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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEREMY CONKLIN, D.O., an individual;

Plaintiff

vs.

NO. 2:18-cv-00090

UNIVERSITY OF WASHINGTON
MEDICINE, a Washington public
health system; UW MEDICINE/NW, a
Washington public benefit
corporation; UNIVERSITY OF
WASHINGTON MEDICAL CENTER, a
Washington public hospital;
UNIVERSITY OF WASHINGTON
SCHOOL OF MEDICINE, a Washington
public educational institution; PAUL
RAMSEY, M.D., in his official capacity
and individually; LESTER PERMUT,
M.D., in his official capacity and
individually; SEATTLE CHILDREN'S
HOSPITAL, a Washington non-profit
corporation; CHILDREN'S
UNIVERSITY MEDICAL GROUP, a
Washington pediatric group; MARY
BRIDGE CHILDREN'S FOUNDATION, a
Washington public benefit
corporation; AMERICAN BOARD OF
THORACIC SURGERY, INC., an Illinois
non-profit corporation; THORACIC
SURGERY DIRECTORS ASSOCIATION,

**PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

NOTED FOR HEARING:

**February 23, 2018
*Without Oral Argument***

CLERK'S ACTION REQUIRED

1 INC., a North Carolina non-profit
2 corporation; and ACCREDITATION
3 COUNCIL FOR GRADUATE MEDICAL
4 EDUCATION, an Illinois non-profit
5 corporation;

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8 Defendants

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11 **INTRODUCTION**

12 Osteopathic physicians (“DOs”) have been excluded from training and
13 career opportunities and hospital privileges to the benefit of allopathic, or
14 medical, physicians (“MDs”) since the profession was founded, even though
15 DOs and MDs have the same number of years of education and training,
16 require passing of exams that are similar, are required to be licensed in the
17 state they practice, are the only two physician categories that can practice
18 medicine in the United States, and both are referred to as doctors. Yet, DOs
19 have a stigma and they experience discrimination by patients, hospitals,
20 schools, and accreditation/board certification entities even when they are
21 well qualified for a position. *See Declaration of Dr. Jeremy Conklin (“Conklin
22 Decl.”) at 3.*

23 Plaintiff, Dr. Jeremy Conklin, D.O.,¹ is an accomplished and skilled
24 osteopathic surgeon with an impressive resume. He wants to become a
25 pediatric heart surgeon, but he cannot. He is not qualified or eligible,
26 according to the Defendants in this lawsuit, and these defendants **WILL**
determine whether he can be, believe it or not, if the Court does not
intervene. Defendants hold the key to Dr. Conklin’s future; and they
swallowed it because they never want him to get in.

¹ Hereafter, “Plaintiff” or “Dr. Conklin”.

1 Defendants are involved in or affiliated with the University of
2 Washington School of Medicine's ("UWSOM's") congenital cardiothoracic
3 surgery ("CCS") fellowship (hereafter, "the fellowship") at Seattle Children's
4 Hospital ("SCH"), one of only twelve accredited pediatric cardiac surgery
5 fellowships in the nation. *Id. at 6, Ex. C.* None of the twelve fellowships
6 select/hire DOs because the rules set by board certifying and accrediting
7 agencies are such that only MDs will have the requisite training, board
8 certifications, and accredited programs necessary to qualify for the
9 fellowship. *Id.* This is the way they control competition and limit the DO
10 profession. This is not extraordinary. It happens throughout the profession.
11 But, UWSOM's² fellowship is different from the other eleven. It is in a
12 conundrum. UW has to choose either to comply with the rules it is required
13 to follow under contract with its accrediting agency and board certifying
14 entities and exclude DOs from even being considered for the fellowship, and
15 violate Washington law, or, follow the law and risk accreditation, physician
16 training programs and funding, and potentially its reputation. Twenty-three
17 years ago, UW decided to break the law instead of its accreditation contract,
18 and it has apparently gotten away with it until now. Enter Plaintiff, Dr.
19 Jeremy Conklin.

20 Dr. Conklin applied for the fellowship in 2015, 2016, and 2017. *Id. at*
21 *6.* He was rejected each time without explanation and without an interview.
22 In 2017, he had to ask why. He was given one reason and one reason only:
23 he was denied based solely on the fact that he did not have board eligibility
24 or certification by the American Board of Thoracic Surgeons ("ABTS") in
25 cardiothoracic surgery ("CS"). *Id. at 8, Ex. D.* Dr. Conklin will never be ABTS

26 ² All Defendants named in this lawsuit except the last three: ABTS, Thoracic Surgery Directors Association ("TSDA"), and Accreditation Council for Graduate Medical Education ("ACGME"), are involved in the decision making for the fellowship in some way. Therefore, for ease of drafting and to avoid confusion, these Defendants are referred to collectively as "UW" or "the UW Defendants". This reference is not to be construed to have any meaning or purpose other than to simplify this Motion. If any Defendant is referred to individually, the Defendant will be referred to by name or the term "each UW Defendant" will be used.

1 board certified in CS unless he goes back to school to become an MD. The
2 ABTS does not board certify DOs. Dr. Conklin is board certified in CS by the
3 American Osteopathic Board of Surgery (“AOBS”), which is the osteopathic
4 equivalent of the ABTS board certification in CS. But, Defendants will not
5 recognize the AOBS certification as equal to the ABTS certification nor will
6 they make an exception. Additionally, there is no osteopathic board
7 certification in CCS. ABTS is the only entity that board certifies accredited
8 CCS, and ACGME is the only entity that accredits CCS GME training. So, Dr.
9 Conklin cannot train in pediatric heart surgery and therefore, he cannot
10 become a pediatric heart surgeon, which explains why we are here. *Id.* at 6,
11 12.

12 Not only does this smell of anti-trust, restraint of trade, and market
13 control, it is discriminatory, and in 1995, the Washington State legislature
14 unanimously enacted a statute that prohibits this exact scenario. RCW
15 70.41.235 prohibits hospitals that serve the general public from
16 discriminating against DOs based solely on board certification. In this case,
17 Defendants conspired to and/or did discriminate against Dr. Conklin based
18 solely on his board certification by an osteopathic board in preference of
19 an allopathic board certification. What makes the situation worse is that this
20 has been going on for 23 years; and it happens each and every year when
21 UW selects its residents and fellows for training positions, called Graduate
22 Medical Education (“GME”). It will continue to happen each year, including
23 this year, beginning in mid-March as UW begins its match programs for GME.

24 DOs have been irreparably harmed by these practices for many years.
25 Dr. Conklin has been and continues to be irreparably harmed. *Id.* at 12. The
26 only way the violations of the RCW and discriminatory acts can be stopped,
and harm prevented, is with the Court’s intervention, which is why Dr.
Conklin filed his lawsuit and this Motion for Preliminary Injunction.

1 **RELIEF REQUESTED**

2 Dr. Conklin respectfully requests that the Court issue a preliminary
3 injunction that prohibits the Defendants' discriminatory practices, which
4 violate Washington law, are ongoing and have caused him and other DOs
5 immeasurable irreparable harm. *Fed.R.Civ.P. 65(a)*.

6 **EVIDENCE RELIED UPON**

7 The Declaration of Dr. Jeremy Conklin and exhibits attached thereto;
8 the Declaration of General Stanley Fleming, D.O.; and the Complaint filed
9 contemporaneous with this Motion.

10 **FACTS**

11 There are two categories of physicians who may practice medicine in
12 the United States: MDs and DOs. Both are licensed and trained in diagnosing
13 and treating illnesses, and in preventive care. Hospitals require licensing in
14 the state of practice and board certification in the practice area, which is
15 obtained through residencies and fellowships, known as GME. *Conklin Decl.,*
16 *at 3.*

17 As mentioned above, Dr. Conklin applied to the fellowship in 2017.
18 *Id. at 6.* UW³ selects the fellow via a match program run by Defendant
19 TSDA. ("TSDA"). *Id., Ex. C.* The TSDA requires board eligibility or
20 certification in cardiothoracic surgery ("CS") by the ABTS, which exclusively
21 board certifies physicians who completed ACGME⁴ accredited training and
22 will not board certify physicians who completed AOA accredited training.
23 ABTS is the only entity that board certifies and provides accredited CCS
24 training. *Id. at 5, Ex. B.* DOs, who completed AOA accredited training, cannot

24 ³ UW is the largest sponsor of GME in the northwestern United States, including Washington,
25 Wyoming, Alaska, Montana, and Idaho. It trains 1350 residents and fellows each year. It has 25
26 residency programs and 76 fellowship programs, and ranks 7th nationally in number of programs
and 8th nationally in number of trainees. *Id. at 5, EX. B.*

⁴ The ACGME provides the UWSOM's accreditation. It is specifically applied to the MD profession and
does not typically accredit DO training. *Id., Ex. C.*

1 be ABTS board certified. *Id. at 5*. Therefore, they are not eligible for the TSDA
2 match program and the fellowship.

3 Dr. Conklin obtained his medical license in Pennsylvania in 2006, is
4 licensed in two additional states, and has applied for his Washington license.
5 He is board certified by the AOBS in general surgery, surgical critical care
6 and trauma, and CS. He completed an ACGME⁵ accredited CS fellowship and
7 an AOA accredited general surgery residency. He is a fellow of the American
8 College of Osteopathic Surgeons. He is a member of the AOA, the American
9 College of Surgeons, and the Society of Thoracic Surgeons. As previously
10 discussed, the AOBS certification in CS is the DO equivalent to the ABTS
11 certification in CS, but the TSDA does not recognize the AOBS certification
12 in CS as equivalent, which makes DOs, including Dr. Conklin, , not eligible
13 for the TSDA match, and unable to participate in ACGME accredited CCS
14 training. *Id.*

15 UW rejected Dr. Conklin's application for the fellowship solely
16 because he was not ABTS board certified. *Id. at 8, Ex. D*. The 2017 match
17 concluded in November. The 2018 match process begins in July and Dr.
18 Conklin intends to apply again. *Id. at 11, Ex. C*. He should have been and
19 should be considered for the fellowship given that Washington is one of two
20 states that has enacted a law prohibiting DO discrimination in training,
21 hiring, and granting privileges⁶ to physicians. RCW 70.41.235 was enacted
22 in 1995 to prohibit public hospitals from discriminating against DOs based
23 solely on board certification. *Id. at 9, Ex. F*. RCW 70.41.235 is the central
24 issue in this case.

24 ⁵ The ACGME typically only offers fellowships to MDs. The year Plaintiff completed his CS fellowship,
25 there were more GME positions than physicians so the ACGME allowed him to complete the CS program
26 and board certified him. *Id. at 7*.

26 ⁶ Other states have anti-discrimination laws with respect to privileges but the application to training is
included in only two state's statutes.

1 **LEGAL ARGUMENT**

2 **A. Applicable Law**

3 This Motion is brought pursuant to Federal Rule of Civil Procedure
4 (“FRCP”) 65. Preliminary injunctions are issued when justified. At the
5 preliminary hearing, the Court may advance the trial on the merits and
6 consolidate it with the hearing. *See* FRCP 65(a)(2). FRCP 65(c) requires
7 security to cover the risk of a wrongfully issued injunction. A preliminary
8 injunction will only be reversed if based on an erroneous legal premise or
9 for abuse of discretion. *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir.
1988).

10 Courts consider four factors when deciding whether or not a
11 preliminary injunction should be issued:: (1) the likelihood of success on the
12 merits, (2) the likelihood of irreparable harm, (3) the balance of equities, and
13 (4) the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7,
20 (2008).

14 In this case, the issuance of a preliminary injunction is justified, as all
15 four factors support such relief.

16 **B. The Four Factor Analysis of Plaintiff’s Primary Claims Supports**
17 **Issuance of An Injunction.**

18 ***1. Likelihood of Success at Trial - Violations of RCW 70.41.235***

19 RCW 70.41.235 was passed in 1995 and states, “A hospital that
20 provides health care services to the general public may not discriminate
21 against a qualified doctor of osteopathic medicine and surgery...solely
22 because that practitioner was board certified or eligible under an approved
23 osteopathic certifying board...” The purpose of RCW 70.41.235 is to
24 address discrimination of DOs in both training for and practicing medicine.
25 UW’s exclusion of DOs from training was one of the reasons the statute was
26 enacted. *Conklin Decl, Exs. E and F*. The primary issue at trial will be whether

1 UW violated RCW 70.41.235 and discriminated against Dr. Conklin and
2 other DOs by:

- 3 1. Rejecting Dr. Conklin's application to the fellowship for the sole
4 reason of not having ABTS board eligibility/certification;
- 5 2. Entering into a contract with TSDA that agrees to accept only
6 residents and fellows who are board eligible/certified by the ABTS, an
7 MD certification entity; and
- 8 3. Rejecting DO applications, including Dr. Conklin's, because the
9 applicants' training was not accredited by the ACGME and/or the
10 ABTS, both of which exclusively accredit and board certify MDs.

11 Applying the facts to the statute, the answer is a resounding yes. UW has
12 done exactly what the statute prohibits - discrimination against Dr. Conklin
13 and other DOs based solely on board certification by an osteopathic entity
14 instead of an allopathic entity. The facts here fit squarely with the reason
15 RCW 70.41.235 exists. Therefore, the likelihood of success at trial is strong.

16 UW will likely argue that Dr. Conklin is not licensed in Washington
17 and has no standing for his discrimination claim because RCW 70.41.235
18 applies only to physicians who are licensed in Washington under RCW 18.57.
19 But, RCW 18.57.130 allows for reciprocal licensure for DOs licensed in other
20 states. Additionally, Washington joined the Interstate Medical Licensure
21 Compact, effective July 23, 2017, which also gives reciprocity to out-of-state
22 physicians. Dr. Conklin has applied for his Washington license under these
23 reciprocity revisions and will have no problem obtaining it. *Conklin Decl. at*
24 *7.*

25 Furthermore, holding that the purpose of RCW 70.41.235 was to
26 protect only Washington licensed physicians, and not protect out-of-state
licensed physicians applying for positions in Washington, is contrary to the
intent and purpose of the statute. The legislative history supports that the
legislature did not intend for out-of-state DOs to be discriminated against
while protecting DOs in Washington. If that were the case, the legislature

1 would be violating the Equal Protection Clause of the 14th Amendment of
2 the United States Constitution. More than likely, the language regarding
3 licensure in Washington was included in recognition that Washington is one
4 of the only states that prohibits such discrimination. Many out-of-state
5 physicians apply for jobs in Washington and it makes no sense that the
6 legislature would exclude them from protection. Rather, it is clear from the
7 legislative history that the legislature wanted to protect ALL DOs from
8 discrimination by any public hospital in Washington. *Conklin Decl., Ex. E.*
9 For purposes of RCW 70.41.235, Dr. Conklin is within the class that the
10 statute was designed to protect. He applied to a Washington public hospital
11 and was discriminated against based on his status as a DO. *Conklin Decl. at*
12 *8.*

12 In conclusion, UW's actions create the exact outcome that RCW
13 70.41.235 was enacted to prohibit and should be ruled *per se* violations of
14 the statute. UW has discriminated against Dr. Conklin and continues to do
15 so based solely on osteopathic board certification. Given these clear
16 violations of RCW 70.41.235, it is likely that Dr. Conklin will succeed at trial.

16 **2. Irreparable Injury**

17 Irreparable injury has occurred and is ongoing. Since 1995, UW has
18 been violating RCW 70.41.235 by participating in the TSDA match and by
19 rejecting DO applicants, including Dr. Conklin, based on the fact that they
20 are not ABTS certified, which is a TSDA match program requirement.⁷
21 Moreover, the discrimination of DOs leads to restraint of trade, unfair
22 competition, and control of the market, which impacts DOs' abilities to offer
23 a service and consumer's inability of choice In the market, which should be
24 fair. Such discrimination and restraint of trade has not just occurred by

25 ⁷ Dr. Conklin attempted to gather such information in a Public Records Act request, but to date, UW has not
26 produced the documents. Therefore, the number of applicants rejected due to board certification status is
unknown. *Conklin Decl. at 10.* While this case is Dr. Conklin's alone and not a class action, it is important for
the Court to understand the harm done to others as a result of UW's discrimination as well.

1 rejecting DOs who have applied, it has also resulted in DOs deciding not to
2 apply given the TSDA disqualification, which is extremely difficult to
3 quantify, but the DO community is well aware of their ineligibility from
4 ACGME accredited programs due to their status as DOs and certainly many
5 have refrained from applying for positions that have been advertised as not
6 being available to DOs because they are not eligible. Substantial irreparable
7 harm to Dr. Conklin and others has resulted from this discriminatory
8 behavior.

9 Dr. Conklin is qualified for the position and extremely passionate about
10 his goal to treat and hopefully, cure, children with heart conditions. *Conklin*
11 *Decl. at 12, Ex. D.* Yet, each year, UW has automatically rejected him and
12 labeled him not eligible because he is not ABTS board certified. *Id. at 8.* If
13 an injunction prohibiting this discrimination is not issued, he will continue
14 to be rejected for the fellowship, which results in UW continuing to
15 discriminate and Plaintiff never obtaining board certification in CCS and
16 never becoming a pediatric heart surgeon, which no monetary amount can
17 address. *Id. at 12.*

18 The UW application and TSDA match processes begin in July. The match
19 occurs in November. *Id. at 13.* This case will likely be pending during the
20 2018 match. If an injunction is not issued, Plaintiff and other DOs will be
21 harmed again by this year's match. *Id.* MD applicants could also be
22 irreparably injured because they could be in the middle of the match
23 process or already matched and end up with a defunct program having
24 wasted their time. They also may miss an opportunity to match elsewhere,
25 lose a year of training, and fall behind in their board certifications, which
26 could lead to their unemployment/future job loss. Moreover, the public has
been irreparably harmed since 1995 by being limited on physician choice
and access, which is irreparable and will continue each time UW violates
RCW 70.41.235 by excluding DOs from training.

3. *Balance of Equities*

1
2 When balancing the equities, they weigh in Plaintiff's favor. UW may
3 experience hardship if an injunction is issued because it may not have a
4 match for the 2018 fellowship and its 2017 fellowship may be disrupted.
5 UW may also lose other GME placements. However, Medicare pays for those
6 positions so monetary damages do not apply. UW's reputation and
7 accreditation may also be injured, but that is UW's fault for knowingly
8 discriminating against DOs.

9 RCW 70.41.235 cannot be a surprise to UW. In fact, it is clear from the
10 legislative history and other evidence that it has been aware of the statute
11 since its enactment. *Conklin Decl., Exs. E and F.* UW chose to violate the
12 statute and hoped it would not be caught. UW was able to knowingly violate
13 RCW 70.40.235 for 23 years.⁸ Any injury UW suffers is therefore, diminished
14 by its decisions.

15 In contrast, Plaintiff, other DOs, and the public, are innocent parties
16 and the harm they have suffered is due to no fault of their own. The limit
17 on DOs' careers since 1995 has likely been extensive and is impossible to
18 quantify in terms of numbers and extent. DOs have been excluded from
19 pursuing medical specialties requiring allopathic certification for years
20 without any protection. Plaintiff needs that protection from the Court now
21 and the equities weigh heavily in his favor. A preliminary injunction is
22 justified.

4. *Public Interest*

23 The public also has an interest in prohibiting DO discrimination and
24 in being assured that Courts will protect against it. The public should also
25 have a choice in their physician.

26 Irreparable injury to Plaintiff, DOs, and the public will occur if a

⁸ There is no case law regarding RCW 70.41.235 and it is unknown whether anyone has ever brought such a claim in Washington. Our research did not disclose a single lawsuit.

1 preliminary injunction is not issued.

2 **C. The Court should not require security.**

3 The facts in this case establish that UW is violating RCW 70.41.235
4 and controlling the market of medical specialties, particularly CCS. Thus,
5 advancing the case on its merits and consolidating it with the preliminary
6 injunction hearing is warranted and would serve substantial justice and
7 judicial efficiency.

8 If the Court declines, a preliminary injunction is proper and no (or
9 minimal) security should be required because an injunction would not be
10 wrongful given that UW has knowingly violated the law for 23 years and
11 took on the risk of its damages.

12 **CONCLUSION**

13 Because Dr. Conklin's likelihood of success at trial is great, Plaintiff
14 (and other DOs and the public) has suffered irreparable harm that will
15 continue if an injunction is not issued, the equities weigh in his favor, and
16 the public has an interest in the discrimination of DOs in GME training at
17 UW, a preliminary injunction prohibiting UW from discriminating against
18 DOs, which violates RCW 70.41.235 and restrains trade is justified.

19 Therefore, Plaintiff requests that the Court issue an injunction as
20 follows:

- 21 1. Prohibit UW from discriminating against DOs in violation of RCW
22 70.41.235 and anti-trust laws; and,
- 23 2. Require UW to withdraw from the TSDA match program until DO
24 accreditation is recognized as equivalent to MD accreditation by TSDA and
25 the ACGME and/or the ABTS will board certify DOs; and,
- 26 3. Require that UW recognize all DO and MD board certification
equivalencies as equal; and
4. Require that UW consider DOs for all of its residencies and

1 fellowships by giving equivalency to DO accreditation and board
2 certification and accept DOs for at least 30 percent of its GME training
3 positions per program offered, including highly specialized programs such
4 as CCS.

5 Plaintiff further requests no or minimal security be required of him.
6 A proposed order is submitted with this Motion.

7
8 DATED THE 19TH DAY OF JANUARY 2018.

9
10 HKM Employment Attorneys, LLP

11 *s/Kristi Favard*

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DECLARATION OF SERVICE

I certify under penalty of perjury that I have contacted ABC Legal Messengers for Service of the Complaint, Motion for Preliminary Injunction, Declaration of Dr. Jeremy Conklin, and Proposed Order to Defendants at the following addresses:

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Dated this 19THL Day of January 2018 in Everett, WA.

/s/ Kristi Favardl
Kristi Favard, WSBA No. 34419