or set a precedent that new law schools – even those that meet the ABA Standards and Rules – will nevertheless be denied accreditation. (Compl. ¶ 101).

What is the Evidence? The evidence supporting the plausibility of a conclusion that the ABA and the Competitor Law Schools acted in an anticompetitive manner in denying DSOL accreditation includes the facts that Tennessee Board of Law Examiners (TBLE) and the Southern Association of Colleges and Schools – Commission on Colleges (SACS-COC), using similar standards, each accredited DSOL, while the ABA did not (Compl. ¶¶ 8; 11; 21-27; 42-43; 52-53; 58-59); the Council's failure to articulate any reason why it ignored the findings of the

ABA's own Site Team that investigated DSOL and found it in compliance with all Standards (Compl. ¶¶ 28-30; 35-36; 39-40; 41; 47; 51; 57; 64); the extent to which the qualifications of DSOL's students was consistent with other ABA-accredited law schools (Compl. ¶¶ 61-63); and the ABA's prior history of anticompetitive conduct, including violating a consent decree that regulated in part the ABA's accreditation practices. (Compl. ¶¶74-86.)

The totality of these facts are more than sufficient to support DSOL's antitrust claims as pleaded and to defeat the ABA's attempt to dismiss them. Despite significant misperception concerning the alleged changes to Rule 8 ushered in by *Twombly* in 2007, it must be remembered all *Twombly* and *Iqbal* require is that a complaint "must contain either direct or inferential allegations respecting all material elements" of the claim at issue, and that the "factual allegations must be enough to raise a right to relief above the speculative level" and "state a claim to relief that is plausible on its face." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*,648 F.3d 452, 456-57 (6th Cir. 2011) (reinstating antitrust claims dismissed by the district court because of allegedly insufficient pleading) (quoting *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 902 (6th Cir. 2009)) (quotation marks omitted). This does not require that the claims be "probable"; all that is required is that they be "plausible." *Watson Carpet*, 648 F.3d at 458 (citing *Iqbal*, 129 S. Ct. at 1949; and *Twombly*, 550 U.S. at 556). Moreover, to survive a motion to dismiss, plaintiffs need only plead "enough factual matter (taken as true) to *suggest* that an agreement was made[.]" *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2011) (emphasis added), *cert. denied*, 131 S. Ct. 901 (2011). As the Sixth Circuit noted in *Watson Carpet*, "often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet*, 648 F.3d at 458. And it is important to remember that a complaint

should survive a motion to dismiss "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556 (internal quotation marks omitted).

Here, DSOL has satisfied this standard. The ABA urges DSOL has lodged "conclusory allegations" that are not "adequate to show illegality" or to "suggest than an agreement was made." (ABA Memo., p. 24.) This is off-target. The shortcoming targeted by *Twombly, Iqbal,* and lower court decisions applying them are allegations that simply mimic the elements of the cause of action in question – i.e., naked allegations that the essential elements are present. Here, by contrast, DSOL has alleged *specific* facts that, if found to be true at a subsequent stage in the litigation, could lead to a finding for DSOL on its antitrust claims. The "rule of reason" test that the ABA summarily claims DSOL cannot satisfy, (ABA Memo., p. 23), is not undertaken in connection with a motion to dismiss, but only later, at summary judgment or trial, when fact evidence and expert testimony is introduced for consideration.[4] *See, e.g., United States of America and State of Michigan, v. Blue Cross Blue Shield of Michigan*, 2011 U.S. Dist. LEXIS 89849, *13 (E.D. Mich. Aug. 12, 2011) (With respect to the "rule of reason" test in the context of a § 1 Sherman Act claim, the court stated that "[c]ourts hesitate to grant motions to dismiss for failure to plead a relevant product market because market definition is a fact-intensive inquiry only after a factual inquiry into the commercial realities faced by the consumers."). At the very least, at this stage, the allegations give rise to a plausible theory on which DSOL could succeed, regardless of what the ABA (or this Court) thinks of its eventual merits.

[4] Additionally, the ABA has no authority for its proposition that as part of the rule of reason analysis it is somehow incumbent on DSOL to plead "less-restrictive alternatives that would accomplish [the ABA's] legitimate accreditation objectives." (ABA Memo., p. 23.) That is simply not the law.

The authorities the ABA has highlighted are completely off-target. In *Twombly* itself, for example, the plaintiffs did not even allege an express agreement to restrain trade. *See Watson Carpet*, 648 F.3d at 457. In *Total Benefits*, the complaint was properly dismissed because it failed to plead, *inter alia*, how the anticompetitive boycott of the plaintiffs was accomplished and for what purpose. *See Total Benefits*, 552 F.3d at 436. The plaintiffs also offered only "bare allegations without any reference to the 'who, what, where, when, how or why.'" *Id.* at 437. The plaintiffs also failed to allege a relevant product market. *See id.* As described above, DSOL has pleaded all of those facts and elements here. Similarly, in *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008), the complaint completely lacked any allegation of injuries to the market as a result of the defendants' actions. The plaintiff did not even allege that the motivation behind his termination was anticompetitive.

The ABA also contends that DSOL has not, and somehow cannot, allege a sufficient "antitrust injury" to maintain its antitrust claims. (ABA Memo., p. 20-22.) Generally, a plaintiff must demonstrate a harm both to itself and to competition generally in order to sustain an antitrust claim. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). After stating that DSOL "must allege facts establishing that there has been an 'adverse impact on price, quality, or output' in the law school market as a result of its denial of accreditation . . . [and] It has not done so here[,]" (ABA Memo., p. 20-21), in footnote 6 the ABA reluctantly admits that the Verified Complaint does in fact identify 3 such phenomena – increasing the price of legal education, increasing the cost of legal services, and decreasing the consistent quality of legal education. (ABA Memo., p. 21; Compl. ¶¶ 106-108.) Although apparently conceding these types of injuries may qualify, the ABA notes that these are mere "conclusory statements [that will] not suffice." Again, as noted above, DSOL has met its burden to plead the specific

injuries both it and competition generally has suffered as a result of the ABA's anticompetitive conduct. DSOL has not simply alleged that competition has been harmed – it has stated in what manner that occurred. Any quantification and further elaboration on the circumstances of those effects is a matter to be addressed by fact and expert testimony later in this proceeding. *See, e.g.*, *Blue Cross Blue Shield of Michigan*, 2011 U.S. Dist. LEXIS 89849 at *13.

Furthermore, DSOL has sufficiently alleged a type of private injury that is remediable under the antitrust laws – an injury that even the authorities the ABA cites support DSOL's standing here. Putting to the side the question of whether the inability of DSOL graduates to sit for the bar examination in most states and the "stigmatic" injury suffered by DSOL as the result of the failure to obtain provisional accreditation is actionable under the Sherman Act, this matter fits squarely within the broad terrain left open by the Third Circuit in *Mass. Sch. of Law v. ABA*, 107 F.3d 1026 (3d Cir. 1997) ("*MSL*"), a case to which the ABA would analogize this one. This is not a matter where, as the Massachusetts Law School did in *MSL*, the DSOL contends that the valid, even-handed application of the ABA's accreditation standards – indeed, the fact that the ABA has processes and standards – gives rise to an antitrust injury. Rather, as the Third Circuit expressly recognized, the ABA is not immune from the effects of its anticompetitive conduct in connection with its own accreditation *process*, which is purely private conduct not connected to any state action or stigmatic injury. And that is precisely what DSOL has alleged here – the intentionally injurious misapplication by the ABA of the ABA's own standards here caused DSOL concrete, specific harm.

The Third Circuit explicitly instructed:

> MSL alleges a third injury which occurs directly from the ABA's enforcement of its standards, independent of both the bar examination and stigma issues. The challenged standards relate to faculty salaries (MSL charges price-fixing) and limitations on accredited schools accepting transfers or graduate students from unaccredited schools (MSL charges a boycott). Although the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school and from any stigma injury resulting from the denial of accreditation under the Noerr petitioning doctrine, ***the ABA is not immune in the actual enforcement of its standards***. The state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state. *See Midcal, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233*. Thus, the ABA's enforcement of an anticompetitive standard which injures MSL would not be immune from possible antitrust liability.

MSL, 107 F.3d at 1038-39 (emphasis added).[5]

Accordingly, it could not be more clear that even using the ABA's own theory, the type of injury about which DSOL complains is actionable. DSOL does not complain that the ABA has Standards. Were DSOL challenging the fact that the ABA had standards at all, and DSOL objectively failed to meet them, some of the ABA's actions in the accreditation process would perhaps be immunized. But that is a different case. Here, DSOL's allegations constitute precisely the type of injury that *MSL* contemplated the antitrust laws were designed to handle – injuries flowing from the ABA's own internal processes and conduct. DSOL has alleged that the ABA's wrongful accreditation decision has complicated hiring, frustrated fundraising, put DSOL at a disadvantage in competing for law students, and led to the failure to secure goodwill and other economic opportunities in the market. (Compl. ¶ 111.) In addition, the fact that the accreditation decision itself was wrongful and anticompetitive renders what may have been

[5] Despite the potential availability of this type of a claim for MSL, both the District Court and the Third Circuit concluded that, in connection with a motion for summary judgment, MSL had failed to show sufficient evidence concerning the harms it alleged. *See MSL*, *id.* at 1039, 1041.

under other circumstances "immunized" injuries (i.e., the inability of DSOL graduates to take the bar examination, among others) actionable as against the ABA because of the tainted origins of that determination. Rather than hiding behind misapplied notions of "state action" and "stigma," the ABA must be held responsible for the consequences of its anticompetitive conduct.

CONCLUSION

For all the reasons discussed above and as set forth in the allegations in Plaintiff's Verified Complaint, there is no question that the DSOL has properly alleged due process and antitrust claims which are plausible on their face. Consequently, Defendant's motion to dismiss for failure to state a claim must be denied.

Respectfully submitted,

WATSON ROACH BATSON ROWELL & LAUDERBACK

/s/ Robert H. Watson, Jr.
Robert H. Watson, Jr. (001702)
1500 Riverview Tower
900 South Gay Street
P.O. Box 131
Knoxville, TN 37901-0131
Telephone: (865) 637-1700
Facsimile: (865) 525-2514
rwatson@watsonroach.com

BLANK ROME LLP

/s/ Michael L. Cioffi
Michael L. Cioffi (0031098)
1700 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Telephone: (513) 362-8700
Facsimile: (513) 362-8702
cioffi@blankrome.com

CERTIFICATE OF SERVICE

I hereby certify on February 29, 2012, I am filing the foregoing Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss via the Court's CM/ECF which will automatically generate a Notice of Electronic Filing that will be emailed to the following registered Filing Users:

Anne E. Rea
Sidley Austin LLP (Chicago)
One South Dearborn Street
Chicago, IL 60603

P. Alexander Vogel
O'Neil, Parker & Williamson
7610 Gleason Drive, Suite 200
Knoxville, TN 37919

Howard H. Vogel
O'Neil, Parker & Williamson
7610 Gleason Drive, Suite 200
Knoxville, TN 37919

Patricia J. Larson
American Bar Association
321 N. Clark Street
Chicago, IL 60654

Jeffrey R. Thompson
O'Neil, Parker & Williamson
7610 Gleason Drive, Suite 200
Knoxville, TN 37919

Stephanie A. Giggetts
American Bar Association
321 N. Clark Street
Chicago, IL 60654

Linda R. Friedlieb
Sidley Austin LLP (Chicago)
One South Dearborn Street
Chicago, IL 60603

Michael P. Doss
Sidley Austin LLP (Chicago)
One South Dearborn Street
Chicago, IL 60603

/s/ Michael L. Cioffi
Counsel for Plaintiff