JACOB L. HAFTER, ESQ.
Nevada State Bar No. 9303
LAW OFFICE OF JACOB L. HAFTER, P.C.
2620 Regatta Drive, Suite 102
Las Vegas, Nevada 89128
Tel: (702) 405-6700
Fax: (702) 685-4184

Attorney for Plaintiff
RICHARD CHUDACOFF, M.D.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD M. CHUDACOFF, M.D.,

Plaintiff,

vs.

UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA, a political subdivision of Clark County, State of Nevada; BRUCE L. WOODBURY, TOM COLLINS, CHIPMAXFIELD, LAWRENCE WEEKLY, CHRIS GIUNCHIGLIANI, SUSAN BRAGER, and RORY REID, Clark County Commissioners, ex-officio, the Board of Trustees of UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA; KATHLEEN SILVER, an individual; THE MEDICAL AND DENTAL STAFF OF THE UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA, an independent subdivision of University Medical Center of Southern Nevada; JOHN ELLERTON, M.D., an individual; MARVIN J. BERNSTEIN, M.D., an individual, DALE CARRISON, M.D., and individual, DONALD ROBERTS, M.D., an individual, DOE Defendants I through X, inclusive; and ROE CORPORATIONS A through Z, inclusive,

Defendants.

Case No.: 2:08-cv-00863-ECR-RJJ

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

2620 Regatta Drive, Suite 102
Las Vegas, Nevada 89128
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

Plaintiff RICHARD CHUDACOFF, by and through his attorney, Jacob L. Hafter, Esq., of the law firm Law Office of Jacob Hafter, P.C., hereby submits his Motion for Partial Summary Judgment ("Motion"). This Motion is made pursuant to Fed.R.Civ.Proc 56, Local Rules 7-2 and 56-1, the attached memorandum of points and authorities, the exhibits hereto, the records and pleadings on file with the Court, of which judicial notice is respectfully requested pursuant to Fed. R. Evid. 201, and any oral argument entertained by the Court at the hearing set on this Motion.

Dated this 9th day of January, 2009.

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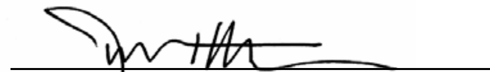
By: 

Jacob L. Hafter, Esq.
Nevada Bar Number 9303
2620 Regatta Drive, Suite 102
Las Vegas, Nevada 89128
Attorney for Plaintiff

2620 Regatta Drive, Suite 102
Las Vegas, Nevada 89128
(702) 405-6700 Telephone
(702) 685-4184 Facsimile

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Two questions of law have become paramount to this instant action. First, whether Plaintiff's due process rights were violated by the Defendants. Second, whether the Defendants are immune from liability in the instant action under the Health Care Quality Improvement Act of 1996, *42 U.S.C. § 11111, et. seq.* ("HCQIA"). This Motion asks the Court to make a determination of law regarding these two questions.

Throughout this action, it has been evident that Defendants had an "act first, justify later" mentality. In their Motion to Dismiss (Document #48), the first pleading where Defendants had an opportunity to describe their version of this matter, Defendants' started their factual narrative with the *fait accompli* of Plaintiff having received the letter from the Medical Executive Committee of UMC (the "MEC") notifying him of adverse action they *took* as a result of five (5) alleged incidents involving Plaintiff. Unfortunately, the violations were not reported contemporaneously with the occurrence of the incidents, they were not reported in written form, and they were not adequately, yet alone reasonably investigation prior to the MEC's actions. Plaintiff did not have adequate notice of the meetings at which the action against him was to be taken, nor did Plaintiff have an opportunity to defend himself against the accusations before any adverse actions were taken. These violations of the Defendants' policies and procedures are violations of Plaintiff's due process rights.

Then, several months later, the Defendants trounced upon Plaintiff's due process rights again. Using information that the Defendants had before they initially granted Plaintiff clinical privileges, information which they must not have deemed as material as they did grant privileges notwithstanding, Defendants, without reasonable notice to Plaintiff, then suspended his clinical privileges again.

Defendants claim that such actions were taken against Plaintiff in furtherance of health care and as part of the peer review process. As such, any action taken should be immune from

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(702) 405-6700 Telephone
(702) 685-4184 Facsimile

liability under HCQIA. This is a false reliance. HCQIA is a qualified immunity that only applies when certain pre-requisites are met; such pre-requisites were not met by Defendants.

At this time, Plaintiff believes that the record is sufficient to allow this Court to answer the two questions of law which are raised by this Motion. Plaintiff respectfully requests that this Court use the facts as set forth here and find that Plaintiff's due process rights were violated by the Defendants and that qualified immunity under HCQIA does not apply.

II.

STATEMENTS OF MATERIAL FACT AS REQUIRED BY LOCAL RULE 56-1

1. On or about February 2, 2007, Plaintiff applied for clinical privileges at University Medical Center of Southern Nevada. *see* page 19 of Credentialing File attached hereto as Exhibit A.

2. On or about October 27, 2007, a letter was written to the Medical Staff Department from James S. Boyd, Archives Technician of the National Personnel Records Center, of Military Personnel Records, wherein the Plaintiff's Separation Documents and Personnel Records were provided. *see Document 57, Exhibit B*.

3. On or about January 15, 2008, Plaintiff was granted staff privileges at Defendant University Medical Center of Southern Nevada as part of the Department of Obstetrics and Gynecology. *see* Letter January 15, 2008 attached hereto as Exhibit B.

4. At some time in May, 2008, Defendant Ellerton received a verbal complaint from Defendant Roberts wherein he "expressed concerns that the hospital department had about the surgical outcomes of some of Dr. Chudacoff's cases." *see* Transcript of Deposition of Defendant Ellerton attached as *Exhibit 1 to Document 50* ("*Ellerton Transcript*") at pp. 46-47 and pp. 66-67.

5. Defendant Ellerton did not receive a written version of the complaint. *Id.*

6. As a result of the verbal complaint, an investigation was initiated. *see Ellerton Transcript*, 67:3-7.

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7. The investigation was overseen by Defendant Ellerton. *see Ellerton Transcript*, 67:14-20.

8. The investigation overseen by Defendant Ellerton was the only investigation completed. *see Ellerton Transcript*, 78:4-5.

9. The investigation consisted solely of "reviewing the medical records, reviewing the e-mail [from a nurse complaining about Plaintiff's behavior during an isolated incident], and speaking with Dr. Roberts." *see Ellerton Transcript*, 67:14-20; *see also Ellerton Transcript*, pp 54-55.

10. The investigation was completed before May 27, 2008. *see Ellerton Transcript*, 67:8-11.

11. During the investigation, on or about May 13, 2008, Defendant Ellerton received an electronic mail from a nurse complaining about Plaintiff's behavior towards the nursing staff. *see Ellerton Transcript*, pp. 54-55

12. Prior to this e-mail, the Chief of Staff, Defendant Ellerton "received no information about Dr. Chudacoff being disruptive." *see Ellerton Transcript*, 55:9-10.

13. Defendant Ellerton did not speak to the nurse who wrote the email complaint prior to the MEC meeting on May 27, 2008. *see Ellerton Transcript*, 78-79.

14. Defendant Ellerton did not speak to Plaintiff about the complaint before the MEC meeting on May 27, 2008. *Id.*

15. Prior to the May 27, 2008 MEC meeting, Defendant Ellerton did not speak with any of the residents or the nursing staff about Dr. Chudacoff. *see Ellerton Transcript*, 56-57.

16. Defendant Ellerton went before the MEC and presented the results of his investigation. *see Ellerton Transcript*.

17. On May 27, 2008, at the meeting of the MEC, they decided to:

a. Suspend Plaintiff's obstetrical privileges

b. Require that one specific physician be present during any future surgeries

c. Place Plaintiff on a zero tolerance policy for disruptive behavior

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d. Require Plaintiff to engage in a discussion with the Nevada Health Professionals Foundation regarding the necessity of a physical and psychological evaluation; and

e. Require the Plaintiff to undergo drug testing under the auspices of the Nevada Health Professionals Foundation.

see May 28, 2008 Letter from Defendant Ellerton attached as *Exhibit A* to *Document 48* ("*Suspension Letter*").

18. The MEC's action on May 27, 2008, differed from the recommendation of the Department of Obstetrics and Gynecology, in that the Department's recommendation was for a "concurrent Focused Professional Practice evaluation." *Id.*

19. The action taken by the MEC was not a summary suspension. *see Ellerton Transcript*, 48:18-19, and 64:12-15.

20. On May 28, 2008, Defendant John A. Ellerton, M.D., CM FACP, Chief of Staff at UMC, wrote Plaintiff a letter in which Plaintiff was informed of the actions that the MEC took at their May 27, 2008 meeting regarding his clinical privileges. *see Suspension Letter.*

21. Prior to the May 28, 2008 letter, Plaintiff had no knowledge of that any suspension, alteration or modification of his medical staff privileges were even being considered by the MEC at their May 27, 2008 meeting. *see* Affidavit by Plaintiff, *Document 57-2*, 1:17-18.

22. In the May 28, 2008 letter, Plaintiff was advised that pursuant to the Medical Staff Bylaws, he was entitled to a Fair Hearing. *see Suspension Letter*.

23. In the May 28, 2008 letter, Plaintiff was not advised of the allegations presented against him or who had made those allegations against him. *Id*.

24. On or about June 16, 2008, Defendants filed a report with the National Practitioner Data Bank that stated that Plaintiff's privileges had been suspended indefinitely for "substandard or inadequate care" and "substandard or inadequate skill level." *see* National Practitioner Data Bank Report attached hereto as Exhibit C.

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1 25. In its report to the National Practitioner Data Bank, Defendants cited four cases
2 where Plaintiff allegedly caused four (4) "serious operative complications during gynecological
3 surgery," one incident of a failure to respond to a medical emergency, and numerous complaints
4 of disruptive physician behavior. *Id.*

5 26. Plaintiff received a copy of the Defendants' materials that they planned on using
6 at the Fair Hearing at almost 5 p.m. on September 5, 2008, the Friday before the Fair Hearing.
7 *see* emails from Brad Ballard, Esq., attached as *Exhibit C* to *Document 85-5*.

8 27. Plaintiff's Fair Hearing was held on September 11, 2008. See July 18, 2008
9 Letter from Defendant Ellerton, attached as *Exhibit G* to *Document 48*.

10 28. At the Fair Hearing, Plaintiff's counsel was not allowed to aid Plaintiff in the
11 presentation of the case, questioning of witnesses or proffering of evidence. *see Document 71-4*
12 and *Document 71-5*; *see also* Article IV.C.1.d) of the Fair Hearing Plan attached as *Exhibit L* to
13 *Document 48-5:23*.

14 29. The Fair Hearing Committee found that the suspension and limitation of
15 privileges be "100%" modified, where such suspensions and limitations were reversed and
16 Plaintiff should be subject only to focused peer review and a medical documentation class. *see*
17 *Exhibit K* to *Document 48-5*.

18 30. At the October 28, 2008 MEC meeting, the MEC suspended Plaintiff's clinical
19 privileges "pending revocation for material misstatements of fact" on his medical staff
20 application for privileges. *see Exhibit D* to *Document 57-4:11-12*.

21 31. Plaintiff did not have notice that this topic would be a topic of consideration at
22 the October 28, 2008 MEC meeting, nor that he would have to defend himself against these
23 allegations at this meeting. *see* Affidavit by Plaintiff, *Document 57-2*, 3:4-12.

24 32. After the required time permitted under the Fair Hearing Plan to provide Plaintiff
25 with notice of the outcome of such meeting, on November 7, 2008, the MEC sent Plaintiff a two
26 letters. *see Exhibit D* to *Document 57-4*.

27 33. The first November 7, 2008 letter informed Plaintiff that the MEC partially
28 adopted the findings of the Fair Hearing Committee, while adding additional requirements.

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1 Compare *Exhibit D* to *Document 57-4:13* with *Suspension Letter* with *Exhibit K* to *Document*
2 *48-5.*

3 34. The second November 7, 2008 letter informed Plaintiff that as a result of
4 allegedly falsifying his medical staff application, his privileges were being suspended. *see*
5 *Exhibit D* to *Document 57-4:11-12*.

6 35. Plaintiff asked the MEC for reconsideration of their new action related to the
7 allegations of falsifying his medical staff application. *see* November 21, 2008 letter to
8 Defendants' counsel attached hereto as Exhibit D; *see also* Certification from Plaintiff's
9 Counsel filed as *Document 57-3*.

10 36. On November 25, 2008, at around 9:10 am, Plaintiff's counsel received an email
11 (through his former firm, as the firm was sent to an old email address), wherein he was notified
12 that Plaintiff was invited to the MEC meeting that day at 12:30 p.m. to present his side of the
13 story regarding the discrepancy on his application. *see Exhibit E* attached to *Document 57-4:16*.

14 37. With approximately 3 hours notice, both Plaintiff and Plaintiff's counsel cleared
15 their calendars, prepared their exhibits and went to the MEC meeting. *see* Affidavit from
16 Plaintiff filed as *Document 57-2; see also* Certification from Plaintiff's Counsel filed as
17 *Document 57-3*.

18 38. At that meeting on November 25, 2008, the MEC did not provide Plaintiff with a
19 list of allegations or concerns to which he could respond; rather, Plaintiff was simply given the
20 floor and asked to present his side. In essence, Plaintiff presented what he thought were
21 explanations to allegations, however, in fact, Plaintiff had no way of knowing whether his
22 presentation was on point or related to the concerns or allegations of the MEC. *see* Affidavit
23 from Plaintiff filed as *Document 57-2*.

24 39. Plaintiff's counsel was notified less than one hour after they left the MEC
25 meeting on November 25, 2008, via email from Defense counsel, notifying him that the MEC
26 denied his request for reconsideration and that they were proceeding with the suspension of his
27 privileges. *see Exhibit F* attached to *Document 57-4:18.*

28 **III.**

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(702) 405-6700 Telephone
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LEGAL ARGUMENT

A. THE STANDARD FOR DECIDING A MOTION FOR SUMMARY JUDGMENT

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. *Nw. Motorcycle Ass'n v. U.S. Dep't. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir.1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c).* Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. *Fed.R.Civ.P. 50(a)*. Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), cert. denied, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Although the parties may submit evidence in an inadmissible form-namely, depositions, admissions, interrogatory answers, and affidavits-only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. *Fed.R.Civ.P. 56(c)*; *Beyene v. Coleman Security Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. *Anderson*, 477

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1 U.S. at 248. Summary Judgment is not proper if material factual issues exist for trial. *B.C. v.*
2 *Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir.1999). As to materiality, only disputes
3 over facts that might affect the outcome of the suit under the governing law will properly
4 preclude the entry of summary judgment. Disputes over irrelevant or unnecessary facts should
5 not be considered. Id. Where there is a complete failure of proof on an essential element of the
6 nonmoving party's case, all other facts become immaterial, and the moving party is entitled to
7 judgment as a matter of law. *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored
8 procedural shortcut, but rather an integral part of the federal rules as a whole. *Id.*

9 **B. DEFENDANTS VIOLATED THE PLAINTIFF'S DUE PROCESS RIGHTS.**

10 For more than three quarters of a century, the "right to work for a living in the common
11 occupations of the community" has enjoyed substantive as well as procedural due process
12 protections. *Truax v. Raich*, 239 U.S. 33, 41 (1915). In the leading case of *Meyer v. Nebraska*,
13 262 U.S. 390 (1923), the Court held that the right to work at one's trade or profession is of the
14 very essence of the personal freedoms that was the purpose of the Due Process and Equal
15 Protection provisions to secure. *Id.* at 144 n.12. In *Meyer*, the Court stated that while it had not
16 attempted to define with exactness the liberty guaranteed by the Due Process Clause, it had no
17 doubt that the right to engage in one's occupation is "one of several fundamental liberties," like
18 the right of the individual to "acquire useful knowledge, to marry, establish a home and bring up
19 children, to worship God according to the dictates of his own conscience, and generally to enjoy
20 those privileges long ago recognized at common law as essential to the orderly pursuit of
21 happiness by free men." *Id.* at 626.

22 To invoke the protections of procedural due process, a plaintiff must establish the
23 existence of a recognized property or liberty interest. *Bd. of Regents v. Roth*, 408 U.S. 564, 569,
24 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Property interests are not derived from the
25 Constitution. *Id.* "[T]he range of interests protected by procedural due process is not infinite."
26 *Roth*, 408 U.S. at 570, 92 S.Ct. at 2705. Courts must look to "existing rules or understandings
27 that stem from an independent source such as state law" to define the dimensions of protected
28 property interests. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487,

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1491, 84 L.Ed.2d 494 (1985) (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709). "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982).

In cases involving public hospitals, several circuits have acknowledged that in certain circumstances a physician's privileges constitute a property interest whose revocation or suspension by the hospital must satisfy the requirements of due process. *see Darlak v. Bobear*, 814 F.2d 1055, 1061 (5th Cir.1987) ("It is well-settled in this circuit that a physician's staff privileges may constitute a property interest protected by the due process clause...."); *Yashon v. Hunt*, 825 F.2d 1016, 1022-27 (6th Cir.1987), cert. denied, 486 U.S. 1032, 108 S.Ct. 2015, 100 L.Ed.2d 602 (1988) (reviewing for conformity with principles of due process public hospital's refusal to reinstate neurologist's hospital privileges); *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1394-95 (10th Cir.1988) (while physician might have had property interest in his medical privileges, no due process violation occurred where hospital provided pre-suspension hearing); *Shahawy v. Harrison*, 875 F.2d 1529, 1532-33 (11th Cir.1989) (although physician had protected property interest in staff privileges, public hospital's termination of these privileges comported with due process).

While the Ninth Circuit has ruled on this issue, there are several decisions within the Ninth Circuit that support this concept. A doctor who has been granted hospital privileges has a vested "property interest which directly relates to the pursuit of his [or her] livelihood." *Nasim v. Los Robles Regional Medical Center*, 165 Cal.App.4th 1538 at 1542, 82 Cal.Rptr.3d 58 (Cal.App.2008) citing *Anton v. San Antonio Community Hosp.* 567 P.2d 1162. (Cal.App.1977); *see also McMillan v. Anchorage Community Hosp.*, 646 P.2d 857 at 864 (Alaska, 1982) citing *Anton*.

Closer to home, while the Supreme Court of Nevada was concerned primarily with HCQIA immunity, it is clear that in Nevada a clinical privileges are linked to procedural due process rights. *Meyer v. Sunrise*, 117 Nev. 313, 22 P.3d 1142 (2001). In Nevada, the Supreme

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(702) 405-6700 Telephone
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Court seems to give deference, however, to the hospital and its bylaws and related governing documents in determining the extent of the procedural due process required.[1]

1. With respect to the First Suspension and Limitation of Plaintiff's Privileges, the Defendants Failed to Afford Plaintiff Proper Procedural Due Process as they Violated their Bylaws and Related Governing Documents.

The Bylaws of the Medical Staff of UMC ("Bylaws") provide for two types of action with respect to a suspension, limitation or modification of a physician's clinical privileges: routine administrative action and summary suspension. *see Bylaws* Article XI.B & XI.C, a full copy of the Bylaws was attached as *Exhibit A* to *Document 85-4*. In this case, the action taken by the MEC at the May 27, 2008 meeting was not a summary suspension. *see Ellerton Transcript* 48:18-19, and 64:12-15. "The procedure for processing a routine administrative action matter is contained in the Credentialing Procedures Manual, Article VI." *Bylaws* Article XI.B.1.

"All requests for administrative action *must be in writing*, submitted to the MEC (MEC) and *supported by reference to the specific activities or conduct which constitutes the grounds for the request*." Credentialing Procedures Manual, Article VI, a full copy of this manual was attached as *Exhibit B* to *Document 85-4*. In this case, *there was no writing*. As Defendant Ellerton testified, he first heard of Plaintiff in May of 2008, when Defendant Roberts "approached" him "about some concerns with surgical cases" that involved the Plaintiff. *Ellerton Transcript* 46. Defendant Ellerton further stated that "the hospital OB/GYN department was proposing a course plan of action with Dr. Chudacoff."[2] Ellerton Transcript 46.

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[1] In a concurring opinion, the court acknowledged that the HCQIA can sometimes be used, "not to improve the quality of medical care, but to leave a doctor who was unfairly treated without any viable remedy." *Meyer*, 117 Nev. at 330. The dissenting opinion noted dryly that "basically as long as the hospitals provide procedural due process and state some minimal basis related to quality health care, whether legitimate or not, they are immune from liability, which leaves the hospitals free to abuse the process for their own purposes." *Meyer*, 117 Nev. at 330.

[2] It is of interest to note that the MEC actually voted on action that is far more severe than what the OB/GYN Department recommendation. In the May 28, 2008 letter to Plaintiff, the MEC stated that "(a)t its meeting of May 27, 2008, the Medical Executive Committee reviewed the recommendation of University Medical Center Ob/Gyn Department to place you on a concurrent Focused Professional Practice evaluation." Nonetheless, the MEC voted to suspend his obstetrical privileges and severely limit his surgical privileges.

1 All of Defendant Roberts' concerns were communicated verbally. *see* Ellerton Transcript pp.
2 46-7 and pp. 66-67.
3 Quite clearly, the Defendants made no attempt to comply with even the first requirement
4 of the administrative process: the requirement that any request for administrative action be in
5 writing. This absence of a written request to take administrative action submitted to the MEC
6 and *supported by reference to the specific activities or conduct which constitutes the grounds*
7 *for the request* validates Plaintiff's claims that his procedural due process rights have been
8 violated by the Defendants.
9 Defendants may argue that the need for a writing is *splitting hairs* and that such is *form*
10 *over substance*. First, the entire concept of providing procedural due process is ability of a
11 party to provide another with a standardized set of procedures – defendants cannot pick and
12 chose what part of the due process plan they feel that is the material aspect to provide (expand
13 with case law) Nonetheless, the requirement that a "request for administrative action" be in
14 writing, and supported by specific instances of misconduct is of obvious utility, as it creates a
15 clear and articulate record of the allegations leveled at the practitioner that is the subject of the
16 request – the sort of thing one would expect prior to taking steps that may adversely impact that
17 practitioner's career.
18 The absence of a written request for administrative action, though perhaps the most
19 blatant and obvious violation of the UMC's administrative procedures, was by no means the
20 only violation. In fact, throughout this entire saga, Defendants' dealings with Plaintiff have
21 been characterized by secrecy, delay and obstructionism. For example, Plaintiff made his
22 request for a Fair Hearing on June 2, 2008, just 5 days after receiving notice of the MEC's
23 adverse action against him. It was not until July 18, 2008 – *a month and a half later* and almost
24 3 weeks after Plaintiff filed this action – that such a hearing was scheduled. Once scheduled,
25 Plaintiff had to wait nearly an additional 2 months, until September 11, 2008, for the actual Fair
26 Hearing.
27 At the hearing, while the Plaintiff was technically allowed to be represented by counsel,
28 counsel was not allowed to "call, examine, or cross-examine witnesses or otherwise present the

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case." Fair Hearing Plan Article IV.C.1(d). Defendants argue that such limitations are fair and proper. Plaintiff disagrees.

In discussing the Nevada State Board of Medical Examiners' disciplinary procedures, this Court stated that "it is clear that the disciplinary process is adversary in nature and that errors made by the Board are correctable on appeal." *Mishler v. Clift*, 191 F.3d 998 (9th Cir.1999). Citing *Nev.Rev.Stat. §233B.121*, the Court stated that "physicians are entitled to representation by counsel and may present evidence at a formal disciplinary hearing." *Id.* at 1006.

Plaintiff recognizes that the Fair Hearing is intended to be a proceeding during which physicians can self-regulate. Just because a physician, or group thereof, is sitting at the head of the table, does not make the process any less adversarial. A Fair Hearing is an adversarial process. There are formal Hearing Procedures. *Fair Hearing Plan Article IV*. There is a requirement for the advance disclosure of Evidence and Witnesses. *Fair Hearing Plan Article III.D.* There is a formal Hearing Procedure. *Fair Hearing Plan Article IV.* There is a standard of a burden of proof that must be met. *Fair Hearing Plan Article IV.E.* There is requirement for a record of the hearing. *Fair Hearing Plan Article IV.F*. Finally, there is a procedure for appealing the recommendation made by the Fair Hearing Committee. *Fair Hearing Plan Article V.D.*

Further, the Health Care Quality Improvement Act specifically requires that a physician be afforded the right to representation by counsel during a Fair Hearing. *42 U.S.C. § 11112(b)(3)(C)*. Section 11112(b)(3)(C) lists those hearing aspects considered so intrinsic to fairness that adhering to them creates a presumption of fairness under the HCQIA. At the top of the list for "in the hearing," HCQIA provides the right to "representation by an attorney." This placement is no accident - for this is the most important and protective of all procedures. It provides the doctor with a trained advocate who recognizes and appreciates the high stakes at risk in the proceedings and champions the doctor's cause. It is an attorney who can ensure that the other elements required for fair procedures are complied with - that a record is made; that

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witnesses are called, examined, and cross-examined; and that relevant evidence is presented). In short, the right to representation by an attorney is essential to HCQIA fairness.

In the case at hand, Plaintiff's attorney was "present" but he was a mere on-looker, who was not allowed to function as an advocate in the proceedings - he could not make comments on the record, he could not examine and cross-examine witnesses. If this Court found that such mere presence satisfied the representation requirement, this Court would, in effect, authorize pseudo-lawyering. No one would doubt, for example, that an operation performed with a surgeon merely whispering instructions to a lay person is not "close" to having an operation by a surgeon. Similarly, here, the presence of Plaintiff's attorney at the hearing is not close to Plaintiff having an attorney of his choice represent him, and, as such, was an additional violation of Plaintiff's due process rights.

The irregularities continued. In fact, the Fair Hearing Committee itself found that "the Fair Hearing process could have proceeded much more smoothly if both sides had supplied their counterparts with appropriate information at least two weeks prior to the Fair Hearing." *see Exhibit K* to *Document 48-5*. "We recommend a policy similar to this for the future." Id. This statement has its origins in a fundamentally unfair design of the Defendants' Fair Hearing Plan. Section III.D.2. requires that Plaintiff deliver his materials (written statement setting forth the reasons why the adverse recommendation is unreasonable, inappropriate or lacks factual basis, list of witnesses, all documents intended on being used and expert reports) to the Defendants and the Fair Hearing Committee 15 days prior to the Fair Hearing. *see Fair Hearing Plan.* On the other hand, the Fair Hearing Plan simply requires that the Medical Staff provide the practitioner with copies of the Medical Staff's evidence and expert reports "prior to the hearing." *Fair Hearing Plan Section III.D.1.* Accordingly, in the instant action, Plaintiff did not receive a copy of the Defendants' materials until almost 5 p.m. on the Friday before the Fair Hearing. *see Exhibit C* attached to *Document 85-5*.

This disparagement in the exchange of disclosures of witnesses and evidence violates the Plaintiff's right to adequate notice of the hearing. Because the Plaintiff had to provide his materials 15 days before the Fair Hearing, in this instant action, he had to prepare his materials,

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including his written statement "setting forth the reasons why … the adverse recommendation is unreasonable, inappropriate or lacks factual basis" without any knowledge of what the adverse recommendation is or upon what grounds it was being made. *see* Fair Hearing Plan Article III.D.2.a). The only thing that the Plaintiff received at the time his statement was due, was a copy of the medical records for five cases. *see Document 57-2* at 2:3-17. In fact, the medical record for the most concerning case (as stated by the Fair Hearing Committee), the alleged failure to respond to the prolapsed cord/medical emergency, showed that Plaintiff was, in fact, present at the delivery. *see* Miscellaneous Pages from Patient's Medical Record where it shows Plaintiff as surgeon attached as *Exhibit D* to *Document 85-5*.

2. With respect to the Second Suspension of Plaintiff's Privileges, the Defendants Failed to Afford Plaintiff Proper Procedural Due Process as they Violated their Bylaws and Related Governing Documents.

The purpose of Congress' passing HCQIA was "to balance the chilling effect of litigation on peer review with concerns for *protecting physicians improperly subjected to disciplinary action*." *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1322 (11th Cir. 1994). While HCQIA is often looked upon as a crutch with respect to its qualified immunity provisions, HCQIA also sets forth the standards for how "professional review action" shall be taken. *42 U.S.C. § 11112(a).* The requisites are set out as follows:

> For purposes of the protection set forth in section 11111 (a) of this title, a professional review action must be taken—
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a).

Thus, in *Bryan*, the court held that there are certain requisite actions required before a hospital may alter a physician's medical staff privileges. *Bryan*, 33 F.3d 1318. Relying on

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HCQIA, the court held that such adverse action may only be taken *after*: (i) the physician's conduct had been evaluated by the executive committee, the peer review panel, and an appellate review panel of board members; (ii) where each of those groups submitted written reports to the board, which made its decision based upon the documentary record developed during the various peer review proceedings; ***and*** (iii) *after* the physician had the opportunity to make a presentation. *Bryan*, 33 F.3d 1318.

In the current action, Defendants initiated this new suspension of Plaintiff's privileges without *adequate notice and hearing procedures*. At their meeting on October 28, 2008, the MEC suspended Plaintiff's privileges because he allegedly materially misrepresented information on his application for staff privileges.[3]

Plaintiff and his counsel was present at the October 28, 2008 MEC meeting. Plaintiff, however, was under the impression that the purpose of the MEC meeting on October 28, 2008 was to address the issues raised by the MEC's action of May 27, 2008, and considered by the Fair Hearing Committee. The Plaintiff's military record and its effect on his application for medical staff privileges was not addressed in the May 28, 2008 notice to Plaintiff and was

[3] It should be noted that this new suspension is grounded in the theory that Plaintiff materially misrepresented facts on his medical staff application. It is true that Plaintiff did not disclose an issue that he had during his medical career on his application. While in the military, as a physician, Plaintiff was subject to adverse credentialing actions, which he fought. After several years in court, the United States District Court held that any adverse credentialing decisions should be reversed and that any reports made to the National Practitioner Data Bank should be removed. *see* Order attached as *Exhibit "H" to Document 57*. What remained after the Court order on Plaintiff's military record was a minor disciplinary infraction that was not part of his medical service record. In fact, notwithstanding the disciplinary infraction related to conduct unbecoming an officer, Plaintiff still received an *honorable* discharge. Accordingly, in light of the context of the application, the question to which he answered in the negative, "have you ever received a letter of reprimand," was answered honestly in context to his past medical service record and other credentialing matters. The remaining letter of reprimand had nothing to do with his clinical care or medical service, making it anything but *material* as the Defendants are claiming in this instant action. Such technical issue has no bearing on the Plaintiff's ability to render competent or quality healthcare, a quintessential element which medical staffs should make credentialing decisions. Moreover, as such letter of reprimand had nothing to do with his clinical abilities or medical service, Plaintiff relied on his former counsel's advice that he did not have to disclose his military actions to future hospitals. *See* letter from Jane Norman, Esq., attached as *Exhibit "G"* to Document 57. Thus, while he may not have disclosed the military action, he did it based on good faith reliance that he did not need to, not because of a desire to deceive or misguide the Defendants.

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dismissed by the Fair Hearing Committee as being outside the scope of the proceeding at hand. Accordingly, Plaintiff did not have true notice of the nature of the meeting, and he had no opportunity to make a presentation *prior* to his suspension.

Further, when he was allowed to present his side to the MEC, on November 25, 2008, after he already received a letter notifying him that his privileges were suspended, he was given 3 hours notice (despite the fact that the notice was sent to an email account that was no longer valid for the Plaintiff's counsel), and was still not told all of the accusations made against him, thus, depleting Plaintiff from having a fair chance to defend himself. Further, again, while his counsel was allowed to attend the meeting, he was not allowed to speak or assist in the presentation.

Plaintiff's role in the peer review process is critical as *42 U.S.C. § 11112(a)(3)* requires that any action be "fair to the physician under the circumstances." At the very least, if a governing body is to take such action where not only is such action intended to interfere with his ability to practice medicine within their facility, but will also result in the publication of the action in such a respected forum as the National Practitioner Data Bank, the State Board of Medical Examiners and other hospitals and health care institutions, basic reason would require that the physician have the opportunity to explain his alleged behavior and provide supporting evidence of such *before* the action is taken. Moreover, one would expect that an opportunity to defend one's self would include a more structured hearing – not one where the Plaintiff is merely given the floor for a few minutes to present his story and answer questions, but not the opportunity to directly rebut the allegations made against him.

3. Defendants' Acts were Misleading, False or Otherwise Deceptive.

The Supreme Court of Nevada in *Meyer* stated that "evidence that *an evaluation was misleading, false or otherwise defective*," would destroy any immunity and allow a physician to seek "monetary damages under the Act." *Meyer* at 324. In this case, the record to date is replete with evidence that the evaluation of Plaintiff's conduct was "misleading, false, or otherwise deceptive."

i. The First Suspension

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The second requirement of a routine administrative action set forth in Article VI.A of the Credentialing Manual is captioned "Investigation". Significantly, this provision of the Credentialing Manual leaves to the MEC's discretion whether to direct an investigation at all, or whether to take immediate action without the benefit of an investigation.[4] Nevertheless, in his Deposition, Defendant Ellerton testified that an investigation contemplated by the Credentialing Manual was in fact undertaken. *Ellerton Transcript*, p. 67, ll. 3-7.

However, the undertaking of this "investigation" was fraught with irregularities and was inconsistent with the provisions of the Credentialing Manual from the onset. The Credentialing Manual provides that the investigation is to be undertaken "after deliberation." However, Defendant Ellerton testified that the "investigation was *completed* before the MEC meeting." *Ellerton Transcript,* 67:8-11 (emphasis added). Clearly, the "investigation" was not undertaken "after" deliberation.

The aforementioned provision of the Credentialing Manual further provides that, "[i]f the investigation is accomplished by a group or individual other than the MEC, that group or individual must forward a written report of the investigation to the MEC as soon as is practicable after the assignment to investigate has been made." *Credentialing Manual, Article VI.A.2.*

In this case, Defendant Ellerton was the person who "oversaw that investigation." *Ellerton Transcript*, 67:14-20. Later, Defendant Ellerton testified that "[t]he only investigation done was my investigation." *Ellerton Transcript*, 78:4-5. As discussed in greater detail below, Defendant Ellerton's testimony itself demonstrates the absence of any real investigation – especially as the *only* medical record that Ellerton in fact reviewed prior to the MEC meeting was the chart of the patient with the prolapsed cord. *Ellerton Transcript*, 54:17-18.[5]

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[4] Any decision by the MEC to take immediate action without investigation would obviously be unwise in light of the Health Care Quality Improvement, which grants conditional immunity only "after a reasonable effort to obtain the facts in the matter." 42 U.S.C. § 11112(a)(2), as echoed in Article XIV.E.1 of UMC's own Bylaws, unless such action is taken in the case of an emergency, where, pursuant to the Bylaws, such action would fall under the rules governing a summary suspension.

[5] Even Defendant Ellerton's review of the single chart is of limited value to his "investigation", however, as, even if the chart somehow bore some relevance to

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(702) 405-6700 Telephone
(702) 685-4184 Facsimile
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By way of introduction, Article XIV.E.1 of UMC's own Bylaws, the section pursuant to which immunity is granted for actions taken as a representative of UMC, provides that immunity is available only if "such representative acts in good faith and without malice after reasonable effort under the circumstances to ascertain the truthfulness of the facts and in the reasonable belief that the decision, opinion, action, statement or recommendation is warranted by such facts." *Bylaws*, Article XIV.E.1. This requirement of a reasonable investigation as a precondition to qualified immunity is also set forth in HCQIA, which grants conditional immunity only "after a reasonable effort to obtain the facts in the matter." *42 U.S.C. § 11112(a)(2)*.

Against this backdrop, Defendant Ellerton's "investigation" would be almost comical, if it wasn't so devastating to Plaintiff's career. Defendant Ellerton's investigation was less than complete, yet alone reasonable under the circumstances. On several occasions Defendant Ellerton testified that the aforementioned two alleged incidents – Plaintiff's purported absence at the emergency C-section, and the nurses complaint of disruptive behavior (as discussed below) – formed the entire basis for his recommendation to the MEC that Plaintiff be suspended. *See, e.g., Ellerton Transcript,* pp. 81-82, 137-138. Indeed, Defendant Ellerton's testimony was that, in fact, the *only* medical record that he reviewed prior to the MEC meeting was the chart of the patient with the prolapsed cord. *see Ellerton Transcript*, 54:17-18. Even if the chart somehow bore some relevance to Plaintiff's competence or care in this case, which it does not, as it states that Plaintiff was present at the delivery, Defendant Ellerton testified that he does not practice gynecology or obstetrics. *see Ellerton Transcript*, 50:20-23.

Defendant Ellerton did not bother to question Plaintiff regarding the truth of the allegation. Defendant Ellerton did not even bother to question the residents *who were present at the emergency C-section* regarding the truth of the allegation. Defendant Ellerton did not seek an independent opinion from another obstetrician/gynecologist as to whether the allegations by

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Plaintiff's competence or care in this case, Defendant Ellerton testified that he does not practice gynecology or obstetrics. See *Ellerton Transcript*, 50:20-23. Moreover, as the concern in that case was the Plaintiff's alleged failure to respond, the surgical record for that case in the chart which Defendant Ellerton allegedly reviewed lists Plaintiff as being present at the delivery. *See Exhibit D* attached to *Document 85-5*.

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Defendant Roberts regarding Plaintiff's clinical care were justified by the record. Defendant Ellerton did not seek the input from other nurses who have worked with the Plaintiff as to whether he was disruptive. Rather, Defendant Ellerton took the unsupported allegations straight to the MEC and requested that they take action (which was different and more severe than recommended by the Department of Obstetrics and Gynecology) from simply a discussion with Defendant Roberts, reading an e-mail and looking over *some of* medical records which dealt with a specialty of medicine in which Defendant Ellerton does not practice!

Had he made even a basic inquiry, he would have found – as did the Fair Hearing panel – that "the residents…were quite sure that he was available and even commented on the minor scalp laceration of the baby."[6] In fact, Dr. Ming Zhou, the delivering physician for the emergency C-section case in question, has strengthened her Fair Hearing testimony by providing the Plaintiff with an affidavit that not only attests to her recollection as to Plaintiff's attendance at the procedure, but the fact that she was never contacted by Ellerton regarding this incident before the MEC took action. *see* Zhou Affidavit filed as *Document 50-3*. In short, Defendant Ellerton made *no investigation at all* to determine whether Plaintiff was present at the emergency C-section.

Another issue that was apparently raised with Defendant Ellerton was regarding Plaintiff's "disruptive behavior." In that regard, Defendant Ellerton testified that he received an email from a nurse regarding "Dr. Chudacoff's behavior in regard to the delivery of babies." *Ellerton Transcript*, 54-55. However, Defendant Ellerton stated that prior to the email from the nurse he "had received no information about Dr. Chudacoff being disruptive." *Id.* Further, Defendant Ellerton stated that the only information he reviewed was Defendant Roberts' verbal complaint, the nurse's email and the charts. *see Ellerton Transcript*, 67:14-20; *see also* Ellerton Transcript, pp 54-55. From Defendant Ellerton's own admission, there were no other

[6] Although the Fair Hearing panel apparently heard testimony from an Ob/Gyn nurse to the effect that Plaintiff was *not* present at the emergency C-section, this testimony was: (1) obtained *after* the MEC's action; (2) was filled with holes regarding basic facts surround the incident which the nurse could not recall; and (3) and did not constitute a part of Defendant Ellerton's investigation prior to suspending Plaintiff.

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complaints that Plaintiff was disruptive. *see Ellerton Transcript*, 55:9-10. Thus, the only basis for the allegations of Plaintiff's "disruptive behavior" is a solitary e-mail from a nurse.

In investigating this solitary complaint of disruptive behavior, Defendant Ellerton did not even take a moment to speak to this nurse to get her full story before he went to the MEC. *see Ellerton Transcript*, p. 78-79. As is evident from the Transcript, Defendant Ellerton took a single e-mail from a nurse as evidence of Plaintiff's disruptive behavior, and used solely that evidence to justify the MEC's actions.[7] *see Ellerton Transcript*, 67:14-20; *see also Ellerton Transcript*, pp 54-55. Thus, the basis for the allegations that Plaintiff was a disruptive physician, upon which the MEC took action, is founded upon an investigation that was *misleading, false, and otherwise deceptive*.

ii. The Second Suspension

There is amble evidence so show that the second suspension, the suspension that occurred in October, was based upon a premise that is *misleading, false or otherwise defective.* As discussed above, Defendants claim that Plaintiff included material misstatements in his application for credentials. This is a defective position.

On or about January 15, 2008, Plaintiff was granted staff privileges at Defendant University Medical Center of Southern Nevada as part of the Department of Obstetrics and Gynecology. *see* Exhibit B. The Defendants granted such clinical privileges despite the fact that on or about October 27, 2007, a letter was written to the Medical Staff Department from James S. Boyd, Archives Technician of the National Personnel Records Center, of Military Personnel Records, wherein the Plaintiff's Separation Documents and Personnel Records were

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[7] It is important to note that, as the transcripts from Defendant Ellerton's and Defendant Roberts' depositions reflect numerous times, that the Defendants will not testify or provide any evidence as to the nature or contents of the MEC's deliberations regarding the Plaintiff due to a dubious claim of privilege. As such, without any evidence or testimony as to what was presented to the MEC as part of the request to take a routine administrative action against the Plaintiff, the Court can only rely only upon the evidence as to what information Defendant Ellerton himself obtained as a result of his "investigation" prior to the MEC's meeting, in order to deduce what information was made available to the MEC for its deliberations. Accordingly, if Defendant Ellerton's investigation consisted only of Defendant Roberts' verbal complaint, the email from the nurse and the medical records, one can only assume that the MEC's actions were based upon the same limited information.

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provided. *see Document 57, Exhibit B*. Now, almost eleven months after they initially granted such privileges, they seek to suspend them subject to revocation due to information that the Defendants had before they initially granted Plaintiff such privileges.

While the procedure of such suspension is suspect, at best, as discussed above, Plaintiff suggests that this action is under misleading, false or otherwise defective causes. There is no rational basis for making a claim that the Defendants' actions in this instance were in furtherance of heath care. With respect to the Plaintiff's past experience in the military, the United States District Court held that any adverse credentialing decisions should be reversed and that any reports made to the National Practitioner Data Bank should be removed. *see* Order attached as *Exhibit "H" to* Document 57. What remained after the Court order on Plaintiff's military record was a minor disciplinary infraction that was not part of his medical service record. In fact, notwithstanding the disciplinary infraction related to conduct unbecoming an officer, Plaintiff still received an *honorable* discharge. Accordingly, in light of the context of the application, the question to which he answered in the negative, "have you ever received a letter of reprimand," was answered honestly in context to his past medical service record and other credentialing matters, as modified by the United States District Court. The remaining letter of reprimand had nothing to do with his clinical care or medical service, making it anything but *material* as the Defendants are claiming in this instant action. Such technical issue has no bearing on the Plaintiff's ability to render competent or quality healthcare, a quintessential element which medical staffs should make credentialing decisions.

C. DEFENDANTS ARE NOT ENTITLED TO IMMUNITY

Plaintiff requests that this Court find that in the instant action, the Defendants are not immune from damages as they failed to meet the immunity requirements of HCQIA and there are no applicable exceptions to the immunity requirements of HCQIA which would apply in this case.

1. Defendants Failed to Meet Immunity Requirements of HCQIA

As discussed above in Section III.B.2 of this Motion, HCQIA requires that the Defendant meet four requirements before they take an adverse action in order for HCQIA

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Las Vegas, Nevada 89128
(702) 405-6700 Telephone
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immunity under *42 U.S.C § 11111(a)* to apply. In stark contrast with these requirements, Defendants failed to meet these standards with respect to either suspension.

With respect to the first suspension voted upon at the May 27, 2008 MEC meeting, Plaintiff did not have his conduct evaluated by a peer review panel *prior* to his suspension, no written reports were submitted *prior* to the suspension, no *reasonable efforts* were made to obtain the facts of the matter, and Plaintiff did not have *advance notice* or the opportunity to be heard *prior* to his suspension.

With respect to the second suspension voted upon at the October 28, 2008 MEC meeting, as demonstrated above, again, Plaintiff did not have advance notice of the allegations that were being made against him, and, as such, he did not have the opportunity to present a competent defense to the allegations prior to the suspension. Further, it is highly unlikely that the decision was made in the furtherance of health care, as, Defendants are using the same information that they had when they initially granted the clinical privileges to Plaintiff to now suspend and revoke such.

2. While There Is an Exception To The Pre-Requisites For Immunity Under HCQIA, Such Exception Does Not Apply.

It should be noted that HCQIA does provide an exception to these pre-requisites in certain circumstances. Under *42 U.S.C. § 11112(c)*, HCQIA addresses actions taken in response to emergencies. This subsection states:

> For purposes of section 11111 (a) of this title, nothing in this section shall be construed as—
>
> (1) requiring the procedures referred to in subsection (a)(3) of this section—
> (A) where there is no adverse professional review action taken, or
> (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
>
> (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

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(702) 685-4184 Facsimile

42 U.S.C. § 11112(c). In other words, the only time action should be taken without a prior thorough investigation is in the case of an emergency. In these limited cases, hospitals are permitted to take action first and then investigate whether such action was indicated. Most hospital governing documents describe these special circumstances as a "summary suspension."

In this matter, the first suspension, by admission of Defendant was "not a summary suspension." *Ellerton Transcript*, 64:12-15. As Plaintiff's suspension was not a summary suspension, it was processed as a Routine Administrative Action. *See Ellerton Transcript*,65:5-6. Thus, the four pre-requisites of *42 U.S.C § 11112(a)* were required to have been met *before* the MEC acted in order for the Defendants to qualify for HCQIA immunity.

While the second suspension occurred after the deposition of Defendant Ellerton was completed, it would be near impossible for Defendants to argue that this suspension was a summary suspension. As Plaintiff has not provided any medical services at UMC since May, 2008, and he was not planning on beginning on rendering any services, Plaintiff was not in a position to render clinical care.[8] There is no justification that in October 2008, Plaintiff was in a position to create an imminent danger to patients, staff or visitors, which would require a summary suspension. As such, here, too, Defendants were not exempt from the four pre-requisites of *42 U.S.C § 11112(a) before* the MEC acted in order for the Defendants to qualify for HCQIA immunity.

IV.

CONCLUSON

Plaintiff respectfully requests that this Court find that, as a matter of law, Defendants violated Plaintiff's due process rights when they suspended and limited his clinical privileges in May, 2008, and again, when they suspended his clinical privileges in October, 2008. Further, Plaintiff respectfully requests that this Court find that, as a matter of law, Defendants are not

[8] Plaintiff's delivery of care at UMC was as a result of his academic appointment to the University of Nevada School of Medicine. Because his appointment was terminated by a June 10, 2008 letter from University of Nevada President Marvin Glick, he had no immediate obligations to provide care at UMC in October when the MEC voted again to suspend his privileges. See Letter attached as *Exhibit E* to *Document 85-5*.

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Las Vegas, Nevada 89128
(702) 405-6700 Telephone
(702) 685-4184 Facsimile
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1 immune from damages under the theory of qualified immunity under HCQIA, as they failed to
2 meet the pre-requisites to such immunity.
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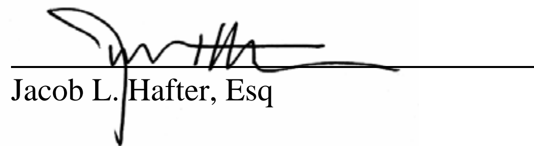
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2009, I, personally, did electronically transmit the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing on the following CM/ECF registrants:

KIM I. MANDELBAUM, ESQ.
Mandelbaum & Schwarz, LTD
2012 Hamilton Lane
Las Vegas, Nevada 89106
Fax: (702) 367-1978
Attorneys for Defendants Medical and Dental Staff of University Medical Center of Southern Nevada; John Ellerton, M.D.; Marvin J. Bernstein, M.D.; Dale Carrison, M.D.; and Donald Roberts, M.D.

LYNN HANSEN, ESQ.
Jimmerson Hansen
415 S. Sixth Street, Suite 100
Las Vegas, Nevada 89101
Fax: (702) 380-6406
Attorneys for Defendants University Medical Center of Southern Nevada; and Kathleen Silver



Jacob L. Hafter, Esq

2620 Regatta Drive, Suite 102
Las Vegas, Nevada 89128
(702) 405-6700 Telephone
(702) 685-4184 Facsimile