

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHARMACYCHECKER.COM, LLC,

Plaintiff,

v.

NATIONAL ASSOCIATION OF BOARDS
OF PHARMACY, *et al.*,

Defendants.

No. 19-CV-7577 (KMK)

OPINION & ORDER

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KENNETH M. KARAS, United States District Judge:

Plaintiff PharmacyChecker.com (“Plaintiff”) brings this Action against the National Association of Boards of Pharmacy (“NABP”), Alliance for Safe Online Pharmacies (“ASOP”), Center for Safe Internet Pharmacies Ltd. (“CSIP”), LegitScript LLC (“LegitScript”), and Partnership for Safe Medicines, Inc. (“PSM”; collectively “Defendants”), alleging that Defendants unlawfully conspired to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and that NABP falsely advertised or promoted in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125. (Am. Compl. (“AC”) (Dkt. No. 82).) Before the Court are the following Motions: Defendants’ Joint Motion to Dismiss (the “Joint Motion”), (Joint Not. of Mot. To Dismiss by Defs. (“Joint Mot.”) (Dkt. No. 100)), PSM’s Motion to Dismiss (the “PSM Motion”), (Def. PSM’s Mot. To Dismiss the AC as to It with Prejudice (“PSM Mot.”) (Dkt. No. 97)), ASOP’s Motion to Dismiss (the “ASOP Motion”), (Not. of Def. ASOP’s Mot. To Dismiss the

AC (“ASOP Mot.”) (Dkt. No. 104)), and LegitScript’s Motion to Dismiss (the “LegitScript Motion”; collectively, the “Motions”), (Not. of Mot. (“LS Mot.”) (Dkt. No. 119)). The Joint Motion, PSM Motion, and ASOP Motion are brought pursuant to Federal Rule of Civil Procedure 12(b)(6). (Joint Mot.; PSM Mot.; ASOP Mot.) The LegitScript Motion is brought pursuant to Rules 12(b)(2) and 12(b)(6). (LS Mot.) For the reasons that follow, the LegitScript Motion is granted, the Joint Motion and the ASOP Motion are denied, and the PSM Motion is granted in part and denied in part.

I. Background

A. Factual Background

The following facts are drawn from Plaintiff’s Amended Complaint (“AC”) and the documents it references, and are taken as true for the purpose of resolving the instant Motions.

Plaintiff is a Limited Liability Company organized under the laws of New York that offers an accreditation program for pharmacies and provides drug price comparison information. (AC ¶ 5.) Unlike its competitors in these industries, Plaintiff offers pharmacy accreditation to, and provides comparative drug price information for, pharmacies operating worldwide. (*Id.* ¶¶ 27, 33.) However, Plaintiff’s business is not limited to certifying and providing price information for foreign pharmacies. For example, Plaintiff also accredits U.S. online pharmacies, and includes these U.S. online pharmacies in its price comparisons. (*Id.* ¶¶ 40, 43.) The AC contains no allegations regarding the size of Plaintiff’s foreign accreditation and price comparison businesses as compared to their U.S. equivalents.

While Plaintiff does not itself sell or import prescription drugs, it claims that the personal import of drugs from pharmacies outside the U.S. “remains under some circumstances in a legal gray area.” (*Id.* ¶ 24.) While foreign drug imports are generally prohibited due to U.S. labeling

requirements, *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 789 (8th Cir. 2006), (*see also* Decl. of Erik T. Koons in Supp. of Joint Mot. (“Koons Decl.”) Ex. C (“Google Non-Prosecution Agreement”) 1 (Dkt. No. 102-1, at 81) (“Except under very limited circumstances . . . it is unlawful for pharmacies outside the United States to ship prescription drugs to customers in the United States.”)), Plaintiff identifies a handful of purported exceptions where personal imports may be permitted, (AC ¶ 57). Defendants allow that personal imports “might” be permitted in certain, limited cases. (Mem. Of Law in Supp. of Joint Mot. (“Defs.’ Mem.”) 4 (Dkt. No. 101).) The AC makes no allegations regarding the conditions or legality of any foreign drug imports made by users of Plaintiff’s pharmacy accreditation and drug price comparison services. (*See generally* AC.)

NABP is an association of state boards of pharmacy. (*Id.* ¶ 6.) It competes with Plaintiff in the pharmacy accreditation market through its Verified Internet Pharmacy Practice Sites (“VIPPS”) program, its “.pharmacy” Verified Websites program, and its Internet Drug Outlet Identification Program. (*Id.*)

LegitScript is a Limited Liability Company organized under the laws of Oregon offering verification and monitoring services for online pharmacies. (*Id.* ¶ 9.) Like NABP, LegitScript also competes with Plaintiff in the pharmacy accreditation market. (*Id.*)

ASOP is an organization that represents the Pharmaceutical Researchers and Manufacturers of America (“PhRMA”) to address the problem of online drug sellers and counterfeit drugs. (*Id.* ¶ 7.) NABP regularly participates in ASOP’s meetings. (*Id.* ¶ 67(a).) One of ASOP’s members, GoodRx, competes with Plaintiff in the market for comparative drug price information. (*Id.* ¶ 7.)

PSM is a nonprofit organization that has orchestrated a campaign against foreign drug imports and often works with PhRMA. (*Id.* ¶ 10.) PSM is an observer to ASOP, and regularly participates in ASOP meetings. (*Id.* ¶¶ 10, 67(a).)

CSIP is an organization that includes internet commerce gatekeepers, including Google, Microsoft, Facebook, Mastercard, and UPS. (*Id.* ¶ 8.) It was organized and founded at least in part by ASOP and LegitScript. (*Id.*)

In December 2018, NABP added Plaintiff's website and blog to its Not Recommended Sites list. (*Id.* ¶¶ 87, 90.) CSIP maintains a similar list, which is recognized by NABP as adhering to NABP's standards. (*Id.* ¶ 94.) In June and July of 2019, CSIP ran targeted online ads against Plaintiff. (*Id.* ¶ 93.) On July 21, 2019, users of the Bing search engine began seeing a red caution shield and a warning box when clicking on search results for pages from Plaintiff's website and blog. (*Id.* ¶ 95.) This change was driven by CSIP's "Principles of Participation," under which its members have agreed to use data-sharing tools to detect and target suspected illegitimate pharmacy websites. (*Id.* ¶¶ 75, 93.) The Bing warning caused Plaintiff to lose 76% of its web traffic from Bing. (*Id.* ¶ 95.)

In addition, LegitScript or NABP allegedly convinced one vendor to list Plaintiff's website as "not safe," "malicious," or "pornography." (*Id.* ¶ 84.) In 2015, NABP, CSIP, ASOP, and LegitScript published articles disparaging Plaintiff, and in 2018 PSM did the same. (*Id.* ¶ 85.) NABP, CSIP, ASOP, LegitScript, and various companies that are members of PSM's collaborator PhRMA also jointly created the ".pharmacy" domain to serve a gatekeeping function. (*Id.* ¶¶ 10, 80, 96.) As a result of these actions, since March 2019, Plaintiff's site traffic from organic search results has dropped more than 78%, and its monthly click-through revenue has dropped more than 77%. (*Id.* ¶ 109.)

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