BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an order of the United States District Court for the Southern District of West Virginia entered on October 27, 2004, dismissing several of Appellant's claims, and its September 29, 2006 Order, granting Appellees' motions for summary judgment as to Appellant's remaining claims. Appellant filed a timely notice of appeal on October 25, 2006.

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. Appellant brought his claims pursuant to 15 U.S.C. §§ 1 and 2, and 42 U.S.C. § 1983, seeking monetary damages for antitrust and constitutional rights violations, as well as injunctive and declaratory relief. The district court had supplemental jurisdiction over Appellant's state-law claims under 28 U.S.C. § 1367, inasmuch as those claims arose out of the same occurrences that gave rise to the federal claims. This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1294.

ISSUES PRESENTED

A. Whether the District Court erred in concluding that Appellant was provided fair process when he (i) was summarily suspended without a finding of imminent danger and (ii) was not afforded a hearing to contest the charges against him, as required by the Fifth and Fourteenth Amendments to the United States Constitution, the Health Care Quality Improvement Act, and Charleston Area Medical Center bylaws.

B. Whether the District Court erred in granting Charleston Area Medical Center summary judgment on (i) the antitrust claims and (ii) the state-law defamation claim on the ground that the Health Care Quality Improvement Act provided immunity from monetary damages.

C. Whether the District Court erred in dismissing various supplemental causes of action, including breach of confidentiality and breach of contract.

STATEMENT OF THE CASE

1. On March 18, 2004, Appellant Dr. Rakesh Wahi (hereinafter "Dr. Wahi") filed an amended complaint against Charleston Area Medical Center (hereinafter "CAMC") in the United States District Court for the Southern District of West Virginia. The complaint alleged that CAMC, Drs. Crotty, Khan, Rashid, Chapman, and Vaughn had: (1) engaged in an antitrust conspiracy under the Sherman Act (15 U.S.C. § 1); (2) engaged in antitrust monopolization under the Sherman Act (15 U.S.C. § 2); (3) violated his Fifth and Fourteenth Amendment due process rights; (4) retaliated against him in violation of his First Amendment rights; (5) breached his employment contract with CAMC; (6) conspired to deny him due process; (7) defamed him by reporting him to the National Practitioner Data Bank ("NPDB"); (8) invaded his privacy and disclosed confidential information to the local media; and (9) violated his federal civil rights under 42

U.S.C. § 1981.[1] Dr. Wahi's amended complaint requested declaratory and injunctive relief, compensatory damages, and punitive damages.

CAMC moved to dismiss the amended complaint for failure to state a claim upon which relief could be granted under FRCP 12(b)(6). *Wahi v. Charleston Area Medical Center, et al*, No. Civ. A.2:04-CV-0019, 2004 U.S. Dist. WL 2418316 (S.D. W. Va. Oct. 27, 2004). In an opinion dated October 27, 2004, the district court dismissed the due process and First Amendment claims under 42 U.S.C. § 1983 on the ground that CAMC was not a state actor. The court also dismissed appellant's breach of confidentiality claim. The court found that - although reporting information contained in the NPDB report would have constituted a breach of confidentiality - merely disclosing to the media that a report had been filed did not. *Id*. The district court further ordered that the scope of discovery with respect to the antitrust and defamation claims be limited, and requested the parties to brief whether Appellees were entitled to immunity from civil liability under the Health Care Quality Improvement Act (hereinafter "HCQIA"), 42 U.S.C. § 11101 *et seq*., for all claims except the civil rights claims.

[1] CAMC's chief operating officer, Dr. Crotty, was also named as co-defendant. Although for sake of simplicity this brief refers to CAMC as "Appellee", Dr. Wahi is also appealing the dismissal of Dr. Crotty as a co-defendant. Although others were named, those defendants were subsequently voluntarily dismissed without prejudice and thus are not parties to this appeal.

Id. at *9. The parties were also directed to brief whether any issues of material fact existed with respect to the remaining claims. *Id*.

2. On September 29, 2006, the district court granted CAMC's motions for summary judgment with respect to the antitrust and defamation counts. The court's adjudication was based on its determination that CAMC enjoyed immunity from liability under the HCQIA. *Wahi v. Charleston Area Medical Center*, 453 F. Supp. 2d 942 (S.D. W. Va. 2006). The district court also dismissed Dr. Wahi's breach of employment contract claim, on the ground that CAMC's bylaws did not create an enforceable contract under West Virginia law. *Id*. This appeal followed.

3. On February 6, 2006, in an unrelated case, the United States filed an antitrust action against CAMC, alleging that CAMC engaged in illegally anti-competitive practices by preventing Raleigh General, a competing hospital, from opening a cardiac-surgery program. (JA 215-225.) To resolve that case, CAMC agreed to abide by a consent decree and judgment against it. That judgment expressly enjoins CAMC from engaging in further anti-competitive conduct with respect to cardiac surgery. (JA 243.)

4. Additionally, on December 28, 2005, CAMC filed suit against its own doctors for competing against Dr. Wahi at CAMC (Humayun, Rashid, K.C. Lee, and members of Thoracic and Cardiovascular Associates, Inc. (hereinafter TCA)),

alleging the same anti-competitive practices identified in Dr. Wahi's complaint. (JA 199-214.)

STATEMENT OF FACTS

In 1992, Dr. Wahi was hired as a surgeon by CAMC. (JA 98.) In 1994, CAMC promoted Dr. Wahi from its probationary staff to its provisional staff. (JA 294.)

In July of 1994, Dr. Wahi launched his own surgical practice and began exploring the possibility of associating with surgeons at Beckley "Medsurg Group" (hereinafter "Raleigh General"). (JA 967.) At the time, CAMC did not question Dr. Wahi's conduct. Yet, it opposed the efforts of the Beckley hospitals – of which Raleigh General was one – to obtain a certificate of need for cardiac surgery. (JA 218-219, 222.)

Thereafter, in February, 1995, Dr. Glenn Crotty, then Chief of Staff, appointed a group of physicians to investigate Dr. Wahi and make a recommendation as to whether his privileges should be suspended immediately based upon what he characterized as "troubling incidents." (JA 339-40.) When this first group of physicians did not recommend Dr. Wahi's suspension, CAMC officials sent Dr. Wahi's selected charts to an outside agency for review. (JA 341-2, 345-46). When CAMC received the initial report back from the outside agency, CAMC destroyed the report before Dr. Wahi could see it. (JA 978, 997-8.)

Dr. Crotty then appointed an "investigative committee" that largely consisted of Dr. Wahi's competitors, members of TCA to investigate Dr. Wahi and look at ways of revoking his hospital privileges. The economic competitors appointed to the initial "investigative committee," and/or subsequent committees, consisted of Jamal Khan, H. Rashid, K. C. Lee, Andrew Vaughn, and John L. Chapman. (JA 901-2, 968, 970, 974, 936-7, 996.) While these investigations were being conducted, the duly constituted peer review Committees of CAMC charged with monitoring CAMC's physicians continuously evaluated Dr. Wahi's treatment of his patients and found it to be within the required standard of care. (JA 967, 1015.)

In addition to speaking with Raleigh General, Dr. Wahi contacted Bluefield Regional Hospital (hereinafter "Bluefield") in February 1999 about establishing cardiac surgery programs that would compete with CAMC. (JA 974-75.) On April 22, 1999, CAMC's Credentials Committee recommended Dr. Wahi's reappointment to the medical staff at CAMC for another year. (JA 532, 963.) When Dr. Wahi began successfully treating a patient referred by Bluefield on May 20, 1999, however, the Credentials Committee abruptly rescinded its prior favorable recommendation without notifying Dr. Wahi. (JA 572-3, 975.) The Credentials Committee then formally requested CAMC's Chief of Staff to conduct an "investigation and an appropriate suspension of Dr. Wahi's clinical privileges" for

treating the Bluefield patient. (JA 572.) The Committee concluded that Dr. Wahi's treatment was outside the scope of his delineated clinical privileges. (*Id*.)

On July 28, 1999, Dr. Skaff, CAMC's new Chief of Staff, met with CAMC's Board of Trustees to report on the results of his investigation. The investigation used an external review panel, and the Chief of the Department concurred in the investigation's conclusion. Dr. Skaff found that Dr. Wahi's treatment "*did not fall outside of his delineated clinical privileges*." (JA 964)(emphasis added). Despite Dr. Skaff's exculpatory report, CAMC's Board of Trustees decided to summarily suspend Dr. Wahi's privileges. (JA 189, 600-2, 965.)

Two days after the decision was made, CAMC notified Dr. Wahi of the summary suspension by letter. Notably, the letter was bereft of any suggestion that that Dr. Wahi posed an imminent danger to his patients. (JA 586.) A second letter from CAMC's president, dated August 26, 1999, notified Dr. Wahi that CAMC's Credentials Committee had recommended that the Board of Trustees deny Dr. Wahi's request for re-appointment to the medical staff. (JA 647.) The letter further stated that Dr. Wahi was entitled to a hearing if a written request was received by CAMC within thirty (30) days, namely by September 26, 1999. (*Id*.)

On September 8, 1999, Dr. Wahi submitted a written request for a hearing. That pivotal request was received on September 9, 1999. (JA 648.) Dr. Wahi also

requested: (i) a more particularized statement of the charges; (ii) a factual predicate for the charges; (iii) access to related documents in CAMC's possession; and (iv) a list of witnesses that CAMC intended to call. (JA 649-50.)

On December 2, 1999, almost three months after Dr. Wahi requested a hearing, CAMC notified Dr. Wahi that a panel had been appointed to hear his appeal of (i) the summary suspension and (ii) the denial of his re-appointment to the medical staff. (JA 672-78.) The letter explained that F.C. Gall, the hospital's attorney, would serve as presiding officer, and that Cheryl Eifert, CAMC's General Counsel, would represent CAMC at the hearing. (*Id*.) The letter did not, however, set forth the date or time of the hearing, nor did it identify any of CAMC's proposed witnesses. (*Id*.) That hearing was never scheduled or held.

Faced with CAMC's intransigence and failure to provide a list of witnesses, Dr. Wahi filed suit in the Circuit Court of Kanawha County, West Virginia, in 2000, requesting a fair hearing panel review his suspension and denial of re-appointment. (JA 99-114.) On February 23, 2001, CAMC opposed Dr. Wahi's request. CAMC argued that the circuit court should not intervene in the matter because the hospital planned to provide Dr. Wahi a hearing and indeed had appointed its own hearing panel. (JA 181, 183-4.) CAMC assured the circuit court that it was going forward with the hearing and that it would replace the hearing

panel members. (JA 186-7.) Based on these and other representations, the circuit court dismissed Dr. Wahi's suit without prejudice.[2] (JA 131-46.)

CAMC did not provide Dr. Wahi the hearing it had promised. Instead, CAMC requested the West Virginia Board of Medicine to prosecute Dr. Wahi. (JA 147-50, 701.) Significantly, on November 10, 2003, the State Board of Medicine dismissed CAMC's charges with prejudice.[3] (JA 254-65.)

On January 10, 2004, Dr. Crotty, then CAMC's chief operating officer, announced to the local news media that CAMC would not reinstate Dr. Wahi's hospital privileges and that CAMC had reported Dr. Wahi to the NPDB.[4] (JA 197-8.) The NPDB report Dr. Crotty disclosed was filed on June 10, 2003. It stated, in pertinent part:

> As a result of the summary suspension and a later credentials committee recommendation to deny Dr. Wahi reappointment to the medical staff, he requested a hearing. Subsequently, Dr. Wahi filed suit against CAMC in the state circuit court of Kanawha County, West

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[2] In 2002, Dr. Wahi appealed the circuit court's dismissal. However, the West Virginia Supreme Court denied his appeal. (JA 997.)

[3] The Board of Medicine had previously dismissed two earlier complaints against Dr. Wahi, finding that there was no probable cause for CAMC's charges against him. Therefore, all charges were ordered to be expunged from Dr. Wahi's record. (JA 248-53.) Likewise, the State Board of Medicine dismissed the third round of charges, with prejudice, on November, 10, 2003. (JA 254-5.)

[4] Dr. Crotty stated: "CAMC officials are confident in their decision not to reinstate [Dr. Wahi]… 'We stand by our decision not to renew his privileges… We followed our obligation under the law and reported him to the National Practitioner Data Bank.'" (JA 198.)

> Virginia (case 00-C-3043) to enjoin the hearing and/or judicially amend CAMC's procedures. Dr. Wahi lost that case in 2002 and appealed. The WV Supreme Court denied his appeal. Dr. Wahi remains suspended until resolution of the hearing and the Board of Trustees takes final action.

(JA 997.)

SUMMARY OF ARGUMENT

The district court erred in ignoring evidence that CAMC was a state actor and refusing to allow Dr. Wahi to pursue his due process claims. By virtue of its association with the West Virginia University system, CAMC is unquestionably a state actor for purposes of the civil rights claims. As a state actor, CAMC deprived Dr. Wahi of his protected liberty and property interests when it summarily suspended him and reported him to the NPDB without prior notice or hearing, in direct violation of the HCQIA and CAMC bylaws.

The district court further erred when it granted CAMC's motion for summary judgment with respect to Dr. Wahi's antitrust claims. The HCQIA does not provide immunity unless CAMC complied with the HCQIA's procedural due process requirements. Since CAMC never afforded Dr. Wahi a hearing or any other form of procedural due process, CAMC failed to satisfy the requirements for immunity from civil damages. Moreover, after Dr. Wahi was summarily suspended and reported to the NPDB, the United States brought an antitrust claim against CAMC based on facts similar to those recounted here. In response, CAMC

entered into a consent decree, prohibiting it from engaging in further anti-competitive conduct. The judgment against CAMC powerfully demonstrates that an issue of triable fact exists with respect to Dr. Wahi's antitrust claims.

Finally, the district court erred when it dismissed several of Dr. Wahi's supplemental state law claims and granted summary judgment with respect to the remainder of those claims. The district court misinterpreted state law with respect to the breach of confidentiality and contract claims. First, CAMC is not protected by the HCQIA's immunity provision as to the defamation claim because CAMC failed to substantially comply with the HCQIA's due process requirements. Second, a plain reading of the statute makes crystal clear that disclosing the fact that a physician has been reported to the NPDB constitutes a breach of confidentiality. Further, CAMC violated West Virginia law when it breached Dr. Wahi's employment contract by suspending his hospital privileges and failing to comply with its own bylaws.

ARGUMENT

I. STANDARD OF REVIEW

A district court's dismissal under Rule 12(b)(6) is reviewed *de novo*. *See* Fed. R. Civ. P. 12(b)(6); *Bosiger v. U.S. Airways*, 510 F.3d 442, 448 (4th Cir. 2007). A district court's grant of summary judgment is also reviewed *de novo*.

Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co., 510 F.3d 474, 481 (4th Cir. 2007).

Questions of law and legal conclusions are reviewed *de novo*. *See, e.g.*, *Bacon v. City of Richmond, Va.*, 475 F.3d 633, 637 (4th Cir. 2007); *Meson v. GATX Tech. Servs. Corp.*, 507 F.3d 803, 806 (4th Cir. 2007). A facial challenge to a law presents a *purely* legal issue, as does the interpretation of a provision of law or of a statutory term, whether the challenge is facial or as-applied. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) (interpretation of statutory terms is a question of law).

II. DR. WAHI IS ENTITLED TO A HEARING UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION, THE HCQIA, AND CAMC'S BYLAWS.

A. The District Court Erred in Finding That CAMC Was Not a State Actor.

This Court will not affirm dismissal for failure to state a claim unless it appears that the plaintiff would not be entitled to relief under any facts which could be proved in support of the claim. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). In reaching this decision, the Court accepts as true all well-pleaded allegations, and views the complaint in the light most favorable to the plaintiff. *De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991).

In this case, the district court dismissed Dr. Wahi's due process claims on the ground that CAMC was not a state actor. Section 1983 holds liable any person

who, under color of law, deprives any citizen of rights secured by the Constitution or other federal laws. 42 U.S.C. § 1983. To state a valid claim under Section 1983, the plaintiff must show (1) the defendant is a state actor, and (2) the defendant deprived the plaintiff of a right guaranteed by the Constitution, or other law, without due process. *Id.* Further, to show that a defendant violated a party's right to due process under the Fifth and Fourteenth Amendments, the party must establish: (1) the defendant is a state actor; and (2) a liberty or property interest is at stake. *See* U.S. CONST. AMEND. V, XIV; *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

1. CAMC's Close Relationship with West Virginia Renders It a State Actor.

The district court erred in ignoring the evidence, gathered in discovery, that CAMC was a state actor, rather than a private hospital. Although private hospitals are generally not state actors for purposes of due process, *see Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 214 fn.3 (4th Cir. 2002), when a private hospital has a sufficiently close relationship with the government, it can become a state actor. *See Modaber v. Culpeper Mem'l Hosp., Inc.*, 674 F.2d 1023, 1025 (4th Cir. 1982).

In this case, the district court should have classified CAMC as a state actor because of the close relationship it had with the state and federal government. West Virginia jurisprudence expressly recognizes that a hospital may be classified

as a "quasi-public" hospital, which "subjects [it] to the same responsibilities as a public hospital." *Kessel v. Monongalia County Gen. Hosp.*, 600 S.E.2d 321, 331 (W. Va. 2004). That is this case. CAMC is not only the State's largest hospital, but more relevantly, CAMC has characterized itself as a public hospital. In 1988, the CAMC Foundation published a book, entitled *The Birth of a Medical Center*, in which CAMC's former President and CEO, Phillip Goodwin, acknowledged that CAMC had become "an entirely public institution." (JA 261.) CAMC's extensive programs and merger with the West Virginia University, a government teaching institution, indisputably demonstrates a sufficiently close relationship with state government. *See* Charleston Area Medical Center, Graduate Medical Education, http://camc.wvu.edu/info/camc.htm (last visited Feb. 23, 2008). As such, CAMC acted for the benefit, and at the behest, of the government.

De-credentialing is a power reserved exclusively to state government.[5] W. Va. Code § 30-3-5. In suspending and reporting Dr. Wahi to the NPDB, CAMC essentially de-credentialed Dr. Wahi because an adverse report makes a surgeon, in practical effect, unemployable in a hospital. Therefore, as CAMC has a close relationship with the state government, took actions against Dr. Wahi for the

[5] The West Virginia Medical Practice Act establishes the West Virginia Board of Medicine, a state agency, and empowers the Board with the "sole authority for the issuance of licenses to practice medicine." W. Va. Code § 30-3-5. The Act further provides that the Board "shall be a regulatory and disciplinary body for the practice of medicine." *Id*.

benefit and at the behest of the government, and exercised power reserved exclusively to state government, the district court erred in failing to classify CAMC as a state actor. *See* 42 U.S.C. § 11133. Moreover, the district court, at the very least, should have recognized CAMC to be a quasi-public hospital under *Kessel*. *Kessel*, 600 S.E.2d at 327.

B. Under the HCQIA, Dr. Wahi Had Constitutionally Protected Property And Liberty Interests In His Continued Employment.

As a state actor, CAMC was prohibited from depriving Dr. Wahi of his property and liberty interest in his employment without due process. The Supreme Court has long held that an individual has a property and liberty interest in his employment, so long as there is "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. Such an entitlement must be derived, however, from an independent source, such as a state law, the terms of employment, or certain understandings that secure benefits. *Id*. at 578.

The property and liberty interest Dr. Wahi had in his employment with CAMC derived, in part, from the HCQIA § 11112, which states that before a peer review board may suspend a physician's privileges, the physician must be afforded adequate notice and hearing procedures. *See* 42 U.S.C. § 11112(a)(3). The notice must state:

> (A)(i) that a professional review action has been proposed to be taken against the physician, (ii) reasons for the proposed action; (B)(i) that the physician has the right to request a hearing on the proposed action,

> (ii) any time limit (not less than 30 days) within which to request such a hearing; and (C) a summary of the rights in the hearing…

42 U.S.C. § 11112(b)(1). Once the physician requests a hearing, he or she must be furnished with the time, date, and place of the hearing, as well as a list of witnesses to testify on behalf of the reviewing body. 42 U.S.C. § 11112(b)(2).

Dr. Wahi's property and liberty interest also stemmed from CAMC's own bylaws. The bylaws require CAMC to schedule a hearing before any adverse action is taken against an employee. (JA 489.) The procedures established for such a hearing include:

> 3.6 Notice of Hearing and Statement of Reasons. The President of CAMC **shall schedule** the hearing and **shall** give notice of its time, place and date, in writing, return receipt requested, to the person who requested the hearing. The hearing shall begin **as soon as practicable**, considering the schedules and availability of all concerned, provided that the hearing shall not begin without at least thirty days notice thereof being given thereof to the individual who requested the hearing. This notice shall contain a restatement of the reasons for the recommendation as well as identify, when appropriate, the patient records and other information supporting the recommendation. ...

(JA 489)(emphasis added). The bylaws, which provide that a hearing "shall" be scheduled by the president, are consistent with the HCQIA federal mandate that if "a hearing is requested on a timely basis . . . the physician involved **must** be given notice stating . . . the **place, time and date**, of the hearing . . ." 42 U.S.C. § 11112(b)(2)(A) (emphasis added). Like the HCQIA, 42 U.S.C. § 11112(b)(2)(B), the bylaws further required CAMC to provide Dr. Wahi with a witness list:

> 3.7 List of Witnesses. If either party, by Notice, requests a list of witnesses, then each party within ten days of such request **shall furnish to the other a written list of the names and addresses of the individuals so far as is then reasonably known, who will give testimony or evidence** in support of that part at the hearing, and the names and addresses of additional witnesses as soon as reasonably procured. ...

(JA 489)(emphasis added).

Compliance with the requirements set forth in CAMC's bylaws is also mandated by West Virginia law, which provides that hospitals are bound by their bylaws when charges are brought against a physician in connection with his or her hospital privileges. *See Kessel*, 600 S.E.2d at 327. In *Kessel*, the West Virginia Supreme Court of Appeals held that:

> [G]enerally fair hearing and due process provisions in a hospital's medical staff bylaws are not implicated unless there are allegations against a physician bearing on professional competency and conduct. … However, where it is alleged that a physician is guilty of professional incompetence or misconduct, the hospital is bound by fair hearing procedural provisions contained in the medical staff bylaws.

Id. at 327, 332. *Kessel* buttresses the position of the West Virginia Supreme Court of Appeals in *Mahmoodian v. United Hosp. Center, Inc*., 404 S.E.2d 750, 755-56 (W.Va. 1991). There, West Virginia's highest court held that before a hospital can suspend a physician, it must substantially comply with the due process requirements set forth in its bylaws. *Id*. ("bylaws afford basic notice and fair hearing procedures…"). Therefore, based on federal and state law and CAMC's

binding internal procedures, Dr. Wahi derived a legally protectable property and liberty interest in his continued employment.

III. CAMC DEPRIVED DR. WAHI OF HIS RIGHT TO A HEARING.

A. CAMC Violated Dr. Wahi's Due Process Rights and the HCQIA by Suspending His Medical Privileges Without Providing Him a Hearing.

CAMC deprived Dr. Wahi of the due process rights he derived from state and federal laws when it summarily suspended him from his employment without notice or a hearing. *See Bell v. Burson*, 402 U.S. 535, 542 (1971). In order to afford Dr. Wahi the due process rights to which he was entitled, CAMC was required to: (1) notify Dr. Wahi that a professional review action would be taken against him; (2) set forth the reasons for the proposed action; (3) inform Dr. Wahi of his right to request a hearing on the proposed action, including any time limit (not less than 30 days) within which to request such a hearing; and (4) provide a summary of the rights in the hearing, including the right to access a witness list, and the right to have an attorney present. 42 U.S.C. § 11112(a)(3); *Kessel*, 600 S.E.2d at 327, 331; (JA 489).

CAMC failed to comply with virtually all of Dr. Wahi's procedural due process rights. On July 28, 1999, Dr. Skaff, CAMC's Chief of Staff, met with the CAMC Board of Trustees regarding Dr. Wahi, and reported to the Board that an independent investigation, as well as his own, had concluded that Dr. Wahi's

treatment of a Bluefield patient was not outside the scope of his delineated hospital privileges. (JA 964.) This investigation and report, alone, should have cleared Dr. Wahi of any wrongdoing.

Nevertheless, on July 30, 1999, CAMC notified Dr. Wahi that he had been summarily suspended. (JA 586.) This violated both the HCQIA and CAMC's bylaws. 42 U.S.C. § 11112(a)(3); (JA 489.) CAMC sent Dr. Wahi the equivalent of a pink slip. The hospital advised him of its action after it had already been taken and with no reason set forth for that career-destructive action. (JA 586.)

CAMC purported to comply with the HCQIA and its own bylaws on August 26, 1999, by sending Dr. Wahi a letter explaining that his request for re-appointment had been denied and that he was entitled to a hearing. However, when Dr. Wahi requested that hearing and the additional information to which he was entitled, namely (i) a witness list, (ii) the factual predicate for the charges against him, and (iii) access to all related documents in CAMC's possession, his request was ignored for months. When CAMC finally responded, and promised that a hearing would take place, the hospital still had not put together a witness list. Even more fundamentally, CAMC never provided Dr. Wahi with the time, date, or location of the would-be hearing. To this day, Dr. Wahi has received none of the information he requested in accordance with the HCQIA and CAMC's bylaws. Likewise, and tellingly, no hearing has taken place. (JA 16.)

In fact, Cheryl Eifert, CAMC's prosecuting attorney, admitted in a later deposition that she only made up a list of witnesses "in [her] mind," but that CAMC never gave Dr. Wahi a witness list. (JA 689.) Ms. Eifert also conceded that she "did not set a hearing date" and that she "[does not] know of any date ever being scheduled because the lawsuit was filed." (JA 684-5.)

Even after CAMC convinced the state circuit court to deny Dr. Wahi's lawsuit by, again, promising to provide Dr. Wahi with a hearing and a fair hearing panel, it failed to do so. In short, by CAMC's own admission, none of the due process procedures CAMC was obligated to provide Dr. Wahi in connection with his suspension has ever been provided. *See* 42 U.S.C. §§ 11112(a)(3), (b).

B. CAMC Violated Dr. Wahi's Due Process Rights and the HCQIA by Suspending Him Without a Prior Finding That He Posed an Imminent Danger to Patients.

The only instance under which the HCQIA and CAMC bylaws allow for an "immediate suspension" for longer than fourteen days is "where the failure to take such an action may result in an imminent danger to the health of any individual," and that suspension is "subject to subsequent notice and hearing or other adequate procedures." 42 U.S.C. § 11112(c)(1)(B)(2); (JA 484.) Under both the HCQIA and CAMC's bylaws, the purpose of summary suspension prior to a hearing is to

conduct an investigation to determine if a professional review action is warranted.[6] 42 U.S.C. § 11112(c)(1)(B); (JA 484.)

Summary suspension, therefore, is justified only when there is evidence that a physician's conduct poses a threat to patient care which would require immediate action. *See Patel v. Midland Mem. Hosp. & Med. Cen.*, 298 F.3d 333, 340 (5th Cir. 2002) (holding that summary suspension of cardiologist's clinical privileges did not violate due process only because the doctor's methods posed a danger to patient safety); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (holding that a hearing is not required only when there is a necessity for quick action, or it is impracticable to provide any pre-deprivation process); *and see* 42 U.S.C. § 11112(c)(1)(B)(2).

There was no basis for Dr. Wahi to be summarily suspended. As recounted above, on July 28, 1999, Dr. Skaff reported to the Board of Trustees that Dr. Wahi's conduct was not outside the scope of his hospital privileges. (JA 964). The July 30, 1999, summary suspension letter made no mention that Dr. Wahi constituted an imminent danger to patients. (JA 586.) Neither the Board nor the Credentialing Committee ever deemed Dr. Wahi an imminent danger. Nor was

[6] HCQIA, and a similar CAMC bylaw, provide that if a physician is suspended "for a period of not longer than 14 days," then an "investigation is [to] be [] conducted [during that period] to determine the need for a professional review action." 42 U.S.C. § 11112(c)(1)(B); (JA 484.)

such a finding made at the time the action was taken against him.[7] (*Id*). The report to the NPDB, likewise, does not mention any finding of imminent danger. (JA 962.)[8]

In fact, Dr. Skaff, who summarily suspended Dr. Wahi, was asked in his deposition: "If you had seen a danger to the patient would you have taken steps to stop it then?" He responded: "Absolutely." (JA 609.) Dr. Skaff further testified that "Dr. Wahi [was allowed] to manage the medical treatment of the two patients currently in house" after his summary suspension, and with respect to the continuing treatment of those patients at CAMC, Dr. Skaff was asked and answered as follows:

> Q. Would you have allowed him to continue with that treatment after the suspension if you thought he posed an imminent danger to those two patients?
>
> A. No.

[7] Although the issues of summary suspension and imminent danger were raised and briefed extensively by Dr. Wahi in the record below on pages 41-47 of the Opposition to Defendants' Motions for Summary Judgment (Pl.'s Opp. Mot. Summ. J. 41-47, Doc. 95), the district court made no mention of the issue of the improper summary suspension. As such, this issue should be considered on appeal because a finding of imminent danger is an essential predicate for a summary suspension under the HCQIA.

[8] The amended report for this September 13, 1999, Report to NPDB, filed on June 6, 2003, likewise makes no mention or reference to imminent danger. (JA 997.)

(JA 605-6.)[9] Further, CAMC did not identify or produce a single document in response to interrogatories showing a finding of imminent danger. (JA 194-5, 972-3.) Dr. Skaff's Note to File, dated July 30, 1999, describing the reasons for Dr. Wahi's summary suspension, makes no reference to imminent danger. Rather, it concerns Dr. Wahi's "inability to follow procedural guidelines outlined by the Committee" and "diminishing trust between us and him, as well as the Credentials Committee and him." (JA 965.) Not a single witness or staff member or physician of CAMC has identified any documentation of a finding of or reference to imminent danger. (JA 600 (Skaff), 322 (Mantz), 800 (Chapman), 830 (Khan), 887 (Lee), 1006-8, 1012 (Goodwin).)

Therefore, CAMC did not suspend Dr. Wahi because of any imminent danger to his patients, rendering its actions outside the "immediate suspension" exception. *Cf. Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064, 1068 (8th Cir. 2005)

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[9] This is also contrary to and inconsistent with applicable summary suspension procedures, as the Procedures Manual sets forth the following requirement where summary suspension is imposed:

> 2.4.4. Care of the Suspended Individual's Patients. Immediately upon his imposition of a summary suspension, the appropriate department chief, or in his absence, the Chief of Staff shall assign to another individual with appropriate Clinical Privileges responsibility for care of the suspended individual's patients still in the Hospital at the time of such suspension until such time as they are discharged. ...

(JA 486.) That was not done in this case since there was no finding of "imminent danger" to patients.

(family practice physician received notice and was suspended after a peer review investigation found that her treatment presented imminent danger to patients); *Patel v. Midland Memorial Hosp. and Medical Center*, 298 F.3d 333, 340 (5th Cir. 2002) (cardiologist was suspended without a hearing because a peer review investigation found that his methods were life-threatening to patients, and therefore pre-suspension process was not practical); *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (anesthesiologist was suspended without a hearing after the hospital found that deficient performance endangered patients' lives).

Even indulging the unfounded assumption that Dr. Wahi posed a threat to his patients, Dr. Skaff's investigation, as well as an independent investigation, was conducted prior to the summary suspension, not after. Under both the HCQIA and CAMC's bylaws, if a physician is summarily suspended, the hospital must conduct a post-deprivation investigation to determine if a professional review action is warranted.[10] Here, CAMC conducted the investigation first, clearing him of any wrongful conduct with respect to the incident, and then sent him a suspension letter. (JA 188-9, 602-4, 964, 965). In short, CAMC failed to comply with the HCQIA and its own bylaws.

[10] HCQIA provides that if a physician is suspended "for a period of not longer than 14 days" then an "investigation is [to] be[] conducted [during that period] to determine the need for a professional review action." 42 U.S.C. § 11112(c)(1)(B); (Procedures Manual, § 2.3.3, JA 484).

C. Dr. Wahi Is Entitled To Injunctive Relief.

Although the HCQIA immunizes hospitals and peer review boards from claims for monetary damages, that statutory immunity does not apply to injunctive relief. 42 U.S.C. § 11111(a). To obtain permanent injunctive relief, a plaintiff must show that: (1) he has suffered irreparable injury; (2) the remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by permanent injunction. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

Dr. Wahi suffered irreparable injury when CAMC suspended his clinical privileges and reported him to the NPDB. Not only has Dr. Wahi lost his employment with CAMC, the hospital's report in the NPDB, which all potential employers must check, prevents Dr. Wahi from practicing medicine anywhere else. CAMC has, in essence, taken away Dr. Wahi's liberty interest in partaking in gainful employment. As such, there is no adequate remedy at law. Monetary damages alone will not restore Dr. Wahi's credibility in the medical community, and will not return Dr. Wahi to employable status as a cardiac surgeon. To be fully restored to the status quo ante, it is imperative that CAMC provide Dr. Wahi a hearing and remove his name from the NPDB.

Providing Dr. Wahi a hearing and removing the NPDB report will place no hardship upon CAMC. To comply, CAMC simply has to convene a body composed of different members than the previous body; to review Dr. Wahi's case *and* to retract its report from the NPDB. However, allowing the current situation to persist continues to grievously injure Dr. Wahi. A trained surgeon, Dr. Wahi is presently unable to find comparable employment because of CAMC's report to the NPDB. Finally, requiring CAMC to provide Dr. Wahi a hearing will benefit the public interest by ensuring that hospitals abide by governing federal and state law.

IV. THE DISTRICT COURT IMPROPERLY GRANTED CAMC SUMMARY JUDGMENT ON THE ANTITRUST AND DEFAMATION CLAIMS.

A. Standard Of Review.

This Court "need not defer to factual findings rendered by the district court" when reviewing the grant of a motion for summary judgment. *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 267 (4th Cir. 2006). "[A]ny facts and inferences drawn from them [are viewed] in a light most favorable to. . . the nonmoving party." *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 374 (4th Cir. 2006). Further, the moving party must show that there is no genuine issue of material fact, and that the party is entitled to judgment as a matter of law. Fed. R. Civ. R. 56(c). To overcome summary judgment the nonmoving party must offer evidence sufficient to establish the required element such that a reasonable juror

could find in his favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001); *Kitchen v. Upshaw*, 286 F.3d 179 (4th Cir. 2002).

B. CAMC Was Not Entitled to HCQIA Immunity Because it Did Not Comply with its Due Process Requirements.

The district court's grant of CAMC's motion for summary judgment with respect to Dr. Wahi's antitrust claims and his defamation claim was improper. The HCQIA states that if a professional review body meets the due process standards of the HCQIA section 11112(a), then the body "shall not be liable in damages … with respect to [its] action". *Id*. Although this language appears to grant hospitals immunity from civil damages for conducting peer review actions, it is predicated upon substantial compliance with the HCQIA's due process requirements. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 211 (4th Cir. 2002).

To receive immunity, the peer review board must satisfy the following: (1) the peer review action must be taken in the reasonable belief that the action was in 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. 42 U.S.C. § 11112(a)(1)-(4).

The most important of these procedures is the third - whether the action was taken after adequate notice and hearing procedures. 42 U.S.C. § 11112(a)(3). The "adequate notice and hearing" requirement is further defined as follows:

> (2) … the physician involved **must be given notice stating - (A) the place, time, and date, of the hearing**, …, and **(B) a list of the witnesses (if any) expected to testify at the hearing**…

42 U.S.C. § 11112(b) (emphasis added).

While the HCQIA permits "such other procedures as are fair to the physician under circumstances provided," the legislative history indicates that this clause is not supposed to be a substitute for scheduling a hearing mandated in a hospital's bylaws. Rather, it is designed to allow existing due process procedures, which already provided due process when the HCQIA was passed, to remain in place as a mechanism for meeting the due process requirement:

> The Committee is aware, for example that some Courts have already carefully spelled out different requirements for certain Peer review activities or actions, such as procedures for decision regarding appointment for clinical privileges at a hospital. In those situations compliance with the applicable law should satisfy the "adequacy" requirements even where such activities require different or fewer due process rights than the ones specified in subsection 102(b). In any case it is the Committee's intent that Physicians receive fair and unbiased review to protect their reputation and medical practices.

H.R. Rep. No. 99-903 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6393. CAMC failed to comply with these requirements. *Wahi*, 453 F. Supp. 2d at 951-55.

As we have emphasized in detail, CAMC failed to afford Dr. Wahi notice and a hearing before summarily suspending his practice, and without a finding that he was an imminent danger to his patients. Such unilateral after-the-fact conduct is a far cry from even the "fair [procedures] under the circumstances" that Congress envisioned when drafting the statute.[11] *See* 42 U.S.C. § 11112(a)(3); *see also* H.R. Rep. No. 99-903 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6393.

The district court, thus, had no basis for finding that CAMC had substantially complied with HCQIA's procedures. Indeed, all of the cases relied upon by the district court to support its finding of substantial compliance were decisions in which the physician had been provided a full hearing before a hearing panel. *Imperial v. Suburban Hosp. Assoc.*, 37 F.3d 1026, 1029 (4th Cir. 1994) (internist received a hearing spanning ten hours over three days prior to suspension

[11] Although the primary focus of this appeal is the failure of CAMC to schedule a hearing for Dr. Wahi as mandated by its bylaws and the third paragraph of 42 U.S.C. § 11112(b), Dr. Wahi also contends that the first, second and fourth prongs of the test set forth in paragraphs 1, 2 and 4 were also not met here, where CAMC's credentials committee recommended the renewal of Dr. Wahi's privileges; where the chief of staff conducted an independent investigation finding that Dr. Wahi did not act outside of the scope of his delineated privileges; and where the West Virginia Board of Medicine found in favor of Dr. Wahi on CAMC's charges against him and dismissed CAMC's charges against him with prejudice. (*Supra*, 6, 9.)

of hospital privileges); *Freilich*, 313 F.3d at 210 (internist was afforded a hearing prior to loss of hospital privileges); *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 837 (3d Cir. 1999) (hospital substantially complied with due process requirements, providing multiple hearings prior to suspending a surgeon's hospital privileges); *Meyers* v. *Columbia/ HCA Healthcare Corp*., 341 F.3d 461, 465 (6th Cir. 2003) (hospital was in substantial compliance with the HCQIA by giving a trauma surgeon notice and hearing prior to suspending hospital privileges); *Gabaldoni v. Washington County Hosp. Assoc.*, 250 F.3d 255, 258-59 (4th Cir. 2001) (obstetrician was afforded a hearing prior to termination of clinical privileges). The irony is this – the district court's authorities directly support Dr. Wahi's legal position.

C. There Is a Triable Issue of Fact as to Dr. Wahi's Antitrust Claims.

Had the district court held CAMC to its burden of showing substantial compliance with the HCQIA, Dr. Wahi would have been permitted to conduct further discovery in connection with his antitrust claims. There is manifestly an issue of triable fact with respect to these claims. Anti-competitive conduct, which appears to have been the underlying motive for Dr. Wahi's suspension, is flatly prohibited by the Sherman and Clayton Acts. 15 U.S.C. §§ 1-2, 15.[12]

[12] The Clayton Act provides private persons like Dr. Wahi with a cause of action for damages against a party that violates the Acts. 15 U.S.C. § 15.

CAMC's anti-competitive course of conduct began in June 1994, when Dr. Wahi launched his own practice at CAMC and began exploring the possibility of associating himself with surgeons at Raleigh General. (967, 974.) At the time, no one at CAMC questioned Dr. Wahi's professional competence or conduct. CAMC did oppose the efforts of the Beckley hospitals to obtain a certificate of need for cardiac surgery. (JA 218-9, 222.)

In order to restrain trade and keep Dr. Wahi from practicing with Raleigh General, TCA and CAMC joined together to strip Dr. Wahi of his ability to practice medicine. (JA 974.) As part of this combined effort, in January 1995, Dr. Crotty, then Chief of Staff, appointed a group of competing physicians to investigate Dr. Wahi, and asked the group to make a recommendation as to whether Dr. Wahi's privileges should be suspended immediately, based upon what he characterized as "troubling incidents." (JA 339-40, 974.)

The economic competitors appointed to the initial "investigative committee," and/or subsequent committees, consisted of Jamal Khan, H. Rashid, K. C. Lee, Andrew Vaughn, and John L. Chapman. (JA 901-2, 968, 970, 974, 936-7, 996.) While these investigations were being conducted, CAMC's peer review Committees charged with monitoring CAMC's physicians evaluated Dr. Wahi's treatment of his patients and found it to be within the required standard of care. (JA 967, 1015.)

Subsequently, when Dr. Wahi renewed talks with another competing hospital about helping it open a cardiac surgery center, CAMC rescinded a favorable recommendation that Dr. Wahi's privileges be renewed for another year. It also ignored findings that his conduct was proper and summarily suspended his privileges, thereby preventing him from practicing medicine in competition with CAMC. (JA 572-3, 964, 975.)

The district court's order limiting discovery has utterly prevented Dr. Wahi from obtaining further evidence of CAMC's anti-competitive behavior. Ironically, on February 6, 2006, the United States filed a similar antitrust claim against this very defendant, alleging that CAMC engaged in anti-competitive practices by preventing Raleigh General from opening a cardiac-surgery program. (JA 215-225 16).

CAMC stipulated to the entry of a Final Judgment, enjoining it from engaging in further anti-competitive conduct with respect to cardiac surgery. Specifically, CAMC was enjoined from entering into any agreements that prevent competitors from providing cardiac surgery. (JA 243, 16). This consent decree and final judgment provides compelling evidence that the district court should have permitted Dr. Wahi to conduct thoroughgoing discovery with respect to his antitrust claims. Had this been permitted, he would have established, at a minimum, a triable antitrust claim.

Accordingly, the district court order granting summary judgment on the ground of immunity and its previous order limiting discovery with respect to the antitrust claims should be reversed.[13] Indeed, after the close of the severely circumscribed discovery, CAMC filed suit against its own doctors (Humayun, Rashid, K.C. Lee, and TCA), alleging the same anticompetitive practices identified in Dr. Wahi's complaint. (JA 199-214.)

D. There Is a Triable Issue of Fact as to Dr. Wahi's Defamation Claim.

Additionally, the district court's order granting summary judgment with respect to Dr. Wahi's defamation claim should also be overturned. To establish a defamation claim, a party must show that: (1) there was a defamatory statement; (2) a non-privileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence of the publisher; and (6) resulting injury. *Belcher v. Wal-Mart Stores, Inc.*, 568 S.E.2d 19, 26 (W. Va. 2002). A statement is defamatory if it tends to harm the reputation of another. *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 77 (W. Va. 1984).

[13] The district court also erred in granting CAMC summary judgment on the antitrust claims (as well as with all other claims) because appellant's trial counsel made a Rule 56(f) request for additional discovery on the antitrust claims as well as other claims, and the district court granted summary judgment without allowing any discovery on the antitrust or defamation claims, and only very limited discovery on the other claims. (JA 1016-1023.) *See* Fed. R. Civ. P. 56(f); *Harrods Limited v. Sixty Internet Domain Names*, 302 F.3d 214, 244-8 (4th Cir. 2002), *Willis v. Town of Marshall, North Carolina*, 426 F.3d 251, 263-4 (4th Cir. 2005).

Dr. Wahi was defamed when Dr. Crotty intentionally disclosed to the local media that CAMC had reported him to the NPDB. The only reasonable inference to be drawn from such a statement is that Dr. Wahi's conduct posed a threat to patients. (JA 197-8.) This was a false inference because CAMC's own investigation revealed that Dr. Wahi was not an imminent danger to CAMC patients. There is no doubt that this false statement, and its resulting false impression, gravely injured Dr. Wahi's professional standing in the community. In addition, as set forth in detail below, Dr. Crotty was not privileged to divulge this information since peer review proceedings and reports to the NPDB are confidential. *See* W. Va. Code § 30-3C-3; 45 C.F.R § 60.13.

Further, as we have seen, CAMC failed to satisfy the HCQIA's due process requirements, thereby precluding it from asserting HCQIA immunity. Not only is CAMC disqualified from immunity, the HCQIA's provisions regarding peer review boards and immunity in no way suggest that defamatory statements to the media are protected. *See* 42 U.S.C. §§ 11111(a)(1), 11112. Section 11111(a)(1) provides immunity for the review board's "action", while section 11112 discusses all of the due process requirements required for the peer review. The HCQIA envisages that a peer review "action" consists only of the investigation and hearing proceedings with respect to a physician's status. *See* 42 U.S.C. §§ 11111(a)(1) - 11112.

Further, sections 11131 to 11133 specifically delineate which other entities are permitted and required to have peer review information – the Secretary of State, the Board of Medical Examiners, and the NPDB. 42 U.S.C. §§ 11131-11133. If Congress believed that the general public should be privy to peer review information, it would not have passed legislation that expressly defined which other bodies are privileged to share such information. The only logical inference is that HCQIA immunity cannot apply to defamatory statements made to the general public. Summary judgment should have been denied. What is more, Dr. Wahi is entitled to discovery on this claim.

V. THE DISTRICT COURT IMPROPERLY DISMISSED TWO OTHER STATE LAW CLAIMS.

A. CAMC Breached its Duty of Confidentiality by Disclosing That it Reported Dr. Wahi to the NPDB.

The District Court improperly dismissed Dr. Wahi's breach of confidentiality claim. Federal and state law provides that NPDB information and peer review proceedings are to be kept confidential. 45 C.F.R. § 60.13; W.Va.Code § 30-3C-3. West Virginia recognizes a cause of action for breach of confidentiality when confidential information is disclosed by a fiduciary. *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 656-57 (W.Va. 1994). A fiduciary relationship arises when there is a relationship of trust between parties. *State ex*

rel. Kitzmiller v. Henning, 437 S.E.2d 452, 454 (W.Va. 1993). An employer-employee relationship creates a fiduciary relationship between them. *See Beck v. Pace Intern. Union*, 127 S. Ct. 2310 (2007) (employers owe a fiduciary duty to employees in administering an employment program).

CAMC breached its duty of confidentiality to Dr. Wahi when Dr. Crotty announced to the local news media that CAMC would not reinstate Dr. Wahi and that it had reported him to the NPDB. This was an outrageous breach of professional norms and severely prejudicial to Dr. Wahi. The pivotal fact that CAMC stated it would not reinstate Dr. Wahi ineluctably implied that the Board of CAMC had made a seriously adverse finding. In reality, the Board of CAMC had made no such adverse finding and the NPDB report, for its part, merely recounted the procedural history of the dispute. Yet, the district court dismissed the breach of confidentiality claim, finding that only the information contained in an NPDB report is confidential, not the names of those reported to the NPDB.

This is, with all respect, entirely erroneous. A plain reading of the statute belies the district court's interpretation. The statute provides:

> Information reported to the Data Bank is considered confidential and shall not be disclosed outside the Department of Health and Human Services … Persons and entities which receive information from the

> Data Bank either directly or from another party must use it solely with respect to the purpose for which it was provided. [14] 45 C.F.R. § 60.13.

This is manifestly clear. Accordingly, the district court should have denied CAMC's motion for summary judgment with respect to this claim.

B. CAMC Breached its Employment Contract with Dr. Wahi When it Failed to Follow the Procedures Set Forth in its Bylaws.

The district court's dismissal of Appellant's breach of employment contract claim was based on a misinterpretation of governing state law. The West Virginia Supreme Court of Appeals distinguishes between a situation where a physician is denied staff privileges as a result of an administrative decision, and where staff privileges are being taken away based upon grounds of professional competency by a peer review body. *Kessel*, 600 S.E.2d at 327. The *Kessel* Court held that:

> [W]here it is alleged that a physician is guilty of professional incompetence or misconduct, the hospital is bound by the fair hearing procedural provisions contained in the medical staff bylaws.

Id. *Kessel* confirms West Virginia's jurisprudence with respect to the binding effect of hospital bylaws. *See Mahmoodian*, 404 S.E.2d at 755. *Mahmoodian* likewise held that there must be substantial compliance with hospital bylaws governing a decision to suspend a physician. *Id.*

[14] The reports to the NPDB remain under seal, and CAMC strongly objected to them being unsealed. Further, this Court ordered that they must remain under seal.

In this case, Dr. Wahi was charged with professional incompetence, binding CAMC to the hearing procedures set forth in its bylaws.[15] As stated previously, those bylaws provide that a physician cannot be summarily suspended without a finding of imminent danger to a patient. They further mandate a hearing for a physician subject to an adverse action, as well as a list of witnesses to be used against him at the hearing. (Procedures Manual, §§ 3.6-3.7; JA 490.)

The district court misinterpreted *Kessel* in holding that unless there is express language in the bylaws to the contrary, hospital bylaws do not constitute a contract between the physician and the hospital. *See Kessel*, 600 S.E.2d at 326-27; *Wahi*, 953 F. Supp. 2d at 956. Although the district court is correct in its conclusion that bylaws are not a contract in an administrative situation, this is not so when a physician is accused of misconduct. *See Kessel*, 600 S.E.2d at 327. *Kessel*'s actual holding is that when a physician is accused of professional incompetence, the hospital is "bound" by the procedural due process requirements

[15] CAMC's administrative operations establish the bylaws to be a binding agreement. The bylaws incorporate the Procedures Manual, which Dr. Wahi was subject to at the time of his appointment to the medical staff. This is evidenced in Dr. Wahi's initial appointment letter, which stated:

> You have been furnished with a copy of the Medical Staff Bylaws, Medical Staff Rules and Regulations and Medical Staff Procedures Manual. … [C]ompliance with the Bylaws and Rules and Regulations is a requirement of continuing appointment.
>
> (JA 98.)

in the bylaws. *Id*. Therefore, if CAMC was "bound" by the provisions of its bylaws, noncompliance with those provisions compels the conclusion that CAMC breached the contract.

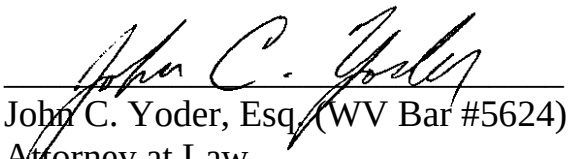
CONCLUSION

The Court should reverse the judgment of the district court and remand the case with instructions to allow full discovery as to all claims.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this case to explain and elaborate upon the points made herein above, including the pivotal importance of a hearing as part of the due process guarantees provided under the HCQIA and CAMC's bylaws. There appear to be no other cases where the HCQIA has been used to bar claims where the physician requested, and was denied, the scheduling of a hearing. The deprivation of hospital privileges without a meaningful opportunity for a hearing would significantly undermine federal authority set forth in the HCQIA, which provides for due process protection, including a hearing. Moreover, serious antitrust and state law claims are presented. Accordingly, oral argument should be granted.

Respectfully submitted,



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