IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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FILED
CLERK, U.S. DISTRICT COURT
June 13, 2005 (2:12pm)
DISTRICT OF UTAH

DR. STEVEN MACARTHUR, et al.,

Plaintiffs,

vs.

SAN JUAN COUNTY, et al.,

Defendants.

Civil No. 2:00-CV-584J

MEMORANDUM DECISION & ORDER

* * * * * * * * *

This case involves a potpourri of individual claims with individual histories and individual times and contexts, held together, if at all, by a common defendant, or common defendants. It has an erratic procedural history, complicated by prolix pleadings and appendices, evolving arguments, and motions to reconsider matters already decided. In an effort to deal with this matter as completely as we can—extended though it may be—the court in the context of pretrial has considered in detail each of the plaintiffs' legal theories, and the factual allegations advanced as the basis for those theories, all in an effort to identify any genuine issues that would require a trial.

The original complaint filed in this action asserted claims by fifteen individual plaintiffs against San Juan County, the San Juan Health Services District, and various individual defendants. Some of those claims were decided upon motion, and some have been resolved by agreement; several of the original plaintiffs and defendants are no longer parties to this case. (*See* Order on Motions Heard on July 2, 2002, filed August 22, 2002 (dkt. no. 417); Order on Motion of Defendant San Juan Foundation to Dismiss, filed June 5, 2002 (dkt. no. 366); Order of Dismissal with Prejudice, filed March 28, 2002 (dkt. no. 309); Order of Dismissal with Prejudice, filed March 25, 2002 (dkt. no. 306); Order of Dismissal with Prejudice, filed March 11, 2002 (dkt. no. 298); Order, filed February 12, 2002 (dkt. no. 272); Order, filed November 29, 2001 (dkt. no. 234); *see also* Order, filed February 15, 2002 (dkt. no. 279) .) Some of the questions decided by the district judge initially assigned this case became the subject of an interlocutory appeal,

and are now back before this court on remand. *See MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002).

By the time of the Final Pretrial Conference on November 14-15, 2002, there remained six named plaintiffs, whose claims fall into two discrete groups: plaintiffs Donna Singer, Fred Riggs and Al Dickson, who seek enforcement of a judgment against several of the defendants previously obtained in Navajo Tribal Court—the matter now before this court on remand from the court of appeals—and plaintiffs Dr. Steven MacArthur, Michelle Lyman and Helen Valdez, who assert individual claims against the defendants arising from various events and alleged acts of one or more of the defendants. The claims of these six remaining plaintiffs were detailed in a proposed Amended Complaint submitted by counsel a few days before the Final Pretrial Conference. (*See* "Amended Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," *annexed to* "Plaintiffs' Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," and "Memorandum of Fact and Law in Support," filed November 6, 2002 (dkt. no. 438) (hereinafter "Proposed Amended Complaint").)[1] "Part I" of the Proposed Amended Complaint sets forth the claims of MacArthur, Lyman and Valdez (*id.* at 2-98 ¶¶ 1-254); "Part II" of the same pleading spells out the relief sought by Singer, Riggs and Dickson. (*Id.* at 98-120.)

[1]As noted in a November 8, 2002 remark on the docket, the Proposed Amended Complaint was accompanied by a separate addendum of "Pertinent Parts of the Navajo Court Record as Attachment to the Amended Complaint," received by the Clerk of the Court on November 8, 2002 and lodged in the case file.

The claims and defenses involving the "Part I Plaintiffs," MacArthur, Lyman and Valdez, were also delineated in an agreed form of proposed Pretrial Order submitted six days later as contemplated by the court's local rules, *see* DUCivR 16-1(e), and by the schedule previously established by the court in this case.[2] (*See* Proposed Pretrial Order, received November 12, 2002.[3]) On the eve of pretrial, the San Juan Health District defendants filed motions to dismiss those plaintiffs' RICO, Health Care Quality Improvement Act and EMTALA claims (dkt. nos. 443, 445, 447), followed the next day by motions to dismiss those plaintiffs' claims of interference with commerce by threats, mail fraud, witness tampering and federal antitrust law violations (dkt. nos. 450, 452, 456, 454).

THE FINAL PRETRIAL CONFERENCE (Fed. R. Civ. P. 16(c))

At the Final Pretrial Conference, court and counsel explored in some detail the factual footing and legal theories underlying the claims of the Part I plaintiffs, engaging in an extended colloquy that sought to identify, formulate and simplify the issues, and to pinpoint any genuine issues of material fact issues requiring a trial.

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[2](*See* Minute Entry, dated October 8, 2002 (dkt. no. 427).) At the request of plaintiffs' counsel, the dates for submission of the draft Pretrial Order (11/1/2002) and the Final Pretrial Conference (11/5/2002) were reset by amended notice of hearing, with the conference to commence on November 12, then November 14. (*See* Motion for a Short Extension of Time to Submit the Final Pretrial Order for Medical Reasons, filed October 28, 2002 (dkt. no. 434); Notice of Hearing, filed October 31, 2002 (dkt. no. 435); Motion to Extend Time for Pretrial Proceedings, filed November 8, 2002 (dkt. no. 439); Amended Notice of Hearing, filed November 12, 2002 (dkt. no. 441).)

[3]The Proposed Pretrial Order ultimately was neither signed by the court nor docketed and filed in this case. To ensure a complete record of the Final Pretrial Conference in this action, a copy of the Proposed Pretrial Order in .pdf file format is annexed to this Memorandum Decision & Order as an Appendix.

Fed. R. Civ. P. 16(c)(1)

At a pretrial conference, "consideration may be given, and the court may take appropriate action, with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; . . . ." Fed. R. Civ. P. 16(c)(1).

> The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. . . . The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

Fed. R. Civ. P. 16 advisory committee note to 1983 amendment (citation omitted). "The court thus is directed to define the issues, facts, and theories actually in contention, which means that extraneous issues should be weeded out . . . ." 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1525, at 242 (2d ed. 1990) (footnotes omitted). As the court of appeals explained some years ago: "The salutary, indeed the desirable and efficacious, purpose of a pretrial conference is to sift the discovered and discoverable facts to determine the triable issues, both factual and legal, and to chart the course of the lawsuit accordingly." *Lynch v. Call*, 261 F.2d 130, 132 (10th Cir. 1958).

It follows that "[a]s a case takes shape and the court struggles to narrow and pinpoint the issues, the parties have an unflagging obligation to spell out squarely and

distinctly those claims they desire to advance at the trial proper. Good-faith compliance with Civil Rule 16 plays an important role in this process." *Veranda Beach Club Limited Partnership v. Western Surety Co.*, 936 F.2d 1364, 1371 (1st Cir. 1991) (citation omitted). Rule 16(c)(1) places upon counsel "a substantial responsibility for assisting the court in identifying the factual issues worthy of trial." Fed. R. Civ. P. 16 advisory committee note to 1983 amendment; *cf. Erff v. MarkHon Industries, Inc.*, 781 F.2d 613, 617 (7th Cir. 1986) ("Attorneys at a pre-trial conference must make a full and fair disclosure of their views as to what the real issues of the trial will be."); *see also* DUCivR 7-1(d).[4]

> Rule 16(c) has confirmed the court's power to identify the litigable issues, and to eliminate frivolous claims or defenses without awaiting the making of a summary judgment or other motion by the parties. But at the same time, counsel bear a substantial responsibility in formulating the triable issues in that they must these issues for the court or they waive the right to have them tried.

3 James W. Moore, et al., *Moore's Federal Practice* ¶ 16.11, at 16-49 (2d ed. Rev. 1994) (footnotes omitted).

Both the Proposed Amended Complaint (Part I) and the Proposed Pretrial Order recite an extended litany of grievances against San Juan County, the San Juan Health

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[4]DUCivR 7-1(d) reads:

> **(d) Final Pretrial Conference.** Trial counsel must attend the final pretrial conference with the court. Preparation for this final pretrial conference should proceed pursuant to Fed. R. Civ. P. 16 and should include (i) preparation by plaintiff's counsel of a recommended pretrial order that is submitted to other counsel at least five (5) days prior to the final pretrial date, and (ii) preparation for resolution of unresolved issues in the case.

Our local rules thus anticipate that trial counsel will be fully prepared to participate in the pretrial examination of the issues contemplated by Fed. R. Civ. P. 16(c).

Services District ("SJHSD") and various individual defendants, ranging from allegations of nepotism in the administration of the SJHSD and San Juan County government to an individual physician's ill-tempered use of derogatory language in referring to medical support staff and patients and his unavailability for specific patient emergencies. (*See* Proposed Amended Complaint at 35 ¶ 58, 35 ¶¶ 50-52,[5] 60 ¶ 146, 63 ¶¶ 156-58, 64 ¶ 159, 66-67 ¶¶ 163-164, 67-68 ¶¶ 165-166; Proposed Pretrial Order at 21 ¶ 58, 21 ¶¶ 51-52, 43 ¶ 146, 44-45 ¶¶ 156-59, 46 ¶¶ 163-164, 47-48 ¶¶ 165-166.) Even so, the Proposed Amended Complaint represented a significant narrowing of the scope of plaintiffs' claims from that of the original complaint—a pleading that alleged a wide range of grievances involving the operation of San Juan County government and the SJHSD,[6] and sought the entry of sweeping declaratory judgments and writs of mandamus requiring, *inter alia*, a GAO[7] audit of federal funds expended in the county in the previous ten years, an IRS audit of payroll tax withholding, the convening of a federal grand jury investigation, and

[5]Part I of the Proposed Amended Complaint includes two series of paragraphs numbered 50 through 58 at pages 34 and 35, and a second sequence of paragraphs 125-168 at pages 54-69; the Proposed Pretrial Order incorporates two similar sequences at pages 20-21 and 38-48, reflective of the fact that counsel simply reiterated almost all of the allegations of Part I of the Proposed Amended Complaint as "Plaintiffs' Statement of Contested Issues of Fact" in Section 5 of the Proposed Pretrial Order.

In this Memorandum Decision & Order, for the sake of clarity, any citations to these numbered paragraphs in either document refer to both the page and paragraph number(s) of the reference.

[6](*See, e.g.*, Complaint (Verified), filed July 25, 2000 (dkt. no. 1), at 141 ¶ 472 ("County Commissioners have laughed at Taxpayers who sought to have San Juan County Commissioners account for what they are spending [and] notice budget items prior to meetings by at least 24 hours."); *id.* at 150-151 ¶514 ("San Juan County has treated the taxpayers with disdain and disrespect and laughed at those taxpayers bringing to the County Commission's attention the statutory provisions the taxpayers believed the County was violating.").

[7]Apparently referring to the General Accounting Office (now the Government Accountability Office). *See What is GAO?*, *at* http://www.gao.gov/about/what.html.

the immediate seizure or sequestration of the defendant entities' financial records by the U.S. Marshal pending that investigation and the GAO and IRS audits. (*See* Complaint, filed July 25, 2000 (dkt. no. 1), at 156 ¶¶ 3, 5 (Prayer for Relief).)

A grievance involving a governmental unit is still a grievance,[8] but a grievance may or may not be "a claim upon which relief can be granted" in a judicial proceeding. Fed. R. Civ. P. 12(b)(6). In attempting to identify and define genuine issues for trial, court and counsel at pretrial undertook to parse the Part I Plaintiffs' allegations in search of viable legal claims. (*See* Transcript of Hearing, dated November 14, 2002 ("Tr. 11/14/02"), *passim*; Transcript of Hearing, dated November 15, 2002 ("Tr. 11/15/02"), *passim*.)

THE PART I PLAINTIFFS

Dr. Steven MacArthur, M.D.

Dr. Steven MacArthur, M.D. is a licensed physician specializing in obstetrics and gynecology. By 1999, he had been in practice in his specialty for about eighteen years (though not in active practice for at least the prior year[9]). On or about December 9, 1999, Dr. MacArthur requested full provisional one-year privileges to practice medicine at health care facilities operated by the SJHSD, including the Blanding Urgent Care Center,

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[8] *Cf.* U.S. Const., Amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). "The First Amendment . . . guarantees the right to petition the Government for a redress of grievances." *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (internal quotation marks omitted).

[9] Tr. 11/14/02, at 6:16-18 (Ms. Rose).)

Blanding Birthing Center, Monument Valley Clinic, Monticello Clinic and San Juan Hospital, the only hospital facility located in San Juan County.[10] The SJHSD did not grant Dr. MacArthur full provisional one-year privileges within thirty days after his request, as contemplated by the SJHSD medical staff bylaws. Nor did it deny them.

Instead, SJHSD administrators (defendants Bradford and Dr. James Redd) granted him two-week "temporary" practice privileges allowing him to treat at least a limited number of patients at SJHSD facilities, and these "temporary" privileges were extended twice, through February 2, 2000.[11]

Dr. MacArthur exercised his "temporary" privileges in providing care to several patients at SJHSD facilities; he also participated with another physician in a delivery by caesarian section in November or December of 1999. In doing so, Dr. MacArthur alleges that he encountered problems involving the availability, quality and sterility of medical instruments and equipment, and some resistance—even antagonism—on the part of

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[10]The next nearest hospital facility to San Juan Hospital in Monticello, Utah is about 65 miles away to the north (Moab) or the east (Cortez, Colorado), and about 85 miles from Blanding. Shiprock Hospital in Shiprock, New Mexico, is between 65 to 85 miles from southern San Juan County. (*See* Proposed Pretrial Order at 19 ¶ 39.)

[11]On December 23, 1999, Dr. MacArthur was informed by Cleal Bradford of the SJHSD that he had been granted "temporary" privileges, which would last from December 23 through January 5, 2000, while his request for full provisional privileges was being considered. According to the defendants, when Dr. MacArthur first discussed his "temporary" privileges with Mr. Bradford, Bradford asked Dr. MacArthur to specify the number of patients that Dr. MacArthur thought he would treat during the temporary privilege period. When Dr. MacArthur indicated that it would be difficult to estimate exactly, Bradford told MacArthur to increase his estimate to cover any potential but unplanned patients. Defendants insist that Dr. MacArthur's "temporary privileges" did not carry any limitation on the actual number of patients that Dr. MacArthur could see during the "temporary" privileges period—but the same may not be true of the number of patients he could treat at SJHSD facilities. On January 10, 2000, Dr. MacArthur's "temporary" privileges were extended from January 5, 2000, through January 25, 2000. On January 26, 2000, Dr. MacArthur was again granted an extension through February 2, 2000.

SJHSD nurses and support staff in treating his patients. He was further troubled by rumors that cast doubt upon his background, professional integrity and expertise, and a local newspaper report that his privileges had been "lifted"by the SJHSD, when in fact no formal determination of his request had yet been made.

On or about February 2, 2000, the SJHSD did not further extend his "temporary" privileges, and had not yet acted on his requests for full provisional privileges. At that point, the delay as to full provisional privileges was explained on the basis that required documentation was missing from his application packet (*viz.*, a copy of his medical license and DEA dispensing license), documentation which he believed had been furnished and in any event was readily available and easily verified.

By February of 2000, Dr. MacArthur had become apprehensive that his request for full provisional privileges may ultimately be denied, albeit for questionable, perhaps even pretextual reasons, and that his "temporary" privileges would soon expire and might not be further extended. He did not press the privileges issue with the SJHSD on or after February 2, 2000. Dr. MacArthur decided to move his medical practice to Ely, Nevada, and did not further pursue his request for full provisional practice privileges at the SJHSD facilities. (*See* Proposed Pretrial Order at 37 ¶ 199.)

Dr. MacArthur now contends that his requests for full provisional one-year privileges were deferred in violation of his constitutional right as a licensed physician to pursue his profession through use of publicly-sponsored medical facilities, and for

pretextual reasons (*viz.*, "missing" documents), the real reasons being (1) discriminatory intent based upon his age (over 40), his associations with Ms. Lyman (gender), and Jewish and Mexican-American physicians (Drs. Penn and Mena), ans his reporting of remarks concerning Dr. Penn; and (2) the intent to limit his competition with other SJHSD medical staff and contract physicians, none of whom are OB/GYN specialists, in serving the needs of women patients in San Juan County. He seeks an award of "damages in excess of $3.5 million dollars and attorney fees" to compensate him for the loss of income anticipated from an estimated ten years' practice in the San Juan County market, resulting from the failure of the SJHSD defendants to grant him full provisional privileges as he requested, and the conduct of those individuals who propagated rumors spreading defamatory falsehoods concerning his background, integrity or professionalism. (Proposed Amended Complaint at 94-95.)

Ms. Michele Lyman, P.A.

Plaintiff Michele Lyman resides in Blanding, Utah, and has been practicing as a licensed Physician's Assistant since 1996. She initially worked for the SJHSD at Montezuma Creek in 1995, completing her preceptorship under the supervision of Dr. Lloyd Val Jones, M.D. in 1996. She then became employed by and practiced under the supervision of Dr. James Redd, M.D., who was in private practice in Blanding; she continued to be supervised by Dr. Jones as a "back-up" as well. While working for Dr. Redd, Ms. Lyman regularly covering Dr. Redd's clinic, and providing some coverage for

the Blanding nursing home, the Blanding Birthing Center, the San Juan Hospital emergency room, and the Blanding Urgent Care Center, a SJHSD facility where she alleges she enjoyed full SJHSD medical staff privileges,[12] and was paid by the District for her "on-call" services. (*See* Proposed Pretrial Order at 29 ¶ 132; Tr. 11/15/02, at 3:4-5:13 (Ms. Rose).) Ms. Lyman ceased working under Dr. Redd's supervision on or about October 7, 1998, but continued providing coverage for the SJHSD through November, 1998. She alleges that she was effectively denied her staff privileges at the Blanding Urgent Care Center within three days after leaving Dr. Redd, and thereafter experienced considerable difficulty in exercising her privileges at SJHSD facilities, even though she was working in Monticello under the supervision of two other Monticello physicians

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[12]While working under the supervision of Drs. Redd and Jones at the Blanding Urgent Care Center, plaintiffs allege that "Mrs. Lyman did the following patient procedures:

a) Took care of acute head trauma's; and,
b) Put in chest tubes; and,
c) Delivered a couple of babies; and,
d) Sutured cuts; and,
e) Dealt with heart attacks; and,
f) Informed families of tragedies; and,
g) Ordered tests; and,
h) Prescribed medications and shots; and,
i) Prescribed tests to be run on the patients; and,
j) Admitted and discharged patients; and,
k) Consulted other specialists by phone; and,
l) Treated patients with infectious diseases; and,
m) Referred patients to the San Juan Hospital and to the other district facilities,

all without a Dr. at her side and without on site supervision, and with no Dr. even in town available for assistance.

(Proposed Amended Complaint at 55-57 ¶ 129.) However, plaintiffs then allege that "Mrs. Lyman and Dr. Key, before he left, informed Dr. Redd and Dr. Jones that this practice of leaving Mrs. Lyman without either Dr. on call was wrong, and that the practice should be changed," (*id.* at 57 ¶ 130), and now characterize that practice as a "Violation of Medical ByLaws and State laws and regs." (*Id.* at 57.)

having SJHSD staff privileges, *viz.*, Dr. Nathaniel Penn, M.D. from November 1998 until July 1999 (when Dr. Penn had moved his practice to Moab),[13] and Dr. Robert Mena, M.D., from July to November 1999 (when Dr. Mena's SJHSD privileges expired). In early 1999, Ms. Lyman and Dr. Penn opened a Blanding Family Practice clinic; Ms. Lyman eventually purchased that clinic from Dr. Penn and operated as a "state-approved off-site independent rural clinic" for three years, until she in turn sold her practice. (Proposed Amended Complaint at 14, 96.)

In December 1999, Ms. Lyman requested a renewal of her SJHSD staff privileges (to be exercised under supervision by Dr. MacArthur), which request was delayed, purportedly because of "missing" documentation in her personnel file, *e.g.*, CPR certification cards, that Ms. Lyman is certain had been properly issued and were current through at least December of 1999. She furnished copies of the missing cards, but alleges that the dates on those cards had been altered.

By the end of March, 2000, formal administrative action on her request for privileges was still being deferred by the SJHSD until the CPR certification card issue was resolved. According to the pleadings, from November 1999 until sometime in 2001, Ms. Lyman may not have had a supervising physician practicing in San Juan County who had staff privileges with the SJHSD, except for the brief period between December 23,

[13](*See* Proposed Amended Complaint at 76 ¶ 203 (In "April, 1999, after working in Monticello under Dr. Penn, Ms. Lyman began a new practice *in Blanding* under the off-site direction of Dr. Nathaniel Penn."); Proposed Pretrial Order at 52 ¶ 203 (same).)

1999 and February 2, 2000, when Dr. MacArthur exercised "temporary" SJHSD privileges.[14] At the time of pretrial, she was again being supervised by Dr. Jones. (*See* Tr. 11/15/02, at 24:9-25, 26:7-11 (Ms. Rose).)

According to the plaintiffs,

> The District employees as a pattern sought to restrain competition, there was inadequate impartiality in 'peer review' or in issuing privileges since the people issuing the privileges are usually in economic competition with those they are giving privileges. Privileges for Mrs. Lyman were de facto denied by nursing personnel and medical staff without any action by the District governance board.

(Proposed Pretrial Order at 14.) As Ms. Lyman's counsel explained at pretrial,

> She's complaining that she could not get the privileges at the hospital when she was working under physicians that had privileges. Her patients she would send over to the clinic, they would not get shots. At one point she was told she couldn't order labs or x-rays. At one point she was told she couldn't set foot in the facility.

(Tr. 11/15/02, at 14-19 (Ms. Rose).)

In addition to the alleged interference with her practice privileges at SJHSD facilities after October 1998, Ms. Lyman alleges harassment and intimidation of, and denial of health care services to her patients by Dr. Redd and other SJHSD support staff, which she contends was intended to inhibit competition by her with the SJHSD medical staff and contract providers. She also alleges a deliberate campaign of harassment

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[14] At pretrial, however, counsel insisted Drs. Penn and Mena continued to supervise Ms. Lyman at a distance even after Dr. MacArthur left for Nevada—concededly doing do at that point without SJHSD privileges—and that when Drs. Penn and Mena no longer supervised her, Ms. Lyman "went to work under Dr. Jones," and therefore "there was never a time that she wasn't without a supervising physician." (Tr. 11/15/02, at 25:1-26:11 (Ms. Rose).)

conducted against her by Dr. Redd since she ceased working for him in October of 1998, intended to hinder and frustrate her professional practice, and cause her severe emotional distress. She contends that Dr. Redd created a misogynistic "hostile environment" in his own medical office in Blanding during the time that she worked under his supervision, and that her personal and professional reputation has suffered as a consequence of defamatory rumors, insinuations and accusations published to her patients and others by one or more of the defendants.

Ms. Lyman seeks an award of "damages in excess of Six (6) Million Dollars" as compensation for "unfair practices" interfering with the exercise of her practice privileges and he relationship with her patients, the harassment and intimidation of her patients, "the terrorism of her children, and herself, and the spreading of rumors that equate to nothing less than criminal defamation for both Michele Lyman and Dr. MacArthur." (Proposed Amended Complaint at 96-98.) She also seeks injunctive relief "to protect patients of Mrs. Lyman and her supervising physician, and give Mrs. Lyman's patients uniform and considerate care with District staff sensitive to the unique needs of the patient," and allowing Ms. Lyman "to minimally go into any facility to at least speak and associate with her patient, regardless of whether she has privileges at the District." According to plaintiff, "ordering the [SJHSD] governance board to make physicians and chiefs of staff accountable for patient complaints and treat all medical providers and physician's equally and uniformly is not contradictory to good public policy." (*Id.* at 93-94.)

Ms. Helen Valdez

The claims of plaintiff Helen Valdez arise out of a single event that took place on April 14, 1999. On that date, Ms. Valdez, accompanied by her sister-in-law, Charlene Gonzales, went to the San Juan Hospital emergency room at about 8:08 a.m. At that time, she was suffering from what was subsequently diagnosed as acute diverticulitis; she was experiencing symptoms including vomiting, cramping, diarrhea and pain, and felt very weak and tired. Ms. Valdez told the emergency room personnel "that she'd been sick, [and] needed to see a doctor."[15] She assisted in filling out a typed patient admittance form, furnishing identification and health insurance information to an emergency room clerk named Judy Kascheaiveaz. She signed the form, as did the clerk. At that point, Ms. Valdez had not described her symptoms to the clerk.[16] Ms. Valdez became ill and went to the lavatory, and when she returned, she observed a nurse in the emergency room, Lori Wallace, R.N., tell the clerk that "she could set both her patients up in the emergency room for the physician," referring to Ms. Valdez and Michael Bailey, another individual who had come to the emergency room with an injured foot.[17]

While Ms. Valdez went to the lavatory a second time, her sister-in-law, Ms. Gonzales, says that she overheard the nurse, Ms. Wallace, tell the clerk to "tell Helen

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[15](Deposition of Charleen Gonzales, dated January 7, 2002, at 12:22-25.)

[16](Deposition of Helen Valdez, dated December 6, 2001, at 18:11-22.)

[17](*Id.* at 17:3-18:10.) At that point, according to Ms. Valdez, she had not spoken with Ms. Wallace and did not know whether or not the nurse "knew anything about [her] symptoms or what was wrong." (*Id.* at 18:11-22.)

[Ms. Valdez] to go to the doctor's office. Dr. Penn's office would open at 9:00."[18] Ms. Gonzales did not hear Ms. Wallace say anything else, and did not converse directly with Ms. Wallace about what she had overheard.[19]

Ms. Gonzalez related the overheard conversation to Ms. Valdez upon her return from the lavatory, and without any further conversation with Ms. Wallace, Ms. Kascheaiveaz, or other emergency room employees, Ms. Valdez left the emergency room, again accompanied by Ms. Gonzales. Instead of going to see her doctor at his office, Ms. Valdez went home.[20] At the time she left the emergency room, Ms. Valdez had not discussed her symptoms with Ms. Wallace or Ms. Kascheaiveaz, whom she had seen in the emergency room,[21] and had not yet seen or been examined by a physician.

Her symptoms subsided for a day but then intensified, and three days later, Ms. Valdez went to the Blanding Urgent Care Clinic, where she was examined by Dr. James Redd, M.D. Dr. Redd diagnosed her condition as acute diverticulitis, for which he prescribed oral antibiotics and a strict liquid diet.[22]

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[18](Deposition of Charlene Gonzales, dated January 7, 2002, at 14:7-17, 20:13-24.)

[19](*Id.*)

[20]Ms. Valdez testified in deposition that she believes Dr. Penn was already at the San Juan Hospital on the morning of April 14th, and that Mr. Bailey, the other emergency room patient at that time, subsequently told her he was examined by Dr. Penn in the emergency room about five minutes after Ms. Valdez had left. (Deposition of Helen Valdez, dated December 6, 2001, at 19:15-20:18.)

[21]Ms. Valdez telephoned the emergency room before going there on the morning of April 14th, and briefly discussed her symptoms with a nurse, someone other than Ms. Wallace. (*Id.* at 18:14-17.)

[22]After leaving the San Juan Hospital emergency room on April 14th, Ms. Valdez did not attempt to

(continued...)

Ms. Valdez' condition did not improve significantly, and two days later she went to Cortez, Colorado, where she was hospitalized and placed on IV fluids and antibiotics. After receiving treatment in the Cortez hospital for several days, Ms. Valdez returned home. Within a few days, she became ill again, and this time was admitted to the University of Utah Hospital, where she was diagnosed as having an obstruction requiring immediate surgery. She underwent surgery, which apparently was successful.

To compensate for "the badge of inferiority she was made to wear as she left the facility she had sought help from, not being able to see the provider of her choice, [and] not being able to feel as though she could return to a facility in Monticello for fear of Laurie Wallace," Ms. Valdez seeks an award of "damages of $350,000 and attorneys fees." (Proposed Amended Complaint at 92-93.)

THE PART I PLAINTIFFS' ALLEGATIONS AGAINST THE INDIVIDUAL DEFENDANTS

Besides the SJHSD and its parent entity, San Juan County,[23] the Part I Plaintiffs have named several individual defendants, originally and in the Proposed Amended Complaint: Commissioner Tyron Lewis, Commissioner Bill Redd, Craig Halls, Reid

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[22](...continued)
contact her physician, Dr. Penn, because she believed he was out of town that weekend. (*Id.* at 26:15-22.) Nor did she try to contact Dr. Penn when her symptoms worsened after seeing Dr. Redd because she did not want to be admitted to San Juan Hospital for treatment. She chose to go to Cortez, Colorado instead. (*Id.* at 35:4-21.)

[23]San Juan County is organized as a political subdivision of the State of Utah under the Utah Constitution and Utah Code Ann. §§ 17-50-101 *et seq.* (2001). The SJHSD is organized as a special service district under the Utah Code Ann. § 17A-2-1301 *et seq.* (2004), and is funded in part through tax revenues. San Juan County appoints the members of the SJHSD governance board. *See* Utah Code Ann. § 17-2A-1326 (2001).

Wood, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Dr. James Redd, Dr. Lloyd Val Jones, Dr. Manfred Nelson, Richard Bailey, Marilee Bailey, Ora Lee Black, Gary Holliday, Laurie Schafer a/k/a "Laurie Shafer,"[24] Lori Wallace a/k/a "Laurie Walker,"[25] Carla Grimshaw, Gloria Yanito, and Julie Bronson.

The County Commissioners

By the time of pretrial, two San Juan County Commissioners remained as defendants in this action in their individual capacities: Bill Redd and Ty Lewis. Both apparently were also named as defendants for their conduct as SJHSD Board members.[26] Plaintiffs allege very few specific facts concerning Commissioners Redd or Lewis individually;[27] instead, their allegations are pleaded against the *Commission* or the

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[24]Ms. Schafer was omitted from the caption of the original Complaint and apparently was added by a document entitled "Amendments to the Complaint Corrections of Errors," filed August 1, 2000 (dkt. no. 3). *See* Fed. R. Civ. P. 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ."). She was again omitted from the captions of both the Proposed Amended Complaint and the Proposed Pretrial Order, in each instance without explanation. Nevertheless, she appears to have been included among the defendants represented by Mr. Harrison in preparation of the Proposed Pretrial Order.

[25]The captions of the original Complaint, the Proposed Amended Complaint and the Proposed Pretrial Order refer to a defendant named "Laurie Walker"—in reality, Lori Wallace, R.N., a former SJHSD employee who was working in the San Juan Hospital emergency room on April 14, 1999 when plaintiff Helen Valdez was there seeking treatment. (*See* Answer to Complaint by Laurie Walker (Lori Wallace), filed September 25, 2000 (dkt. no. 46) (name correction noted on docket).)

[26]Commissioner Redd was a member of the SJHSD Board for a brief period in late 1998 and early 1999, and Commissioner Lewis was a member from late 1998 to mid-1999. (Proposed Pretrial Order at 67 ¶ 2.)

[27]"County Commissioner Ty Lewis made the statement and determination in a public meeting that the County would drive out qualified private competitors," (Proposed Pretrial Order at 29 ¶ 135); "[i]n areas of health care, Commissioner Ty Lewis is against a private entity that would or will compete with the District." (*Id.* at 20 ¶ 50; Proposed Amended Complaint at 34 ¶ 50 (same)).

County:

> 106. The County Commission and District Board, by not policing and supervising the medical staff and leaving carte blanch[e] decisions on who gets on staff and does not get on staff, contributes directly to the private use of the staff's use of the governmental processes.
> * * * *
> 110. The lack of the District Board or County Commission in taking action to supercede medical staff and head of medical staff privilege-granting decisions, and deliberate indifference to investigating complaints, holding hearings, and exercising their government authority to foster economic competition as mandated by statutes, falls outside any 'political' action, and directly is intended to control the business processes of competitors of District employee physicians and P. A.s and those medical staff physicians directly contracting with the District.

(Proposed Amended Complaint at 42-43 ¶¶ 106, 110; Proposed Pretrial Order at 31 ¶¶ 146, 150 (same). *See* Proposed Amended Complaint at 34 ¶ 52 ("The County and District had a de facto policy of deliberate indifference to those who complained of suffering from Dr. Redd and other District staff members.").)

County Attorney Craig Halls

As to San Juan County Attorney Craig Halls, the Part I Plaintiffs note that he "is the brother in law of Rick Bailey, District CEO and County Commission administrator." (Proposed Pretrial Order at 21 § 51.)[28] With respect to certain administrative problems at the San Juan Hospital identified by the Utah Department of Health at or about the time of the event complained of by Ms. Valdez, plaintiffs state that "[t]he Health District and

[28]Plaintiffs assert that "Cleal Bradford and James Redd had access to District board members and County Commissioners and the County Attorney as relatives and close friends, in a highly rural and isolated area," whereas plaintiffs MacArthur and Lyman did not. (Proposed Pretrial Order at 32 ¶¶ 151-152.)

County Commissioners were informed of these problems in a Board meeting, with an executive session attended by Commissioner Bill Redd and County Attorney Craig Halls." (*Id.* at 60 ¶ 236; Proposed Amended Complaint at 87 ¶ 236 (same).) More generally, the Part I Plaintiffs allege that the County Commissioners, County Administrator and County Attorney "behaved in a deliberately indifferent manner, failed to adequately investigate the problems Mrs. Lyman and Dr. MacArthur identified in the District, did not hold hearings on the matters, did not enforce, or take any actions to rectify the situations identified by Mrs. Lyman and Dr. MacArthur." (Proposed Amended Complaint at 16-17.) "A pattern of deliberated indifference as a policy was exhibited by the County Commission, County Attorney, Health District board, administrators and medical staff." (*Id.* at 17.)

SJHSD Board Members: Atcitty, Lewis, Housekeeper, Adams, Shumway & Holliday

Defendants Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway and Gary Holliday are or at relevant times were members of the Board of Trustees of the San Juan Health Services District. (Proposed Pretrial Order at 67 ¶ 3.) Defendant Cleal Bradford was also a member of the SJHSD Board from approximately February 1999 until June 1999, and from approximately June 22, 1999 until April 2001, Bradford served as executive director of the SJHSD. (*Id.*)

In the Proposed Amended Complaint, the Part I Plaintiffs plead very few factual

allegations involving specific SJHSD Board members.[29] The Proposed Amended Complaint alleges nothing regarding intentionally discriminatory acts or other culpable individual conduct of defendants Atcitty, Shumway, Housekeeper,[30] John Lewis, and Adams. Other than noting his status as a SJHSD Board member, the Proposed Amended

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[29]Plaintiffs allege that

> 223. [On] December 21, 1999 Ms. Lyman Attended San Juan Health Care Services board Meeting to discuss and attempt to resolve her problems with SJHSD staff with the SJHSD board. She requested to have a public meeting so the public could fully understand the issues involved in the health care system their tax dollars support.
>
> 224. SJHSD governance board chairman Roger Atcitty stated that he and SJHSD Patsy Shumway and SJHSD Karen Adams had discussed the situation before the official meeting and had decided that the grievance meeting with SJHSD governance board would be private. Such a decision being made before the meeting and without public input appears to be in violation of Utah's Open Meeting law. (cmplt. #162-168).

(Proposed Amended Complaint at 83-84 ¶¶ 223-224; *see* Proposed Pretrial Order at 57 ¶ 223-224 (same).)

> John Housekeeper did do some investigation for Mrs. Lyman, but labeled Dr. MacArthur a troublemaker because Dr. MacArthur was perceived by him to be associated with his current counsel in a lawyer/client relationship when Dr. MacArthur appeared at the District Board meeting in December, 1999.

(*Id.* at 22.)

> Mrs. Valdez, Dr. MacArthur, Mrs. Lyman informed the District of their problems and to no avail. Dr. MacArthur and others reporting problems to Board member Patsy Shumway and John Housekeeper were labeled either troublemakers or Dr. Redd detractors.

(Proposed Pretrial Order at 14.)

> The Defendant community leaders Rick Bailey, Ty Lewis, John Lewis, Karen Adams, Cleal Bradford, with the power and authority over the entire district, did nothing to investigate, find and hold accountable the responsible parties, and carried out a state identified de facto policy that diminished the standard of care for the patients.

(*Id.* at 27 ¶ 112(b).)

[30]Concerning Mr. Housekeeper, the Proposed Amended Complaint alleges that Ms. Lyman "suffered from Dr. Redd driving by her home honking his horn," and relates that "[t]he horn honking subsided notably when John Housekeeper was notified as board member that it was going on and was asked to tell Dr. Redd to stop the honking." (Proposed Amended Complaint at 17, 22-23.) Plainly this scenario would not serve as a basis for any liability on the part of Mr. Housekeeper.

Complaint says nothing at all about defendant Gary Holliday.

Rather than addressing alleged conduct of individual Board members, the Plaintiffs appear to be complaining of alleged *inaction* by the Board *as a Board*: "The governance board displayed a pattern of not holding doctors or others accountable for interfering in doctor /patient relations. The County was aware of the problems and did nothing to investigate, hold hearings, or resolve the provider and patients' and public's concerns as evidenced in petitions with hundreds of signatures." (Proposed Pretrial Order at 14; *see id.* at 31 ¶ 149 ("District Board members and CEOs stated they entrusted medical staff privileging to the medical staff or head of medical staff.").) In plaintiffs' view:

> The District has illegally operated the district by having County Commissioners as board members, by not holding doctors accountable for violations of the law, by not following their own medical by-laws, by not applying policies equally across the board to all persons, by not overriding letters or memos of doctors that set policy, without board approval, while stifling economic competition in the area.

(*Id.* at 74.)

The SJHSD Administrators: Wood, Bailey & Bradford

Like their allegations against the SJHSD Board members, plaintiffs' claims against SJHSD administrators Wood, Bailey and Bradford are largely footed upon allegations of *inaction* in response to plaintiffs' grievances:

> 109. Reid Wood and Rick Bailey did nothing to assist Mrs. Lyman in exercising privileges with the District that the District Board never officially and formally terminated.

110. Reid Wood, Cleal Bradford, and Rick Bailey as CEOs never held the medical Staff chiefs accountable for policies effecting services of P.A.s, whether written or de facto.

111. Reid Wood, Cleal Bradford, and Rick Bailey as CEOs never contradicted the medical Staff chiefs for policies effecting services of Michele Lyman, whether written or de facto.

112. . . . .

b. The Defendant community leaders Rick Bailey, Ty Lewis, John Lewis, Karen Adams, Cleal Bradford, with the power and authority over the entire district, did nothing to investigate, find and hold accountable the responsible parties, and carried out a state identified de facto policy that diminished the standard of care for the patients.

* * * *

126. CEO's Cleal Bradford, Reid Wood, and Rick Bailey did nothing to help these doctors [MacArthur, Penn & Mena] have improved working conditions within the district, or renew their licenses or privileges. All three doctors were not employees of the District when supervising Mrs. Lyman.

* * * *

188. Reid Wood and all other CEO'S in this complaint, ignored Mrs. Lyman's attempts to rectify her situation, or exacerbated it.

* * * *

190. December 10,1998 - Mrs. Lyman called SJHSD administrator Reid Wood twice to see if she could resolve some of the issues she was having with the nurses at the hospital since joining Dr.Penn and to resolve some of the problems with the clinic. Reid Wood did not return her calls. The third Mrs. Lyman called she was told by Carla Grimshaw that he was out of the office.

(Proposed Pretrial Order at 26-28 ¶¶ 109-111, 112(b),126; *id.* at 49 ¶ 188, 50 ¶ 190; *see* Proposed Amended Complaint at 71-72 ¶¶ 188, 190 (same).)

As for Mr. Bradford, the plaintiffs describe the process by which he granted temporary practice privileges to Dr. MacArthur, (Proposed Pretrial Order at 25-26 ¶¶ 98-

101, 104-105), and then assert that "CEO Cleal Bradford made the determination in granting Dr. MacArthur limited temporary privileges that it was best for the District if referrals to the District facilities came from District doctors. Dr. MacArthur was not employed by the District." (*Id.* at 29 ¶ 134.)[31] Finally, plaintiffs assert:

> 151. Cleal Bradford and James Redd had access to District board members and County Commissioners and the County Attorney as relatives and close friends, in a highly rural and isolated area.
>
> 152. Dr. MacArthur and Michele Lyman did not have this familial and close friend relationship with Commissioners and District Board members.
>
> 153. Cleal Bradford who signed off on privileges as the District CEO lobbied the Board and County Commission, and medical staff, in meetings with a plurality of the decision-making body, without Mrs. Lyman or Dr. MacArthur being present.

(*Id.* at 32 ¶¶ 151-153; *see* Proposed Amended Complaint at 44 ¶¶ 111-113 (same).)

What conceivable cause of action the latter allegations would pertain to is not readily apparent. The balance of the allegations against Wood, Bailey and Bradford assert a failure to take affirmative steps to investigate and remedy plaintiffs' grievances involving members of the SJHSD medical and support staff, similar to plaintiffs' claim against the individual SJHSD Board members.

Laurie Schafer (a/k/a Laurie Shafer)

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[31] Plaintiffs also allege that "Dr. MacArthur had an incident report allegedly filed against him by Marilee Bailey, Julie Bronson, Laurie Shafer, Cleal Bradford that was never discussed with him or placed in his District file, and is a report that he considers to be untrue." (Proposed Amended Complaint at 39 ¶ 88; Proposed Pretrial Order at 25 ¶ 96 (same).)

Laurie Schafer served at relevant times as Patient Care Director for the SJHSD. Plaintiffs allege: (1) that "Dr. MacArthur had an incident report allegedly filed against him by Marilee Bailey, Julie Bronson, Laurie Shafer, Cleal Bradford that was never discussed with him or placed in his District file, and is a report that he considers to be untrue." (Proposed Pretrial Order at 25 ¶ 96); (2) that "Mrs. Shafer noticed the dates [on Ms. Lyman's CPR cards] were in error in medical staff meeting," that "[t]he Medical staff and Cleal Bradford and Laurie Shafer discussed Mrs. Lyman's CPR card problems of wrong dates without Mrs. Lyman being present," that "Mrs. Lyman's CPR cards were reviewed and found to be appropriate on more than one occasion by Carla Grimshaw and Laurie Shafer," and that "[t]he medical staff and Cleal Bradford and Laurie Shafer unanimously decided to publish the altered cards to the American Heart Association by vote of the medical staff, who was considering privileges for Mrs. Lyman, without Mrs. Lyman being present." (*Id.* at 32 ¶ 164-165, 34 ¶ 174); (3) "The medical staff, Cleal Bradford, Laurie Shafer, Carla Grimshaw failed to notify Dr. MacArthur of any missing documents in his application packet." (*Id.* at 35 ¶ 182); (4) "After Dr. MacArthur missed this February 2000 meeting, Cleal Bradford, Laurie Shafer, Dr. Redd met with San Juan Record editor Bill Boyle and discussed Dr. MacArthur's privileges with Mr. Boyle. Dr. MacArthur's privileges was private information." (*Id.* at 36 ¶ 195); (5) "Mrs. Lyman was told that her friendship with Laurie Shafer would be over as she knew it if Mrs. Lyman associated herself with Dr. Penn." (*Id.* at 47 ¶ 137); and (5) on one recent occasion when

Ms. Lyman was treating a patient at the Blanding Birthing Center under Dr. Jones' supervision, Ms. Shafer allegedly told "Mrs. Lyman and another nurse of Dr. Jones that they would have to leave. Mrs. Lyman and the nurse finished caring for the patient." (*Id.* at 63 ¶ 254). Further, they allege that on December 16,1998, Ms. Lyman was told she did not have SJHSD privileges and that SJHSD staff were not to take orders from her. "Ms. Lyman asked Ms. Yanito who gave her this order and she stated that Laurie Schafer and Dr. Redd," (*id.* at 48-49 ¶ 170), and that "Laurie Schafer called later in the day and stated that Ms. Lyman could use the lab and xray *only during Dr. Penn's office hours*, otherwise Ms. Lyman did not have privileges." (*Id.* at 49 ¶ 186 (emphasis in original). *See* Proposed Amended Complaint at 39 ¶ 88; 46-49 ¶¶ 132-133, 138, 142, 150; 51 ¶ 163; 59 ¶ 137; 69-71 ¶¶ 170, 186; 91-92 ¶ 254 (same).)

Marilee Bailey, R.N.

At relevant times, defendant Marilee Bailey, R.N., worked as a nurse on the SJHSD support staff. Plaintiffs allege that Ms. Bailey is the wife of defendant Richard Bailey, and that like Laurie Schafer, "Dr. MacArthur had an incident report allegedly filed against him by Marilee Bailey, Julie Bronson, Laurie Shafer, Cleal Bradford that was never discussed with him or placed in his District file, and is a report that he considers to be untrue." (Proposed Pretrial Order at 25 ¶ 96; *see* Proposed Amended Complaint at 39 ¶ 88 (same).)

Ora Lee Black

Plaintiffs allege that "Ora Lee Black, as manager of Blanding clinic and birthing center, posted a paper on the walls within site of the patients stating that Mrs. Lyman had no privileges at SJHSD. Later the limited privileges of lab and exray [sic] were extended to her for her patients as required by State law," and that SJHSD "Staff had previously voted for her privileges and then the County, Board, and medical staff did nothing while District staff Ora Lee Black, Dr. Redd, Gloria Yanito denied her the same. Some privileges as to labs and exrays [sic] were eventually restored." (Proposed Pretrial Order at 49 ¶ 187, 54 ¶ 209; *see* Proposed Amended Complaint at 71 ¶ 187 (same).) Further,

> September 16, 1999 -Etta (Ms. Lyman's secretary) was told by Ora Lee Black that Ms. Lyman would not be allowed to order labs until Ms. Lyman sent a letter to Dr. Redd stating who her supervising physician was. (Ms. Lyman had already sent a letter to administration stating that the State DOPL had approved Dr. Penn in Moab as her supervising physician and Dr. Robert Dr. Mena in Monticello as her back up supervising physician as he was closer that Dr. Penn and could back up any emergencies for admits for Ms. Lyman at the San Juan Hospital). By then, Dr. Dr. Mena had quit the San Juan Health Care Services as an employee and had started a private practice. (cmplt. #149).

(*Id.* at 55 ¶ 213; *see* Proposed Amended Complaint at 79-80 ¶ 213 (same).)

Carla Grimshaw

Carla Grimshaw is a SJHSD employee. Plaintiffs allege that "[l]ess than 24 hours prior to the February 2, 2000 medical staff meeting, Carla Grimshaw called Mrs. Lyman's office to invite Mrs. Lyman and Dr. MacArthur to that meeting";[32] that "Carla Grimshaw

[32]On "February 1, 2000 Carla Grimshaw calls Ms. Lyman's office to say that Ms. Lyman and Dr. MacArthur need to be at Medical staff Meeting in the a.m. at 0800. Ms. Grimshaw states nothing about their (continued...)

delivered copies of Mrs. Lyman's file to her," and that "Mrs. Lyman and Carla Grimshaw, custodian for the records, acknowledge the CPR cards were missing from Mrs. Lyman's credentialing files while in the District's custody"; that "Mrs. Lyman's CPR cards were reviewed and found to be appropriate on more than one occasion by Carla Grimshaw and Laurie Shafer"; that "Carla Grimshaw, records custodian, stated that [Dr. MacArthur's] medical license and DEA license was missing," and "allegedly wrote a note to Mr. Bradford saying Dr. MacArthur was missing only his DEA license and State of Utah Medical License," but that "[t]he medical staff, Cleal Bradford, Laurie Shafer, Carla Grimshaw failed to notify Dr. MacArthur of any missing documents in his application packet." (Proposed Pretrial Order at 26 ¶ 102, 32 ¶ 156, 33 ¶ 161, 34 ¶ 170, 35 ¶ 182, 184, 36 ¶ 191; *see also* Proposed Amended Complaint at 44-50 ¶¶ 114-159 ("Credentialing Document Problems").) Plaintiffs also recount that on May 5, 1999,

> Andrea Bianchini (Ms. Lyman's secretary) faxe[d] Ms. Lyman's ACLS, PALS and BLS heart resuscitation American Heart Association certification cards to Judy at the hospital at the administration's request. Dr. Penn and Ms. Lyman have been requesting her privileges be restored through Reid Wood. Andrea also called Carla Grimshaw to make sure that the certifications have reached her. Grimshaw state[d] that the faxed cards have arrived and that Medical staff reviewed the certifications, found them in order, and the packet has been placed in her personnel file.

(*Id.* at 53 ¶ 207; *see* Proposed Amended Complaint at 77 ¶ 207.)

Gloria Yanito

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[32](...continued)
privileges being an agenda item, or that medical staff would making any decisions about those privileges." (Proposed Pretrial Order at 58-59 ¶ 229.)

Plaintiffs allege that on

> December 16, 1998 - On this day, Ms. Lyman attempted to send a patient to the E.R. in Blanding for treatment. As soon as the patient got to Blanding, Christine Singer (who began working for Dr. Penn in December 1998) took a call from Gloria Yanito, RN at the Blanding Urgent Care. Ms. Yanito stated that Ms. Lyman did not have privileges and that Ms. Lyman "can not give orders of any kind or use any of the county facilities". Ms.Singer then told Ms. Lyman, with several witnesses sitting in the office. Ms. Lyman immediately called Ms. Yanito back and asked Yanito to repeat the Message. Yanito repeated, "you do not have privileges. We are not supposed to take any orders from you and you are not allowed to set foot in any of the county facilities". Ms. Lyman asked Ms. Yanito who gave her this order and she stated that Laurie Schafer and Dr. Redd. Ms. Lyman then attempted to call Laurie Schafer and was told she was not in. Ms. Lyman spoke with Carla Grimshaw and told her she wanted this order in writing, Grimshaw stated that she would let Laurie know. Ms. Lyman also attempted to call Reid Wood, he was not in.(Cmplt. #130)

(Proposed Pretrial Order at 48-49 ¶ 184; Proposed Amended Complaint at 69-70 ¶ 170 (same).) They further allege that Ms. Lyman had been granted SJHSD privileges, but "then the County, Board, and medical staff did nothing while District staff Ora Lee Black, Dr. Redd, Gloria Yanito denied her the same," (*id.* at 54 ¶ 209), apparently referring to the December 16, 1998 conversation with respect to Ms. Yanito.

Julie Bronson

Plaintiffs allege that Julie Bronson, a nurse employed by the SJHSD, circulated a false rumor that Dr. MacArthur, *inter alia*, had previously lost practice privileges due to a felony conviction:

> January 31,2000- Louisa Lyman, of the Utah State Public Health system calls Ms. Lyman's office and states that nurse Julie Bronson has said that Dr. MacArthur lost his privileges to perform epidurals due to a felony

> conviction, that during a delivery the nurse came to Dr. MacArthur in the Dr's lounge and told him that the OB was ready to push and he purportedly said,"I'm going to have an orgasm", and that Dr. MacArthur spent time in prison for tax evasion– All of which is totally untrue and without any foundation whatsoever. Louisa called her office and first spoke to Christine. Ms. Lyman called back and Louisa Lyman repeated this story. Ms. Lyman stated the story was untrue.

(Proposed Amended Complaint at 84-85 ¶ 228; *see* Proposed Pretrial Order at 58 ¶ 228 (same).) They also allege, as noted above, that "Dr. MacArthur had an incident report allegedly filed against him by Marilee Bailey, Julie Bronson, Laurie Shafer, Cleal Bradford that was never discussed with him or placed in his District file, and is a report that he considers to be untrue." (*Id.* at 39 ¶ 88; *see* Proposed Pretrial Order at 25 ¶ 96 (same).)

Lori Wallace, R.N. a/k/a Laurie Walker

As summarized above, Plaintiffs allege that on April 14, 1999, plaintiff Helen Valdez (accompanied by her sister-in-law, Charleen Gonzales) came to the San Juan Hospital emergency room, seeking medical care for an illness later diagnosed as acute diverticulitis. At that time, SJHSD employee Lori Wallace, R.N., was working in the emergency room. While Ms. Valdez was in the hospital lavatory, she alleges that Ms. Gonzales overheard Lori Wallace tell the emergency room clerk "to go to Dr. Penn's clinic." (Proposed Amended Complaint at 23; Proposed Pretrial Order at 13; *id.* at 23 ¶ 81 ("Mrs. Valdez was told by Mrs. Gonzales that Nurse Wallace had told the receptionist that Dr. Penn's clinic was open and Mrs. Valdez should go to the clinic.").) Without any

direct conversation with Lori Wallace, Ms. Valdez decided to leave the emergency room, again accompanied by Ms. Gonzales, and return home. Plaintiffs allege that Ms. Valdez "was turned away, when accompanied by her Mexican-American appearing sister-in-law, by nurse Laurie Wallace"; at the same time, plaintiffs allege that "[t]he white young male with no insurance in the ER waiting area was seen by Dr. Penn almost immediately after Mrs. Valdez left." (Proposed Amended Complaint at 86 ¶ 232-233; *see* Proposed Pretrial Order at 22 ¶ 66 ("Mrs. Valdez' neighbor who was a white young male and had not insurance was seen immediately.").) Plaintiffs pleaded no other factual allegations against Ms. Wallace.

Dr. Lloyd Val Jones, M.D.

Dr. Lloyd Val Jones, M.D., is a licensed physician practicing in Blanding, Utah, who at relevant times has provided services under contract with the SJHSD. Plaintiffs allege that "For Mrs. Lyman's claims, at times the [SJHSD] medical staff consisted of Dr. Penn, Dr. Mena, Dr. Jones, Dr. Nelson, Dr. Cook, Dr. Redd." (Proposed Amended Complaint at 30-31 ¶ 28; *see* Proposed Pretrial Order at 18 ¶ 28 (same).[33]) According to plaintiffs,

> 32. Dr. Redd and Dr. Jones and Dr. Cook and Dr. Nelson did not approve Mrs. Lyman having privileges unless her doctor was a medical staff member and then only if the physician was in the same town as she.

[33] According to plaintiffs, With the exceptions of Dr. Jones and a Monument Valley clinic doctor, all other physicians and P.A.'s within San Juan District are employees of San Juan District." (Proposed Pretrial Order at 20 ¶ 43.)

> 33. While the policy for P.A.s appears neutral, it effected only Michele Lyman in how it was applied, monitored, and carried out.
>
> 34. Mrs. Lyman had no other place to apply for hospital privileges.
>
> 35. Mrs. Lyman's patients at times stopped going to her as they needed to use the District emergency facilities for ailments and were told they could not.

(*Id.* at 31 ¶¶ 32-35.) Plaintiff Lyman alleged that her privileges were "severely limited by Dr. Redd and Dr. Jones with no action by the board of directors," recounting a single conversation in mid-1999:

> 209. Dr. Penn and Ms. Lyman attended the Medical staff Meeting for June, 1999. Dr. Penn and Ms. Lyman requested full privileges be restored and Dr. Redd and Jones both stated that only if Dr. Penn was willing to sit in Blanding with Ms. Lyman while Ms. Lyman took ER call and they would not supervise me. Mr. Bryant as a P.A. working under Dr. Jones while Dr. Jones was not in Blanding, had no such restraints. Mrs. Lyman pointed out that she covered the ER (Blanding urgent care clinic) in Blanding by herself on many occasions. There was no response. (Cmplt. 137-145) Staff had previously voted for her privileges and then the County, Board, and medical staff did nothing while District staff Ora Lee Black, Dr. Redd, Gloria Yanito denied her the same. Some privileges as to labs and exrays [sic] were eventually restored.
>
> 210. Dr. Penn then suggested to medical staff that the only reason that Dr. Redd was against Ms. Lyman's privileges was because Dr. Redd was mad at Ms. Lyman for quitting Dr. Redd and Dr. Redd couldn't take it. To this Dr. Redd responded,"So what"! Dr. Jones then made the comment that Ms. Lyman had a rather large following of patients and that when he was taking ER call he didn't want Ms. Lyman to be able to see her patients at will and thus "dip into his ER money". They left with the staff's edict that Ms. Lyman could call into the ER (Blanding Urgent Care) for shots. However, Ms. Lyman tried on several occasions to call in injections to the ER (Blanding Urgent Care Clinic) and was denied every time. Ms. Lyman always had to call Dr. Penn's office and have him call the order in. (Cmplt.

146)

(*Id.* at 78-79 ¶¶ 209-210; *see* Proposed Pretrial Order ¶¶ 209-210 (same).)

Circumstances change, and by the time of pretrial, Ms. Lyman was working for Utah Navajo Health Systems, once again *under Dr. Jones' supervision*, (*see* Tr. 11/15/02, at 24:9-25 (Ms. Rose)); she points to two recent incidents involving patients in Dr. Jones' and her care:

> 253. Within the last 14 or so days, a patient of Dr. Jones and Michele Lyman's was told, when she called the Birthing Center in labor, that the Birthing Center was shut and she would just have to travel to Monticello. Dr. Jones' staff verified that indeed the BCC was claiming they were SHUT. The patient presented at Blanding Family Clinic, now owned by Utah Navajo Health Systems, and was found to be too far progressed to travel anywhere. Time was of the essence. Mrs. Lyman's supervising physician was denied patient care by the District he has full privileges with. The lady delivered in the Blanding Family Clinic and was then transported to Monticello for observation. The Blanding Family Clinic is taxpayer supported. There is no record of this type of patient of a Dr. Redd being told the Birthing Center was shut.
>
> 254. In another instance, a woman in labor was bleeding to death and she and the baby were in a very dangerous situation. Dr. Jones and Mrs. Lyman transported the woman to the Birthing Center and did an immediate c section on the unconcious or nearly unconcious mother. Both mom and baby were saved. As Dr. Jones was cleaning up, Dr. Fisher and Laurie Shafer were telling Mrs. Lyman and another nurse of Dr. Jones that they would have to leave. Mrs. Lyman and the nurse finished caring for the patient. This incident occurred prior to the Clinic being 'shut' when Michele's next patient was in labor and delivered in a clinic.

(Proposed Amended Complaint at 91-92 ¶¶ 253-254; *see* Proposed Pretrial Order at 62-63 ¶¶ 253-254 (same).)

Dr. Manfred Nelson, M.D.

Dr. Manfred Nelson, M.D., is a licensed physician practicing in San Juan County and at relevant times was a member of the SJHSD medical staff. Plaintiffs' allegations against Dr. Nelson—few as they are—essentially parallel those pleaded against Dr. Jones concerning restriction of Ms. Lyman's privileges in mid-1999, with the addition of the assertion that "Dr. Nelson sent a letter severely criticizing Mrs. Lyman and he is on Medical Staff and has never met her, spoken to her, or worked with her. His writings are the best evidence of the types of rumors he was being told, and the damages the medical staff were seeking to inflict upon Mrs. Lyman." (Proposed Pretrial Order at 61 ¶ 248.)

Dr. James Redd, M.D.

As noted above, Dr. James Redd, M.D., a Blanding, Utah physician, maintained a private medical practice in Blanding until he became a SJHSD employee in early 1999; at relevant times thereafter, Dr. Redd served as District medical staff director. Early in her career, plaintiff Lyman worked as a Physician Assistant under Dr. Redd's and Dr. Jones' supervision. She ended that arrangement in October 1998, and sought supervision by other physicians practicing in the area.

From a review of plaintiff Lyman's allegations at the time of pretrial, it becomes plainly apparent that Dr. Redd is the primary focus of those allegations. Plaintiffs plead a litany of factual allegations against Dr. Redd, recounting a series of incidents involving the making of derogatory remarks or infliction of other verbal abuse, interference with Ms. Lyman's exercise of SJHSD staff privileges from and after the time she left his

supervision in October 1998, and harassment and intimidation of patients who had some relationship with Ms. Lyman and/or her supervising physicians (Drs. Penn, Mena, MacArthur and now, Jones). (*See* Proposed Pretrial Order at 41-45 ¶¶ 133(D)-(F), 138, 144-150, 153, 156-159; *id.* at 45-48 ¶¶ 162-163, 165-166; *id.* at 48-50 ¶¶ 167-186, 193; *id.* at 62-63 ¶¶ 253-254 (quoted *supra*); *see also* Proposed Amended Complaint at 58-76 ¶¶ 133(D)-(F), 138, 143-150, 153, 156-195, 199-205; *id.* at 77-78 ¶¶ 208 (emergency room patient "was told by Dr. Redd that she must choose between Ms. Lyman/Dr. Penn and Dr. Redd as a health care provider," and that "if the patient chose Ms. Lyman, the patient could never use the E.R. again.").) Plaintiffs assert that "[t]he District medical staff director, Dr. Redd has a long standing policy of animus toward women both as employees and as patients," (*id.* at 20 ¶ 51), borne out in the incidents recounted in their pleadings, and that Dr. Redd demeaned and disparaged the other physicians with whom Ms. Lyman had associated. (*Id.* at 56 ¶¶ 215-216.) They also allege a pattern of personal harassment and annoyance directed against Ms. Lyman by Dr. Redd:

> 196. Dr. Redd was witnessed by others as driving by Mrs. Lyman's home, frequently honking.
>
> 197. Mrs. Lyman reports that Dr. Redd followed Mrs. Lyman's about 10 year old daughter in his car for a period of time, frightening the daughter.
>
> 198. Mrs. Lyman and her nurse Christine Singer, experienced numerous flat tires over a two week or so period, with no foreign items found in the tires. These flat tires occurred at the office and at their homes.

(*Id.* at 51 ¶¶ 196-198; *see* Proposed Amended Complaint at 73-74 ¶¶ 196-198 (same).)

THE PART I PLAINTIFFS' THEORIES OF LIABILITY

As summarized in the Proposed Pretrial Order, Part I of the Proposed Amended Complaint asserts an array of causes of action arising under federal and Utah state law, including:

(1) Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (2000);

(2) Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (2000);

(3) Health Care Quality Improvement Act, 42 U.S.C. § 11112 (2000);

(4) Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2000);

(5) "Medicare Patient Bill of Rights," 42 U.S.C. § 1395a (2000);

(6) 42 U.S.C. § 1981 (2000);

(7) 42 U.S.C. § 1985(3) (2000);

(8) 42 U.S.C. § 1983 (2000);

(9) § 4 of the Clayton Act, 15 U.S.C. § 15 (2000) and § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (2000);[34]

(10) Utah Constitution, art. I, §§ 1, 7, 25, 26, 27;

(11) Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1 *et seq.* (2001);

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[34]More recently, plaintiffs' counsel has invoked the Utah Antitrust Act, Utah Code Ann. §§ 76-10-911 through 76-10-926 (2003), in addition to the federal antitrust statutes. (Memorandum in Support of Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), at 4.)

(12) Utah Civil Rights Act, Utah Code Ann. §§ 13-7-1 *et seq.* (2001);

(13) interference with contract and with prospective business relations;

(14) "state *common law* defamation (also a U. S. Constitutional right to reputation as guaranteed by the Ninth Amendment)";[35]

(15) "Federal common law and Utah contract common law and statutory provisions that prohibit contracts of adhesion, bad faith, and lack of fair dealing. Utah Code Ann. 78-12-25(1) (1996)," including the implied covenant of good faith and fair dealing;[36]

(16) "privacy rights and statutory entitlements to have their credential files and patient files accurately kept by the district under Medicaid and Utah Health Department statutes and regulations";

(17) negligent and intentional infliction of emotional distress; and

(18) fraud.

(*See* Proposed Pretrial Order at 3-6.)

Generally, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "Accordingly, a pleading must 'give[ ] fair notice and state[ ] the elements of the claim plainly and

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[35]Plaintiffs' counsel now refers to "civil and criminal defamation with malice," apparently invoking Utah Code Ann. § 76-9-404 (2003) in addition to the common law theories. (*Id.*)

[36]Plaintiffs' counsel would now extend this theory to reach interference with a plaintiff's "right to pursue his profession and business affairs by lack of good faith and fair dealing inherent and mandated in all Utah business relations." (*Id.*)

succinctly.'" *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (quoting 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 8.13 at 8-111 (2d ed.1983)). To give such notice, a pleading must set forth specific facts as the basis for the plaintiffs' claims, not merely legal conclusions. Without specific facts, "claims are little more than conclusory allegations, which are insufficient to state a claim for relief." *Swoboda v. Dubach*, 992 F.2d 286, 289-290 (10th Cir. 1993) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)).

The parties may test the legal sufficiency of claims by motion under Fed. R. Civ. P. 12(b)(6) or 56, and as explained above, "Rule 16 empowers district courts to weed out frivolous claims." *Smith v. Gulf Oil Co.*, 995 F.2d 638, 644 (6th Cir. 1993). "There is no reason to require that [the elimination of frivolous claims] await a formal motion for summary judgment," Fed. R. Civ. P. 16(c)(1), advisory committee note to 1983 amendment, and it certainly "'is not inconsistent with the general purpose of Rule 16' to use this rule 'to determine whether there are any issues remaining in the case that justify proceeding to a full trial on the merits.'" *Chavez v. Illinois State Police*, 251 F.3d 612, 654 (7th Cir. 2001) (quoting 6A Charles A. Wright, et al., *Federal Practice & Procedure* § 1529, at 301 (2d ed.1990)).

In evaluating whether the plaintiffs' claims are maintainable or are frivolous, court and counsel must examine them within the framework of their various legal theories; the facts alleged as the basis for these claims must be considered in terms of the essential

elements of each cause of action.

(1) Plaintiffs' Civil RICO Claims (18 U.S.C. §§ 1961 *et seq.*)

In order to state a civil RICO claim, a plaintiff must allege that he or she suffered (1) an injury to his or her business or property because the defendant(s), (2) while involved in one or more enumerated relationships with an "enterprise," (3) engaged in a pattern of racketeering activity or collected an unlawful debt. *See* 18 U.S.C. §§ 1961-1968 (2000).

Predicate Acts of "Racketeering Activity" (18 U.S.C. § 1961(1))

Among the essential elements required to establish civil liability under the RICO statute, plaintiffs must show, *inter alia*, that the defendants have conducted the affairs of an identifiable "enterprise" through a "pattern of racketeering activity," that is, that the defendants have committed a continuous series of related criminal acts in violation of one or more of the statutes listed in 18 U.S.C. § 1961(1) ("racketeering activity" defined). 18 U.S.C. § 1962. *See, e.g., BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100 (10th Cir. 1999) ("To establish a civil RICO claim under 18 U.S.C. § 1962(c), [plaintiff] must show that the [defendants] '(1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1541 (10th Cir. 1993) (citing *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273 (10th Cir. 1989)).") Defendants "need not engage in the stereotypical mobster behavior to come within the bounds of civil RICO," *Smith v. Our Lady of the*

Lake Hosp., Inc., 960 F.2d 439, 447 (5th Cir. 1992) (citing *United States v. Turkette*, 452 U.S. 576, 580-81, 591(1981)), but they must nevertheless be shown to have participated in continuing criminal violations constituting an identifiable "pattern of racketeering activity." *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).[37]

The Proposed Amended Complaint points to mail fraud (18 U.S.C. § 1341), witness tampering (18 U.S.C. § 1512) and interference with commerce by threats (18 U.S.C. § 1951) as the predicate acts of racketeering activity pertinent to plaintiffs' claims asserted in this case.[38] (Proposed Amended Complaint at 12.)

(a) 18 U.S.C. § 1341 - Mail Fraud

18 U.S.C. § 1341 (2000) reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or

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[37]The statute of limitations applicable to civil RICO actions is the four-year limitations period governing civil enforcement actions under the Clayton Act, 15 U.S.C. § 15b. *See, e.g.*, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273 n. 12 (10th Cir. 1989).

[38]"The various acts of racketeering activity described in the statute are often referred to as 'predicate acts' because they form the basis for liability under RICO." *BancOklahoma Mortgage Corp.*, 194 F.3d at 1102 (citing *Bacchus Industr., Inc. v. Arvin Industr., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991)).

Plaintiffs' counsel also refers to "(d) illegal destruction or tampering with confidential documents in a federally contracted facility;" and "(e) intimidation of witnesses for monetary gain," (Proposed Pretrial Order at 3 ¶ (5)), but these are not found among the offenses enumerated in the statute's definition of "racketeering activity" and thus cannot serve as RICO predicate acts. 18 U.S.C. § 1961(1) ("racketeering activity" defined).

> delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

In order to prove the offense defined in § 1341 in a criminal proceeding, the government must prove the following essential elements: (1) that the defendant knowingly devised or knowingly participated in a scheme or artifice for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; (2) that the pretenses, representations or promises were material, that is, they would reasonably influence a person to part with money or property; (3) that the defendant did so with the intent to defraud; and (4) that in advancing, or furthering, or carrying out this scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises, the defendant used the mail, or any private or commercial interstate carrier, or caused the same to be used by someone else.

To establish mail fraud as a predicate act of racketeering activity for the purposes of a civil RICO claim, plaintiffs must plead and prove facts establishing each of these essential elements as to each occurrence, as to each predicate act alleged as part of the requisite "pattern of racketeering activity." Rule 9(b) of the Federal Rules of Civil Procedure require that allegations of mail fraud be pleaded with particularity. *See, e.g.,*

Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 989-90 (10th Cir. 1992) (predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) requires particularity in pleading the RICO predicate acts of mail fraud).

Plaintiff Lyman alleges that her CPR certification cards, "a necessary component of her ability to obtain privileges were altered purposefully," that "she was not notified immediately that her cards were in some way in error," that "the cards were stolen from her file at least on two if not three occasions," that "*the forged documents were mailed to the American Heart Association*," and that "the doctors would have profited from Mrs. Lyman not being able to work . . . ." (Proposed Pretrial Order at 63 ¶ 255 (emphasis added); *see id.* at 14 ("forged documents were sent in the US mail to harm her reputation with the American Heart Association who oversees the cpr classification certification programs Mrs. Lyman is obligated to pass"); *id.* at 29 ¶¶ 129-131 ("The U. S. mail was used to mail the cards while the local doctors and medical providers could profit from limiting Mrs. Lyman's competition and reputation with the American Heart Association"); *id.* at 34 ¶¶ 174-175.)

Plaintiff Lyman thus complains that her CPR cards were altered and/or forged, and alleges "the use of the mail system to send fraudulent cards" to the American Heart Association. (*Id.* at 66.) Yet mail fraud is not committed simply by sending false statements through the mail; the mails must have been used to further a scheme to defraud

or obtain money or property through false pretenses. *See BancOklahoma Mortgage Corp.*, 194 F.3d at 1102. Here, Ms. Lyman's CPR cards, even if altered or forged, and thereby becoming false or "fraudulent" representations in one sense, are not themselves alleged to be the means of obtaining money or property, and are not such as to "reasonably influence a person to part with money or property" as required to prove a violation of § 1341. Plaintiffs allege that "the local doctors and medical providers could profit from limiting Mrs. Lyman's competition and reputation with the American Heart Association," (Proposed Pretrial Order at 29 ¶ 131), but do not claim that any of the defendants obtained or schemed to obtain money or property by means of the altered or forged CPR cards.

Here, the Part I Plaintiffs have failed to plead facts establishing the essential elements of mail fraud (a scheme or artifice to defraud, *viz.*, to obtain money or property by means of false or fraudulent pretenses, representations, or promises, and the use of the mails in furtherance of the scheme) as against any of the named defendants.

(b) 18 U.S.C. § 1512 - Witness Tampering

Section 1512 of Title 18, United States Code prohibits specific conduct, including physical force, threats of physical force, or intimidation, threatening, "corrupt" or "misleading" persuasion or harassment, that is intended to "influence, delay or prevent" a witness from attending or testifying in an official proceeding, or intended to cause testimony, records, documents, or other objects to be withheld, concealed, altered or

destroyed in order to impair their availability for use in an official proceeding. 18 U.S.C. § 1512(a), (b), (c), (d) (2000). Section 1512 prohibits only the coercive conduct specifically described in its subsections; the legislative history reflects Congress' rejection of broadly inclusive language in favor of "the specific conduct narrowly described in the final version of the statute." *United States v. Dawlet*, 787 F.2d 771, 774-775 (1st Cir. 1986) (citing *United States v. Lester*, 749 F.2d 1288, 1295-1297 (9th Cir. 1984)); *cf. McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1039-1040 (11th Cir. 2000) (assertion that defendants attempted to deter plaintiff by force, intimidation, or threat from testifying before a federal grand jury about employer's activities by threatening him with job-related sanctions alleged a violation under the federal witness tampering statute).

The Part I Plaintiffs assert that defendant "Dr. Redd informed the head of the local nursing home that the nursing home patients would no longer see Dr. Cook as a result of making a witness statement," that "[w]itnesses have requested that they not be used to give testimony due to fear of retaliation and loss of jobs," and that [o]ne witness has stated she is petrified her relatives will not stay employed or her children will not be seen at District facilities if she testifies." (Proposed Pretrial Order at 61 ¶¶ 244-246; Proposed Amended Complaint at 88-89 ¶¶ 244-246.) None of these allegations set forth facts evidencing conduct by any named defendant that falls within the scope of the statute.

Prospective fact witnesses may indeed feel fearful, anxious or apprehensive about

how their testimony may be responded to by those against whom it may be offered. In some cases, potential witnesses may fear for their very lives, and with good reason. Federal law affords such witnesses some degree of protection. *See generally* 18 U.S.C. § 1513 (retaliation against witness); 18 U.S.C. §§ 3521-3528 (2000) (federal witness protection program). But fear, anxiety and apprehension on the part of a prospective witness as to a future loss of employment, denial of services, or other adverse personal consequences do not equate with the culpable criminal conduct on the part of a defendant that violates § 1512. A defendant must do *something*—use physical force, threats of physical force, or intimidation, threatening, corrupt or misleading persuasion or harassment—that is intended to "influence, delay or prevent" a witness from attending or testifying in an official proceeding, or intended to cause testimony, records, documents, or other objects to be withheld, concealed, altered or destroyed in order to impair their availability for use in an official proceeding, in order to run afoul of the witness tampering statute. 18 U.S.C. § 1512(a)-(d).[39] The Proposed Amended Complaint alleges

[39]Section 1512 addresses specific affirmative coercive or misleading conduct intended to inhibit or influence *future* witness testimony or the availability of evidence yet to be offered in a pending or future federal proceeding. *See United States v. Rose*, 362 F.3d 1059, 1067-1068 (8th Cir. 2004); *United States v. Davis*, 357 F.3d 726, 728-729 (8th Cir. 2004), *vacated on other grounds*, 125 S. Ct. 1049 (2005) (mem.); *United States v. Romero*, 54 F.3d 56, 62 (2d Cir. 1995) ("knowing interference with a potential communication between an individual who might become a witness and federal law enforcement officials falls within the ambit of Section 1512. We have thus previously noted that the statute covers 'potential' witnesses. *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984) ('[section] 1512 explicitly covers "potential" witnesses')"); *United States v. Maggitt*, 784 F.2d 590, 593 (5th Cir. 1986) ("18 U.S.C. § 1512 punishes only those threats made with the intent to cause the witness to withhold future testimony").

nothing of that kind.[40]

(c) 18 U.S.C. § 1951 - Interference with Commerce by Threats

The Anti-Racketeering Act of 1934, Act of June 18, 1934, ch. 569, 48 Stat. 979, codified at 18 U.S.C. § 1951 (2000), makes it a federal offense to commit robbery or extortion that in any way or degree obstructs commerce. To prove guilt, the government must prove that a defendant committed extortion or robbery, and that such conduct interfered with interstate commerce. Though § 1951 is often referred to as the "Hobbs Act," the Hobbs Act (Act of July 3, 1946, ch. 537, 60 Stat. 420) itself amended the 1934 Anti-Racketeering Act to include extortionate conduct by labor unions, which had been held to be exempt under the statute's original language. *See United States v. Local 807, Teamsters Union*, 118 F.2d 684, 687–88 (2d Cir. 1941), *aff'd*, 315 U.S. 521, 539 (1942).

The courts read the legislative history of the 1934 Act to indicate that Congress enacted the 1934 legislation to eliminate racketeering by organized gangs, which was

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[40]More recently, plaintiffs' counsel has asserted that Dr. MacArthur and Ms. Lyman suffered retaliation in violation of *18 U.S.C. § 1513* for having informed the SJHSD's governance board of remarks made by SJHSD administration and staff concerning Dr. Nathaniel Penn being a "little New York Jew." (*See* Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), at 17); Memorandum in Support of Plaintiff Lyman's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' [sic] Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed December 28, 2004 (dkt. no. 696), at 24.) Section 1513 prohibits violent retaliation (*e.g.*, killing, attempting to kill, causing bodily injury, damaging tangible property) against any person for attending or furnishing testimony or evidence in a federal proceeding or providing information to a law enforcement officer "relating to the commission or possible commission of a Federal offense . . . ." 18 U.S.C. § 1513(a), (b). Plaintiffs have alleged no federal proceeding, no reporting of a federal offense, and no violent retaliation. Even § 1513(e), which prohibits "interference with the lawful employment or livelihood of any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense," simply cannot be read to reach the reporting of ethnic remarks to a local hospital's governance board.

Counsel's assertion that § 1513 was violated by conduct so plainly outside the clear language of the statute raises serious concerns under Fed. R. Civ. P. 11.

found to have a substantial effect on interstate commerce, particularly the interstate transportation industry. *See United States v. Local 807, Teamsters Union*, 315 U.S. 521, 528–530 (1942) (citing H. Rep. No. 1833, 73d Cong. 2d Sess. (1934)). The 1934 Act was first introduced in the Senate in response to a Senate Committee on Interstate Commerce investigation of "rackets" and "racketeering," which the Committee defined as "an organized conspiracy to commit the crimes of extortion or coercion, or attempts to commit extortion or coercion," as defined by "the penal law of the State of New York and other jurisdictions." S. Rep. No. 75–1189, 75th Cong., 1st Sess., at 3 (1935). The Committee reported that many businesses were being coerced to pay "dues" for "protection" from gangsters—most of whom were actually affiliated with those offering the "protection"—who would engage in the "hijacking" of trucks used to transport merchandise in interstate commerce, as well as price-fixing and other coercive conduct harmful to commerce. *Id.* at 9, 21-23; *Local 807, Teamsters Union*, 315 U.S. at 529–30 (citing H.R. Rep. No. 73-1833, at 2 (1934) (the 1934 Act was intended to make unlawful racketeering "in connection with price fixing and economic extortion directed by professional gangsters.")). According to the 1934 bill's sponsor, Senator Copeland, the legislation was intended to "render more difficult the activities of predatory criminal gangs." S. Rep. No. 73-1440, at 1 (1934). The same was true of the 1946 legislation:

> In arguing for the adoption of the Hobbs Act, Congressman Hobbs, the sponsor of the Act, emphasized that the 1934 Act was being amended to address highway robbery by organized labor unions and was intended to protect individuals and goods in interstate commerce. Additional testimony

> during the debate in the House of Representatives clearly establishes that the Hobbs Act was passed to protect individuals "trying to deliver food into the various big cities in our nation" and those "who feel they have a right to drive down . . . public highways and streets . . ." According to Mr. Hobbs, the "sole and simple purpose" of the Hobbs Act is to protect interstate commerce and "free the highways and streets of this country of robbers." Thus, the Hobbs Act was originally a subject matter specific statute that applied only to actions of organized gangs, and, like other subject matter specific statutes, was passed by Congress only after findings that the specific type of crime so addressed presented a national problem. This interpretation of the Hobbs Act is further supported by the initial and long held position of the Justice Department that the robbery provision of the Act was to be utilized only in instances "involving organized crime, gang activity, or wide-ranging criminal activity."

Michael McGrail, *The Hobbs Act after* Lopez, 41 B.C.L. Rev. 949, 956-57 (2000) (footnotes omitted). Since its 1946 re-enactment in the Hobbs Act, the Court has read § 1951 to "'manifes[t] . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.'" *United States v. Culbert*, 435 U.S. 371, 373 (1978) (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960)).

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), however, the Court read the Hobbs Act's definition of "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C. § 1951(b)(2), to require "that a person must 'obtain' property from another party to commit extortion," that is, that there must be "not only the deprivation but also the acquisition of property." 537 U.S. at 404. The anti-abortion protestors in *Scheidler* did not violate § 1951 for

purposes of civil RICO liability because in physically obstructing the operation of clinics performing abortions, they "neither pursued nor received 'something of value from' respondents that they could exercise, transfer or sell"; thus, under § 1951, "merely interfering with or depriving someone of property" was not "sufficient to constitute extortion." *Id.* at 405.

Even if taken as true in their entirety, none of the factual allegations of Part I of the Proposed Amended Complaint identify any property 'obtained' or acquired from the plaintiffs by San Juan County, the SJHSD, or any of the named individual defendants with plaintiffs' consent "induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[41] Nor do any of the additional factual assertions set forth more recently in the Part I Plaintiffs' combined motions for reconsideration and summary judgment identify any property or thing of value obtained and acquired by the defendants from these plaintiffs through extortionate means. (*See* Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 664); Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for

[41]Plaintiffs assert that Ms. Lyman's patients "were told that even in an emergency they would not be seen by the District if they continued to visit Mrs. Lyman for health care. Mrs. Lyman believes threatening patients that emergency care will be denied in an emergency is extortion of the lowest kind." (Proposed Pretrial Order at 63 ¶ 255.) A threat of denial of emergency medical care by a public facility may be found to be improper for a number of reasons, but such a threat does not constitute "extortion" within the meaning of the Hobbs Act.

Summary Judgment, filed November 23, 2004 (dkt. no. 670); Plaintiff Lyman's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed December 28, 2004 (dkt. no. 695).) These plaintiffs are not engaged in the interstate transportation of goods, or in the sale of merchandise flowing through interstate commerce. Nor, for that matter, do any of plaintiffs' allegations describe conduct of the kind of "organized crime, gang activity, or wide-ranging criminal activity" on the part of the named defendants that Congress had in mind in enacting the statute.

A private civil action under the federal RICO statute remains available as a means for those persons who have been "injured in [their] business or property" by reason of a violation of RICO's criminal provisions to seek legal and equitable remedies for their injuries from those whose ongoing criminal conduct has caused them harm. *See* 18 U.S.C. § 1964. However, civil RICO liability does not serve merely as a device to multiply the money damages available to parties embroiled in more commonplace civil litigation,[42] or as a means to vilify civil litigants by labeling them as "racketeers," gangsters, extortionists and criminals. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) ((a civil RICO plaintiff only has standing if "he has been injured in his

[42]The potential for abuse of the civil RICO remedy was recognized some years ago: "'Given the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses prior to bringing such suit or risk sanctions for failing to do so.'" *Chapman & Cole v. Itel Container Int'l*, 865 F.2d 676, 685 (5th Cir.), *cert. denied*, 493 U.S. 872 (1989) (quoting Black & Magenheim, *Using the RICO Act in Civil Cases*, Houston Law., Oct. 1984, at 20, 24-25 (Oct. 1984)).

business or property by the conduct constituting the violation").

Where a plaintiff's amended complaint fails to allege specific facts stating the elements essential to her federal claim under RICO, dismissal with prejudice is warranted. *See, e.g.*, *Martinez v. Martinez*, 207 F.Supp.2d 1303, 1305-09 (D.N.M. 2002) ("[n]o reasonable or competent counsel who had read any Tenth Circuit cases concerning civil RICO complaints, and the requisites thereof, could believe that the amended complaint filed in this case stated a viable RICO claim."), *aff'd in part, vacated and remanded in part on other grounds*, 62 Fed.Appx. 309, 2003 WL 1904807 (10th Cir. 2003); *Condict v. Condict*, 826 F.2d 923, 929 (10th Cir. 1987) (affirming dismissal of civil RICO claim; "this is but an unsuccessful effort to dress a garden-variety fraud and deceit case in RICO clothing").

(2) Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. § 248)

The Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 U.S.C. 694, *codified at* 18 U.S.C. §§ 241, 248 (2000), addresses the conduct of anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services," or that person is "exercising or seeking to exercise the First Amendment right of religious

freedom at a place of religious worship[.]"[43] Though it is primarily a criminal statute, § 248(c)(1) provides that "[a]ny person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action" seeking "temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses," or as an alternative to compensatory damages, "an award of statutory damages in the amount of $5,000 per violation." 18 U.S.C. § 248(c)(1)(a), (b).

There appears little doubt that patient access to a hospital, clinic, birthing center, or physician's office in San Juan County that offers "medical, surgical, counseling or referral services relating to . . . pregnancy" comes within the scope of protection afforded by this statute. 18 U.S.C. § 248(e)(1), (5). The plaintiffs in this case, however, have not alleged that the defendants engaged in the specific offense conduct prohibited by the statute, that is, the use of "force or threat of force or . . . physical obstruction" to "intentionally injure[], intimidate[] or interfere[] with" patient access to reproductive health care facilities and services. Part I of the Proposed Amended Complaint makes no allegation of facts showing that any defendant has used physical force or obstruction to obstruct or intimidate anyone seeking to obtain or provide reproductive health services.

[43] Section 248(a)(3) also prohibits conduct which "intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship." 18 U.S.C. § 248(a)(3).

(3) Health Care Quality Improvement Act, 42 U.S.C. § 11112 (2000)

Following the Pretrial Conference, the Part I Plaintiffs apparently moved to dismiss their claims under the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101-11152 (2000), and the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2000), on grounds of mootness. (*See* Plaintiffs' Motion to Dismiss, filed November 25, 2002 (dkt. no. 463).) At the hearing on January 7, 2003, the court granted plaintiffs' motion. (*See* Minute Entry, dated January 7, 2003 (dkt. no. 480).)[44]

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[44] As the case proceeded, Ms. Valdez' EMTALA and HCQIA claims were specifically dismissed on motion by her own counsel. (*See* Plaintiffs' Motion to Dismiss, filed November 25, 2002 (dkt. no. 463).) As written, that motion moved "for an order dismissing *the defendants' motions to dismiss* EMTALA and Health Care Quality Improvement Act claims, due to mootness"—apparently making what amounted to a motion to strike the defendants' moving papers. (*Id.* (emphasis added); *see* Defendants' Motion to Dismiss Plantiffs' EMTALA Claims, filed November 13, 2002 (dkt. no. 447).) The Plaintiffs' Motion to Dismiss was not accompanied by an explanatory memorandum.

However, as docketed, calendared and heard, the Plaintiffs' Motion to Dismiss was treated as a motion to dismiss *Ms. Valdez' EMTALA and HCQIA claims* as moot:

> THE COURT: . . . Many of the items that we dealt with before have heretofore been resolved. I do note that plaintiff's motion to dismiss the EMTALA and Health Care Quality Improvement Act Claims, docket number 463, filed November 25th are now moot and I take it ought to be, you don't have any problem with that determination, *your motion, that is you're dismissing those claims?*
>
> MS. ROSE: Uh, yes.
>
> THE COURT: Isn't that right, the EMTALA and Health Care Quality Improvement Act claims?
>
> MS. ROSE: That would be fine.
>
> THE COURT: It was your motion and I think we can grant that at this point without further ado. . . .

(Transcript of Hearing, dated January 7, 2003, at 4:23-5:10 (emphasis added).) The dismissal of plaintiff's EMTALA and HCQIA claims was duly noted in the Minute Entry. (See Minute Entry, dated January 7, 2003 (dkt. no. 480) ("Grants, motion to dismiss **(Dkt # 463)**." *See also* Transcript of Hearing, dated February 24,

(continued...)

Apart from the question of mootness and the effect of plaintiffs' own motion, it appears in any event that the Part I Plaintiffs' claim would fail to state a legally cognizable claim. Title IV, § 412 of the HCQIA, 42 U.S.C. § 11112, the provision cited by plaintiffs, does set standards for professional review actions affecting a health practitioner's practice privileges,[45] but it does so in the context of a statutory scheme that shields the review participants from civil liability arising from the review action if that action satisfies § 11112's procedural criteria.[46] *See* 42 U.S.C. § 11111; *Decker v. IHC*

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[44](...continued)
2003, at 30:19-31:8 (The Court).)

[45]HCQIA § 412 reads in part:

> **(a) In general.** 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).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111 (a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. §11112(a) (2000).

[46]Section 411 of HCQIA provides:

> **(1) Limitation on damages for professional review actions**

(continued...)

Hospitals, Inc., 982 F.2d 433, 436 (10th Cir. 1992).

The court of appeals has determined that the HCQIA does not create a private civil cause of action in favor of plaintiffs whose staff privileges at a medical facility have been adversely affected by a professional or peer review action. *See, e.g.*, *Hancock v. Blue Cross-Blue Shield*, 21 F.3d 373, 374 (10th Cir. 1994). Therefore, in the context of a grievance by a health care professional whose staff privileges have been limited or denied by a peer review process, the question posed by the HCQIA is not whether the participants in the review process are *liable under the HCQIA*, but whether the HCQIA operates to immunize those participants from private civil liability based upon other legal theories. Therefore, as a matter of law, the Part I Plaintiffs can plead no claim "for violation of the guarantees found in" the HCQIA as such.

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[46](...continued)

> If a professional review action (as defined in section 11151 (9) of this title) of a professional review body *meets all the standards specified in section 11112 (a) of this title*, except as provided in subsection (b) of this section—
>
> > (A) the professional review body,
> >
> > (B) any person acting as a member or staff to the body,
> >
> > (C) any person under a contract or other formal agreement with the body, and
> >
> > (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

42 U.S.C. § 11111 (2000) (emphasis added). Section 11111 makes an express exception as to liability under "any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* and the Civil Rights Acts, 42 U.S.C. 1981, *et seq.*," and for actions by the Attorney General under the federal antitrust laws. *Id.*

(4) Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd (2000)

> The Emergency Medical Treatment and Active Labor Act (EMTALA), as added by § 9121(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 164, and as amended, 42 U.S.C. § 1395dd, places obligations of screening and stabilization upon hospitals and emergency rooms that receive patients suffering from an "emergency medical condition."

Roberts v. Galen of Virginia, Inc., 525 U.S. 249, 250 (1999). Among other provisions, EMTALA requires the emergency departments of hospitals participating in the federal Medicare program to provide appropriate medical screening and stabilizing treatment for all persons who present themselves at the emergency room and request care:

> **(a) Medical screening requirement.** In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.
>
> **(b) Necessary stabilizing treatment for emergency medical conditions and labor**
>
> **(1) In general**
>
> If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—
>
> > **(A)** within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
> >
> > **(B)** for transfer of the individual to another medical facility in

accordance with subsection (c) of this section.

42 U.S.C. § 1395dd(a), (b) (2000). Subsection (c) of § 1395dd sets standards governing the transfer of emergency room patients to other health care facilities, and subsection (d) provides for the enforcement of § 1395dd's requirements through civil monetary penalties collected by the Secretary of Health and Human Services and through private civil actions by "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section." 42 U.S.C. § 1395dd(d)(2) (2000).[47] The statute has been construed as imposing strict liability on hospitals for violations of its screening and stabilization requirements. *See Abercrombie v. Osteopathic Hosp. Founders Ass'n*, 950 F.2d 676, 681 (10th Cir. 1991); *Stevison v. Enid Health Systems, Inc.*, 920 F.2d 710, 713 (10th Cir. 1990).

A hospital's duty to provide the required emergency medical screening and stabilizing treatment to persons requesting such care cannot be delayed by any inquiry as

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[47]Subsection (d) of § 1395dd reads:

> **(2) Civil enforcement**
> **(A) Personal harm** Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.
>
> **(B) Financial loss to other medical facility** Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.
>
> **(C) Limitations on actions** No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

to that person's "method of payment or insurance status." 42 U.S.C. § 1395dd(h). Nor is the participating hospital's duty to provide emergency screening and treatment under § 1395dd(a) and (b) limited to those persons who are regularly in the care of physicians or health care providers having current staff privileges or practice privileges at that hospital.

As to plaintiff Helen Valdez, counsel at the time of pretrial asserted the "violation of Mrs. Valdez' entitlement to an equal standard of care and to be examined upon her presentation to the emergency room of the hospital as mandated by 42 USC 1395dd," apparently invoking EMTALA's private civil remedy. (Proposed Amended Complaint at 14 ¶ (22); Proposed Pretrial Order at 5 ¶ (23).)

The event in question occurred on April 14, 1999, yet plaintiff Valdez did not plead a claim under § 1395dd(d)(2) of EMTALA in the original complaint in this action filed on July 25, 2000,[48] and did not attempt to plead such a claim until the Proposed Amended Complaint, submitted on November 6, 2002—one week before pretrial and

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[48]Plaintiffs' counsel now points to two paragraphs out of 523 in the original Complaint as invoking the EMTALA civil remedy:

> 365. In violation of EMPTALA [sic] and COBRA violations Mrs. Valdez was not examined, checked, asked what her problem was, nor had her temperature and blood pressure checked while Mrs. Valdez was in such a condition.
>
> * * * *
>
> 377. Mrs. Valdez had a right to expect an examination by a Dr. Of her choice at San Juan Hospital at the time of presentment with her malady pursuant to her insurance contracts and EMPTALA [sic] and COBRA statutes and regulations.

(Complaint (Verified), filed July 25, 2000 (dkt. no. 1), at 108-109 ¶¶ 365, 377.) Besides the fact that neither paragraph accurately states an EMTALA requirement, the original Complaint makes *no* reference to EMTALA or COBRA in its extended statement of the plaintiffs' "Causes of Action," (*id.* at 118-154 ¶¶ 443-523).

Clearly, the original Complaint did not give fair notice to the SJHSD of any claim of liability under EMTALA, even if one had been intended.

"more than two years after the date of the violation with respect to which the action is brought," 42 U.S.C. § 1395dd(d)(2)(C)—as an attachment to the "Plaintiffs' Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," (dkt. no. 438).

On the eve of pretrial, the SJHSD defendants filed a Rule 12(b)(6) motion to dismiss plaintiff's EMTALA claim as asserted in the Proposed Pretrial Order on the ground of the two-year statute of limitations. (*See* Defendants' Motion to Dismiss Plaintiffs' EMTALA Claims, filed November 13, 2002 (dkt. no. 447); Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's EMTALA Claim, filed November 13, 2002 (dkt. no. 448).)

Absent leave to amend her pleadings under Fed. R. Civ. P. 15(a) & (b), or incorporation of the claim as a triable issue in a pretrial order pursuant to Fed. R. Civ. P. 16(c), even taking all of Ms. Valdez' alleged facts as true, the conclusion would necessarily follow that her claim under EMTALA is time-barred.[49]

(5) "Medicare Patient Bill of Rights" (42 U.S.C. § 1395a)

Plaintiffs' counsel points to § 1802 of Title XVIII of the Social Security Act, 42 U.S.C. § 1395a, as an additional footing for plaintiff Helen Valdez' claims, alleging a "violation of Mrs. Valdez' Medicare Patient Bill of Rights to see the medicare provider of her choice," and a violation of her right "to freely contract and associate with the provider

[49]Her EMTALA claim fails on its merits as well. (*See infra* at 109 & n. 81.)

of her choice as found in 42 USC 1395a." (Proposed Amended Complaint at 13, 14 ¶¶ (19), (24); Proposed Pretrial Order at 5, 6 ¶¶ (20), (25).)

Concerning Medicare beneficiaries, § 1395a provides in part:

> **§ 1395a. Free choice by patient guaranteed**
>
> **(a) Basic freedom of choice** Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services.

This statute, the the so-called Medicare "freedom of choice provision," reflects one of the fundamental principles upon which the Medicare program was founded, and guarantees Medicare beneficiaries the freedom to choose health care providers, who would then be paid by Medicare at the program's prescribed rates. Section 1395a(a) bars interference by the Secretary of Health and Human Services (or his subordinates in the administration of the Medicare program) with a beneficiary's selection of a physician.[50]

Nothing in the Proposed Amended Complaint or in counsel's proffers at the Pretrial Conference suggests that the Secretary, Medicare program officials—or anyone else involved in HHS administration of Medicare benefits—attempted to interfere with Ms. Valdez' choice of health care providers from among those qualified to participate in the Medicare program. No claim whatsoever is made that Dr. Penn or any other qualified provider was denied Medicare payment or reimbursement for medical care provided to

[50]The remaining language of this section gives limited statutory authority for beneficiaries to contract for health care services, *e.g.*, with managed care networks. 42 U.S.C § 1395a(b).

Ms. Valdez as an eligible Medicare recipient.

(6) 42 U.S.C. § 1981

Section 1981 of Title 42, United States Code reads:

> **(a) Statement of equal rights.** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> **(b) "Make and enforce contracts" defined.** For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment.** The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (2000).[51] Section 1981 addresses intentional racial discrimination in the making and enforcement of contracts: "A § 1981 . . . plaintiff must prove by a preponderance of the evidence that the defendant intentionally discriminated against him or her on the basis of race." *Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295

[51] 42 U.S.C. § 1981 (2000) was originally enacted as part of the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, the first of the Reconstruction Era civil rights acts, and was grounded upon the Thirteenth Amendment, ratified a year earlier. The provision was re-enacted in 1870, two years after the ratification of the Fourteenth Amendment. *See* Act of May 31, 1870, ch. 114, §16, 16 Stat. 144. It was amended more recently by the Civil Rights Act of 1991, Pub. L. No. 102-166, title I, § 101, 105 Stat. 1071 (1991) (designated then-existing provisions as subsection (a) and added subsections (b) and (c)). *See also Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d 1065, 1080 (10th Cir. 2002) (dissenting opinion) ("The protection afforded by these statutes finds its roots in the Thirteenth and Fourteenth Amendments. . . ." (citations omitted).)

F.3d 1065, 1073 (10th Cir. 2002) (citing *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1288 (10th Cir. 2000)). As to the scope of the protection afforded by § 1981:

> The Supreme Court has construed the language that secures to all the same contracting rights as "white citizens" to refer only to the racial (as opposed to, say, gender-based or religious) character of the prohibited discrimination . . . . [W]hites as well as blacks may assert contract denial claims under § 1981 on the basis of race.

Harold S. Lewis, Jr., *Civil Rights and Employment Discrimination Law* § 1.2, at 3 (1997) (footnote omitted) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *see also Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d at 1081 n.3 (dissenting opinion) ("In this Circuit, a racial identity is the cornerstone of a section 1981 and 1982 cause of action and a necessary element of a plaintiff's prima facie case. *See Shawl v. Dillards, Inc.*, No. 99- 1409, 2001 WL 967887, at *2 (10th Cir. Aug.27, 2001) ("To establish a claim under § 1981, the plaintiffs must show that (1) they are members of a protected class . . . ." (citing *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1101 (10th Cir. 2001))).". The Supreme Court understands "race" to include "ancestry," defined as genetic membership in an "'ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'" *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (quoting *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 517 (3d Cir. 1986)).

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.

Id. (footnote omitted). However, "ancestry" as "race"—as a prohibited basis for discrimination for purposes of § 1981—does not embrace national origin, religion or status as an alien. *Id.* at 613 ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981."); *King v. Township of East Lampeter*, 17 F.Supp.2d 394, 417 (E.D.Pa. 1998) ("The scope of § 1981 is not so broad as to include disparity in treatment on the basis of religion, sex, or national origin."), *affirmed*, 182 F.3d 903 (3d Cir.) (mem.), *cert. denied*, 528 U.S. 951 (1999); *Vuksta v. Bethlehem Steel Corp.*, 540 F.Supp. 1276, 1281 (E.D.Pa.1982), *affirmed*, 707 F.2d 1405, *cert. denied*, 464 U.S. 835 (1983).

Thus, to state a claim under § 1981, the plaintiffs must show that (1) they are members of an identifiable racial or ancestral group; (2) the defendant had an intent to discriminate on the basis of their race or ancestry; and (3) the discrimination concerned one or more of the activities enumerated in the statute, *viz.*, the making and enforcing of a contract. *See Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994); *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). A § 1981 claim for "interference with the right to make and enforce a contract must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Morris v. Office Max, Inc.*, 89 F.3d 411, 414-15 (7th Cir. 1996) (citing *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989)). Moreover, "It has

been held that '[p]rudential limitations on standing ordinarily require that an action under section[] 1981 . . . be brought by the direct victims of the alleged discrimination because they are best situated to assert the individual rights in question.'" *Guides, Ltd.* , 295 F.3d at 1072 (quoting *Clifton Terrace Assocs., Ltd. v. United Technologies Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991)).

None of the allegations of the Proposed Amended Complaint plead facts that would serve as direct evidence of intentional discrimination against the Part I Plaintiffs in the making or enforcement of contracts based upon these plaintiffs' race or ancestry. *See Durham v. Xerox Corp.*, 18 F.3d 836, 841 (10th Cir.) ("Without proof of pretext or direct evidence of discriminatory intent, Durham cannot meet her ultimate burden of proving intentional discrimination."), *cert. denied*, 513 U.S. 819 (1994). Several paragraphs repeat comments allegedly made by one defendant, Dr. Redd, in which he referred to Dr. Nathaniel Penn as a "little New York Jew," or words to that effect. (Proposed Amended Complaint at 53 ¶ 168(B); 58 ¶ 133(F); 59 ¶ 138; 68-69 ¶ 166.) Such comments may or may not address Dr. Penn's "ancestry" for purposes of § 1981, *cf. Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (42 U.S.C. § 1982 protects property rights of Jewish congregation in synagogue); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1331 (D.Colo.1997), but that question is not now before this court because Dr. Penn is no longer a plaintiff in this action. (*See* Minute Entry, dated March 1, 2002 (dkt. no. 296).)

(7) 42 U.S.C. § 1985(3)

Section 1985(3) of Title 42, United States Code reads:

> **(3) Depriving persons of rights or privileges.** If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (2000).[52]

To state a claim under § 1985, there "must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). A plaintiff who fails to allege racial or class-based discrimination cannot state a claim under § 1985(3). *See Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1028

[52]Section 1985 was enacted as part of the Ku Klux Klan Act of 1871, Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.

(9th Cir. 1985) (en banc)).

In this case, the Part I Plaintiffs allege "civil rights violations regarding freedom to contract, free speech, free association, including 1985 conspiracy," and a "conspiracy to deprive the Plaintiffs of their legal entitlements of due process, equal protection, privacy, rights of association, rights to contract," as well as "state license entitlements," "Medicaid entitlements," and even an "entitlement to a contract with the District that is based upon principles of good faith and fair dealing, with adequate consideration," (Proposed Pretrial Order at 3 ¶ (1), 4 ¶¶ (9), (10), (12), (13) & (14)), but they do not allege discrimination against any remaining Part I Plaintiff based upon that plaintiff's race.

(8) 42 U.S.C. § 1983

Section 1983 of Title 42, United States Code, provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

42 U.S.C. § 1983 (2000).[53] "Section 1983 provides an enforcement remedy for one who is deprived under color of state law of 'any rights, privileges, or immunities secured by the Constitution.'" *Trujillo v. Board of County Comm'rs of Santa Fe*, 768 F.2d 1186, 1189 (10th Cir. 1985). "There are two elements to a section 1983 claim: (1) the conduct

[53]Like § 1985, § 1983 was originally enacted as part of the Ku Klux Klan Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13.

complained of must have been under color of state law, and (2) the conduct must have subjected the plaintiff to a deprivation of constitutional rights," or rights protected by federal law. *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (citing *Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir. 1976)).

Section 1983 does not specify the state of mind on the part of someone who "subjects, or causes to be subjected" a person to a deprivation of civil rights which a plaintiff must allege and prove to establish liability under the statute; the question is "did the defendant violate the plaintiff's Fourteenth Amendment rights? The defendant's state of mind is relevant only to the existence of the claimed Fourteenth Amendment violation." 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 3:2 (4th ed. Rev. 2004) (footnote omitted).

> Although this section does not require a specific state of mind for actionability, *see Parratt v. Taylor*, 451 U.S. 527, 534, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981), a court must examine closely the nature of the constitutional right asserted to determine whether a deprivation of that right requires any particular state of mind, *McKay v. Hammock*, 730 F.2d 1367, 1373 (10th Cir. 1984) (en banc). For instance, it is well established that deprivations of equal protection require proof of discriminatory intent on the part of the state actor, *see, e.g.*, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), while deprivations under the Eighth Amendment require a showing of deliberate indifference, *see, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Moreover, some deprivations of First Amendment rights require proof that the state's action was intended to repress an individual's protected speech or association. *See, e.g.*, *Mt. Health City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); . . . .

Trujillo, 768 F.2d at 1189 (some citations omitted).[54]

In order to state a claim under 42 U.S.C. § 1983, a complaint must assert a right to recover under the Constitution or other federal laws and not be wholly insubstantial and frivolous. *See, e.g., Kensington v. Roberts*, 717 F.2d 1295, 1298 (9th Cir. 1983).

> "Conclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act." *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). The plaintiff must "allege with at least some degree of particularity overt acts which defendants engaged in" that support the plaintiff's claim. *Id.*, quoting *Powell v. Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1964).

Jones, 733 F.2d at 649.

Here, the Part I Plaintiffs assert civil rights "violations regarding freedom to contract, free speech, free association," and "retaliation for speaking and association," as well as the denial of due process guaranteed by the Fourteenth Amendment. (Proposed Pretrial Order at 3 ¶¶ (1), (2), (3).[55]) They allege "interference with the patients' and [plaintiffs'] ability to freely contract for services with the District, with each other, with

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[54] *See* 1 Nahmod, *supra*, at § 3:2:

> Different Fourteenth Amendment violations (and hence Bill of Rights violations) require different states of mind, apparently because of the language and history of the applicable constitutional provisions. For example, equal protection violations require purposeful discrimination, Eighth Amendment violations require deliberate indifference, and due process violations require more than mere negligence. The Supreme Court finally made clear the distinction between § 1983 and the underlying constitutional violation in *Parratt v. Taylor* when it held that, as a matter of statutory interpretation, § 1983 imposed no independent state-of-mind requirement for the prima facie case, in contrast to state-of-mind requirements for the violation of particular constitutional provisions themselves. [Footnotes omitted.]

[55] Plaintiffs also assert their reliance upon a due process guarantee in the provisions of the Health Care Quality Improvement Act, 42 U.S.C. § 11112 (2000), discussed *infra*.

patients as guaranteed by the Fourteenth Amendment, Utah [U]nfair Practices Act, and federal common law," (*id.* at 4 ¶ (8)), and as to plaintiff Helen Valdez, a denial of equal protection of the laws. (*Id.* at 5 ¶ (21).)

Whether these allegations are wholly insubstantial and frivolous, or whether they raise genuine issues requiring a trial was examined in detail by court and counsel during the Pretrial Conference. *See* Fed. R. Civ. P. 16(c)(1).

§ 1983 Conspiracy

The Part I Plaintiffs also allege a "conspiracy to deprive the Plaintiffs of their legal entitlements of due process, equal protection, privacy, rights of association, rights to contract," (Proposed Pretrial Order at 4 ¶ (13)), but they do not plead specific facts showing both conspiratorial agreement and concerted action by the named defendants.

> In order to prevail on such a claim, "a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient." [*Dixon v. Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990)]; *Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990). In pleading conspiracy, a plaintiff must allege "specific facts showing agreement and concerted action among [the alleged co-conspirators]." *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994). "Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim." *Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989). Thus, a plaintiff fails to state a claim for conspiracy absent specific facts showing a "meeting of the minds" among the alleged co-conspirators. *See Hunt*, 17 F.3d at 1268.

Marino v. Mayger, 118 Fed.Appx. 393, 404-405, 2004 WL 2801795,**10 (10th Cir. 2004) (unpublished disposition). The Part I Plaintiffs' conclusory assertion of a conspiracy, without more, fails to state a viable claim under § 1983.

Liability of the SJHSD & San Juan County

To state a colorable claim against San Juan County or the SJHSD under § 1983, the Part I Plaintiffs each must allege that a policy or custom of the County or the SJHSD was the proximate cause of the plaintiffs' constitutional injury. *See Monell v. Dept. of Social Services*, 436 U.S. 658, 690 (1978) (local government may be liable under § 1983 if "the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."). Causation presents a threshold question: "our first inquiry in any case alleging [local governmental] liability under § 1983 is the question whether there is a direct causal link between a [local governmental] policy or custom and the alleged constitutional deprivation," because "[i]t is only when the 'execution of the government's policy or custom ... inflicts the injury'" that a local government entity may be held liable under § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (internal citation omitted). Assuming that causation may be shown,

> To subject a governmental entity to liability, "a municipal policy must be a 'policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a municipality's] officers.'" *See Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996) (quoting *Starrett*, 876 F.2d at 818); *see also Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Absent such an official policy, a municipality may also be held liable if the discriminatory practice is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Lankford*, 73 F.3d at 286 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1249 (10th Cir. 1999).

Thus, acts that do not rise to the level of official policy may nonetheless create liability if they are "sufficiently widespread and pervasive so as to constitute a 'custom.'" *Id.* at 1250. However, conduct directed solely at a plaintiff may not "demonstrate a custom or policy" of the entity "to be deliberately indifferent" to that conduct as a general matter. *Id.* (citing *Monell*, 436 U.S. at 691 & n. 56).

> [T]his deliberate indifference standard may be satisfied "when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1999). Although a single incident generally will not give rise to liability, *Okla. City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), "deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." *Barney*, 143 F.3d at 1307 (internal citations omitted). The official position must operate as the "moving force" behind the violation, and the plaintiff must demonstrate a "direct causal link" between the action and the right violation. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 399, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

Olsen v. Layton Hills Mall, 312 F.3d 1304, (10th Cir. 2002).

Plaintiffs contend that "[t]he County and District had a de facto policy of deliberate indifference to those who complained of suffering from Dr. Redd and other District staff members," and that "[t]he County and District had a policy of harming the reputations of persons in retaliation for challenging their authority." (Proposed Pretrial Order at 20-21 ¶ 52-53; *see* Proposed Amended Complaint at 34 ¶¶ 52-53 (same)). In the Proposed Amended Complaint, they allege that the SJHSD administrators and Board

members, as well as the County Commissioners, County Administrator and County Attorney "behaved in a deliberately indifferent manner, failed to adequately investigate the problems Mrs. Lyman and Dr. MacArthur identified in the District, did not hold hearings on the matters, did not enforce, or take any actions to rectify the situations identified by Mrs. Lyman and Dr. MacArthur." (Proposed Amended Complaint at 16-17.) "A pattern of deliberated indifference as a policy was exhibited by the County Commission, County Attorney, Health District board, administrators and medical staff." (*Id.* at 17.)[56]

Of course, the policy "causation" question presupposes that a deprivation of constitutional rights has occurred; if there was no deprivation, the policy or custom is immaterial. Before the Part I Plaintiffs can plead and prove an arguable legal claim against San Juan County or the SJHSD for liability under § 1983, they first must allege "the deprivation of [a] right[], privilege[], or immunit[y] secured by the Constitution and laws." 42 U.S.C. § 1983.

For the reasons explained hereafter, on the factual allegations now before the

[56]More recently, counsel argued that "[a] repeated pattern of a government entity's conduct is a *de facto* 'silent' policy enabling [individual defendants] to *ultra vires* arbitrarily deny a plaintiff of his liberty and property rights," that "[c]areful or heightened scrutiny attaches when these liberty and property rights are compromised by government," and that the federal civil rights acts are "designed to specifically cure a situation wherein the officials refuse to enforce provisions of the law." (Memorandum in Support of Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), at 5 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), and *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658 (1978)).)

court, Dr. MacArthur suffered no arguable deprivation of a constitutional "liberty" or "property" interest, or other federally protected right. *See infra* at 83-94. Likewise, for reasons explained hereafter, Ms. Lyman has not alleged facts showing such a deprivation. *See infra* at 94-105. Finally, Ms Valdez asserts that—as a woman of advancing years, married to a Mexican-American husband—being refused examination and treatment at an emergency room denies her the equal protection of the laws guaranteed by the Fourteenth Amendment; yet, as examined in greater detail below, the specific facts pleaded and proffered in support of her claim show *no* actual refusal or denial of examination or treatment on the date in question, and therefore prove insufficient to raise a genuine issue as to constitutional deprivation that would require a trial. *See infra* at 106-111.

Plaintiffs' § 1983 Claims Against the County Commissioners & SJHSD Board Members

In the Proposed Amended Complaint, the plaintiffs alleged that the SJHSD "Board members and County Commissioners . . . behaved in a deliberately indifferent manner, failed to adequately investigate the problems Mrs. Lyman and Dr. MacArthur identified in the District, did not hold hearings on the matters, did not enforce, or take any actions to rectify the situations identified by Mrs. Lyman and Dr. MacArthur." (Proposed Amended Complaint at 16-17.) The plaintiffs characterize the SJHSD Board's inaction on their grievances as "[a] pattern of deliberated indifference as a policy" that "was exhibited by the County Commission, County Attorney, Health District board, administrators and medical staff." (*Id.* at 17; *see also id.* at 21 ("The County and District . . . evidenced a

pattern of deliberate indifference to [plaintiffs'] plight."); *id.* at 87 ¶ 237 ("The Health District and the County did not did not reprimand Dr. Redd or any other medical staff member for their treatment of Mrs. Lyman or Dr. MacArthur, or Helen Valdez.").) As noted above, plaintiffs also asserted at pretrial that "[t]he County and District had a de facto policy of deliberate indifference to those who complained of suffering from Dr. Redd and other District staff members." (Proposed Pretrial Order at 21 ¶ 52.)

Vicarious Liability, Respondeat Superior & § 1983

The defendants respond that "[w]ith respect to each of the plaintiffs' discrimination and due process claims, San Juan County, the Health District, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway and Gary Holliday are not liable because respondeat superior liability does not attach for purposes of 42 U.S.C. § 1983 unless the adverse treatment resulted from a policy or custom of the Health District, of which there is no evidence in this case." (Proposed Pretrial Order at 7 ¶ vii.)

It has long been understood that "the doctrine of respondeat superior was not applicable to render a supervisor or other superior liable under § 1983 for the unconstitutional conduct of his subordinates." 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 3:90, at 3-330 (4th ed. rev. 2004) (footnotes omitted); *see Draeger v. Grand Central, Inc.*, 504 F.2d 142, 145 (10th Cir. 1974) ("Generally speaking, the doctrine of vicarious liability or respondeat superior has

been ruled out in cases arising under the Federal Civil Rights statutes."). *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), clearly holds that vicarious liability under the doctrine of respondeat superior "cannot be applied *either* to superiors *or* to local government entities" under § 1983, under any circumstances. 1 Nahmod, *supra*, at § 3:91, at 3-332 (emphasis in original; footnote omitted). Instead, *Monell* held that local governmental entities "are suable persons under § 1983 and can be held liable for *their* unconstitutional policies, practices and customs." *Id.* (emphasis in original).

> Consequently, in light of *Monell*, . . . the superior does not and should not invariably have a § 1983 duty, solely by reason of position, to compensate a person whose constitutional rights have been violated by subordinates. What is currently required in order for the superior to have such a duty is that the superior personally either acted unconstitutionally or with deliberate indifference. That is, the superior must have possessed either the state of mind for the particular constitutional violation or deliberate indifference, and *must also have played a causal role in plaintiff's constitutional deprivation*.

Id. (emphasis added & footnote omitted). Section 1983 addresses conduct which "subjects, or causes to be subjected" the plaintiff to a deprivation of civil rights, requiring pleading and proof of a causal connection between a defendant's conduct and the constitutional deprivation suffered by the plaintiff. *See Rizzo v. Goode*, 423 U.S. 362, 376-377 (1976) ("the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights").

Thus, theories of vicarious liability are not available to § 1983 plaintiffs. "Only the direct acts or omissions of government officials, not the acts of subordinates, will give

rise to individual liability under § 1983." *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 534 (5th Cir. 1997). Where an official becomes aware of a constitutional violation only after the fact, he or she cannot be held liable for the violation under § 1983 because the violation has already occurred and the official played no causal role in it. *See Schultz v. Baumgart*, 738 F.2d 231, 238-239 (7th Cir. 1984). Thus, "some *personal involvement* of the supervisory official in the subordinate's unconstitutional conduct — analogous to *Monell*'s official policy or custom requirement for local government liability — must be shown for § 1983 liability." 1 Nahmod, *supra*, § 6.6, at 6-24 (emphasis in original). *See* Annotation, *Vicarious Liability of Superior Under 42 USCS § 1983 for Subordinate's Acts in Deprivation of Civil Rights*, 51 A.L.R. Fed. 285 (1981 & Supp. 2004), and cases cited therein.

The Part I Plaintiffs plead the language of "deliberate indifference," "pattern," and "policy," but allege no specific facts showing that the individual SJHSD Board members knew of or directly instigated any denial of constitutional due process or other actionable deprivation by SJHSD medical and support staff members; nor do they assert that the alleged violations were directly effected pursuant to an *existing* policy or custom instituted by each Board member named as a defendant. Instead, plaintiffs contend that the SJHSD Board members owed an affirmative duty to provide the plaintiffs with *post*-deprivation relief—that is, a duty after the fact to investigate matters that the plaintiffs complained of, to "find and hold accountable the responsible parties," and to thereby

"resolve the provider and patients' and public's concerns." *Cf.* 1 Nahmod, *supra*, § 6:6 at 6-24 ("Plaintiffs may be expected to try to fit local government failure to act cases into *Monell*'s category of official policy or custom.")

Plaintiffs have not cited to pertinent authority establishing such an affirmative duty on the part of senior public officials to vindicate plaintiffs' interests in that fashion—the breach of which would render the County Commissioners or SJHSD Board members individually liable to plaintiffs under § 1983. Absent such authority, the court has discerned no basis in the law or policy of § 1983 for finding the existence of such an affirmative duty. *See generally Baker v. McCollan*, 443 U.S. 137 (1979) (sheriff has no affirmative duty under § 1983 to investigate arrestee's claims of innocence and mistaken identity).

Even assuming that plaintiffs' claims of due process violations or discrimination by SJHSD medical or support staff could be proven, holding the County Commissioners and SJHSD Board members individually liable for failing to vindicate the plaintiffs' interests *after the fact*—failing to investigate their complaints, "not hold[ing] hearings on the matters," and not "tak[ing] any actions to rectify the situations identified by Mrs. Lyman and Dr. MacArthur"— would attach § 1983 liability to *post hoc* conduct that can bear no causal relationship to the alleged constitutional deprivations themselves. Remembering that § 1983 imposes liability only upon one who "subjects, or causes to be subjected" a person to a constitutional deprivation, the requirement that a plaintiff must

demonstrate a "direct causal link" between the defendant's conduct and the civil rights violation, *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 399 (1997), would appear to preclude the imposition of § 1983 liability upon the County Commissioners and the SJHSD Board members based upon the "failure to vindicate" theory urged by the Part I Plaintiffs.

The SJHSD Board & the SJHSD Medical Staff's "Policy" re: Physician Assistants

Referring to the SJHSD medical staff's alleged adoption in 1999 of a staff "policy" requiring Physician Assistants exercising SJHSD staff privileges to be supervised by a local physician having SJHSD staff privileges,[57] plaintiffs complain that "[w]hile the

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[57]Plaintiff Lyman alleges:

> 31. Though Dr. Penn and Dr. Mena were staff members, Michele Lyman did not enjoy full privileges while supervised by them.
>
> 32. Dr. Redd and Dr. Jones and Dr. Cook and Dr. Nelson did not approve Mrs. Lyman having privileges unless her doctor was a medical staff member and then only if the physician was in the same town as she.
>
> 33. While the policy for P.A.s appears neutral, it effected only Michele Lyman in how it was applied, monitored, and carried out.
>
> * * * *
>
> 209. Dr. Penn and Ms. Lyman attended the Medical staff Meeting for June, 1999. Dr. Penn and Ms. Lyman requested full privileges be restored and Dr. Redd and Jones both stated that only if Dr. Penn was willing to sit in Blanding with Ms. Lyman while Ms. Lyman took ER call and they would not supervise me. Mr. Bryant as a P.A. working under Dr. Jones while Dr. Jones was not in Blanding, had no such restraints. Mrs. Lyman pointed out that she covered the ER (Blanding urgent care clinic) in Blanding by herself on many occasions. There was no response. (Cmplt. 137-145) Staff had previously voted for her privileges and then the County, Board, and medical staff did nothing while District staff Ora Lee Black, Dr. Redd, Gloria Yanito denied her the same. Some privileges as to labs and exrays were eventually restored.

(Proposed Amended Complaint at 31 ¶¶ 31-33; 78 ¶ 209; *see* Proposed Pretrial Order at 18 ¶¶ 31-33; 54 ¶ 209 (same).)

(continued...)

[Physician Assistant] policies in question appear to be facially neutral, in application they applied only to Mrs. Lyman and were not approved by the District Board. However, *the District Board knew of them and did nothing to stop them from being used to prevent Mrs. Lyman's practice*." (Proposed Amended Complaint at 22 (emphasis added).)[58]

Ms. Lyman's contention that the 1999 staff "policy" re: local supervision (or the other alleged "denials" of privileges of which she complains) resulted in a constitutional deprivation under § 1983 presupposes that she had a constitutional right to exercise practice privileges at SJHSD facilities free of any such limitation or restraint imposed by the SJHSD medical staff.

Qualified Immunity & Plaintiffs' § 1983 Claims

In the Proposed Pretrial Order, the defendants asserted that

> [b]ecause San Juan County and the Health District are political subdivisions of the State of Utah and the alleged acts and/or omissions by County commissioners, officials or employees or Health District trustees, employees or staff members, about which plaintiffs complain, were carried out within the scope of and pursuant to their official duties as trustees, employees or staff members of the Health District, plaintiffs' claims are barred by the doctrine of qualified immunity,

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[57](...continued)

Recounting that the medical staff "pass[ed] a policy saying in order to have privileges your supervising physician has to be in the same town," Ms. Lyman's counsel asserted that she did not see "where the governing board adopted that policy so it was an action taken by medical staff but under the bylaws the governing board is the body that sets the policy." (Tr. 11/15/02, at 15:7-24 (Ms. Rose).) Apparently the argument is that the SJHSD Board adopted a "policy" of letting the medical staff make "policy" concerning Physician Assistants' staff privileges, but that it did so without any formal Board action.

[58]Plaintiffs also allege that "[a]s a policy and pattern of practice, those who inform those in power of problems are subjected to reputation assassination within the area." (*Id.* at 17.)

as well as "the provisions of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 *et seq*, including but not limited to § 63-30-3 and § 63-30-10." (Proposed Pretrial Order at 10-11 ¶ xxxvi.)

The Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This grant of immunity is intended to balance two competing interests. On the one hand, when an official abuses his office, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.*, 457 U.S. at 814. On the other hand, exposing government officials to damages suits "entail[s] substantial social costs," *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), such as "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office . . . [and the deterrence of public officials from] 'the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814. "The Supreme Court has attempted to strike the balance between these two concerns by shielding government officials from suits for civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005) (quoting *Harlow*, 457 U.S. at 818). "Although courts have derived from this statement a variety of

multi-part tests, the essential inquiry is: would an objectively reasonable official have known that his conduct was unlawful?" *Id.* (citing *Anderson v. Creighton*, 483 U.S. at 640).

> In the Tenth Circuit, we employ a three-step inquiry. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1239-40, 1247, 1251 (10th Cir. 2003). First, we ask "whether the plaintiff's allegations, if true, establish a constitutional violation." *Id.* at 1239-40. If not, the suit is dismissed; if so, we move to the second step: "whether the law was clearly established at the time the alleged violations occurred." *Id.* at 1247. This step gives the official an opportunity to show that he "neither knew nor should have known of the relevant legal standard" because the law was not clearly established at the time he acted. *Harlow*, 457 U.S. at 819, 102 S.Ct. 2727. Where the law is not clearly established, courts do not require officials to anticipate its future developments, and qualified immunity is therefore appropriate.
>
> If the law was clearly established, we reach the third step of the inquiry: whether, in spite of the fact that the law was clearly established, "extraordinary circumstances"--such as reliance on the advice of counsel or on a statute–"so 'prevented' [the official] from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right." *Roska*, 328 F.3d at 1251. This occurs only "rarely." *Id.*

Id.[59] Whether an official is protected by qualified immunity thus turns upon the objective legal reasonableness of the action, in light of legal rules clearly established at the time the

[59]Once a defendant raises a the defense of qualified immunity, "the burden shifts to the plaintiff [to] satisf[y] a heavy two-part burden" to "demonstrate that the defendant violated a constitutional or statutory right[,]" and "'that the right at issue was clearly established at the time of the defendant's unlawful conduct.'" *Gross v. Pirtle*, 245 F.3d 1151, 1155, 1156 (10th Cir. 2001). If the plaintiff cannot make both showings, the defendant is entitled to qualified immunity; if he can, the burden shifts to the defendant "to prove that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Id.* at 1156.

action was taken.[60] The contours of the right allegedly violated must be sufficiently clear so that a reasonable official would understand that what he or she is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). "'This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law that unlawfulness must be apparent.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. at 640) (internal citation omitted). Thus, if prior case law provides "fair warning" that an officer's conduct would violate the plaintiff's constitutional rights, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 739-704, 741.[61]

It is important to note that qualified immunity "establishes a right not to be tried." *Elliot v. Thomas*, 937 F.2d 338, 341 (7th Cir.1991). Accordingly, the courts often find it appropriate to make a determination on this issue prior to commencement of trial.

> "[T]he 'entitlement [to qualified immunity] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *National Commodity and Barter Association v. Archer*, 31 F.3d 1521, 1532 n. 8 (10th Cir. 1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

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[60]The Supreme Court has expressly held that qualified immunity is governed by an objective reasonableness standard, and that "[e]vidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

[61]According to the court of appeals, "In order for the law to be clearly established there must have been a Supreme Court or other Tenth Circuit decision on point so that 'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' *Finn* [*v. New Mexico*, 249 F.3d 1241 (10th Cir. 2001)] at 1250 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987))." *McFall v. Bednar*, ___ F.3d ___, ___, 2005 WL 1023433 (10th Cir. 2005).

Chavez v. City of Albuquerque, 402 F.3d 1039, 1044 (10th Cir. 2005).

Dr. MacArthur's § 1983 Claim

Dr. MacArthur's "Right" to Practice at SJHSD Facilities

Counsel asserts that "Dr. MacArthur's ability to practice medicine entering into patient contracts which are property constitutes a liberty and property right," relying on an oft-quoted passage from the Declaration of Independence and an excerpt from Justice Bradley's dissenting opinion in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), referring to the right to pursue a common calling.[62] (Memorandum in Support of Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), at 4-5.) In counsel's view, this "liberty and property right" to practice medicine amounts to a *carte blanche* entitlement to full practice privileges at county-sponsored hospital and clinical facilities. Counsel elaborated on this view at the Pretrial Conference:

> THE COURT: Okay. Now what's, what's Dr. MacArthur complaining about?

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> This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits citizens . . . from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.

83 U.S. (16 Wall.), at 116, 122 (Bradley, J., dissenting); *see* Tr. 11/14/02 at 28:11-23 (Ms. Rose) (quoting Justice Bradley's dissenting opinion, 83 U.S. (16 Wall.) at 120).

MS. ROSE: He's complaining about one, he had, he had a medical license that allowed him privileges.

THE COURT: Well you don't get privileges as a matter [of] course do you?

MS. ROSE: I think that when you're, I think that when there is a Congressional policy for encouraging people, providers to go to rural areas to increase competition in those areas and so forth.

THE COURT: But the hospital as a hospital grants privileges and denies privileges or revokes privileges?

MS. ROSE: And that's, that's the key question here Your Honor. He has, I mean they're not claiming that I'm aware of that he was unqualified to work there, they're claiming that those 2 documents weren't in his file. Dr. Redd said he saw the documents.

* * * *

THE COURT: Well no one says that you're entitled to have hospital privileges. Show me a provision that says that you're entitled as a matter of right to have hospital privileges?

MS. ROSE: Well here's another way of rephrasing that. Where is the provision that allows a tax supported publicly funded district to prohibit an otherwise qualified physician from using the facilities for these patients and I think that's more of the crux of it.

We've got, we've, you know, the district's powers are limited by statute. Where's the statute that allows this district to deny and limit the powers and rights and privileges that Dr. MacArthur gets from having that medical license[?].

* * * *

THE COURT: Yes. The fact that you have a medical license doesn't give you automatically hospital privileges. You've got to have a different kind of relationship established.

MS. ROSE: And what right, what statutory source allows the hospital to maintain a monopoly or attempt to maintain a monopoly and reserve its privileges to those they arbitrarily and capriciously choose to bestow them upon[?]

Nothing, there is no source for a publicly funded tax supported

> hospital accepting Medicare and Medicaid to do so because to do so deprives the Medicare patients in the area of the right to choose who their providers are.

(Tr. 11/14/02, at 19:7-23, 24:13-25:1, 28:24-29:10.)

As counsel suggests, the Fourteenth Amendment's "liberty" guarantee includes an individual's right "'to engage in any of the common occupations of life'":

> "While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499--500, 74 S.Ct. 693, 694, 98 L.Ed. 884; *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).[63] As the Fifth Circuit more recently elaborated in *Martin v. Memorial Hosp. at Gulfport*, 130 F.3d 1143 (5th Cir. 1997):

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[63] 2 Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* 824 (8th ed. 1927):

> "Liberty" as used in [the Due Process] clause denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Footnote omitted.]

> "The Due Process Clause . . . protects an individual's liberty interest which is viewed as including an individual's freedom to work and earn a living and to establish a home and position in one's community." *Cabrol v. Town of Youngsville*, 106 F.3d 101 (5th Cir. 1997), citing *Roth*, *supra*, 408 U.S. at 572, 92 S.Ct. at 2706-07. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure." *Phillips v. Vandygriff*, 711 F.2d 1217, 1222 (5th Cir. 1983), quoting *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). *See also*: *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) ("Without doubt, ['liberty' in the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . ."); and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) ("A state cannot exclude a person from the practice of law or from any other occupation ... for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.").

Id. at 1148.

Nonetheless, a physician's "liberty" interest in pursuing his or her professional practice and establish[ing] a home and position in" a particular community does not *per se* entitle the physician to exercise plenary staff privileges at public hospitals or medical facilities. To the contrary, "Suits by physicians who have been denied hospital staff privileges are not new. It has been clearly established for years that a doctor has no constitutional right to the staff privileges of a hospital merely because he is licensed to practice medicine. *Hayman v. Galveston*, 1927, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714." *Sosa v. Board of Managers of Val Verde Mem. Hosp.*, 437 F.2d 173, 175 (5th Cir.

1971).[64] Generally, a physician is limited to assertion of a substantive due process right not to be excluded from staff privileges except for reasons related to the operation of the hospital which are not arbitrary or capricious, and a right to procedural due process sufficient to ensure that the physician has an opportunity to demonstrate that the exclusion is not justified. *See Woodbury v McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971); *Sosa v Board of Managers of Val Verde Mem. Hosp*, 437 F.2d at 176-177; *Sarasota Cty Pub Hosp Bd v Shahawy*, 408 So.2d 644, 646-647 (Fla. 1981).

Absent the recognition of a *per se* right to pursue medical practice through the exercise of full staff privileges at government-sponsored medical facilities, the SJHSD's exercise of supervisory power to grant, limit or deny practice privileges at those facilities—by requiring physicians to apply for and obtain privileges under the medical staff bylaws—did not deny a substantive constitutional "liberty and property right" to practice medicine or to make contracts with patients for his professional services.[65]

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[64]In *Hayman*, the Court stated that

> the only protection claimed here is that of appellant's privilege to practice his calling. However extensive that protection may be in other situations, it cannot, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private practice of medicine.

Hayman v. City of Galveston, 273 U.S. 414, 416-417 (1927).

[65]Justice Sutherland's opinion in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), cited by plaintiffs, extolls the virtue of freedom of contract, but does so in the context of state legislation prescribing minimum wages for women and children in private employment, without reference to the pursuit of a particular line of employment. *See id.* at 545-546 ("the right to contract about one's affairs is a part of the liberty of the individual protected by this [Due Process] clause," and although "[t]here is, of course, no such thing as absolute freedom of contract[,] . . . freedom of contract is, nevertheless, the general rule, and restraint the exception, and

(continued...)

A physician's liberty interest in pursuing a professional practice raises *procedural* due process concerns with respect to the grant or denial of staff privileges at a public hospital or medical facility once a request for such privileges has been made.

Dr. MacArthur's Request for Privileges & Procedural Due Process

Dr. MacArthur's § 1983 claim also attempts to raise an issue of *procedural* due process concerning a right to notice and hearing concerning his December 1999 request for full provisional privileges at SJHSD facilities:

> MS. ROSE: All right. This is what the crux of it is. There was no due process, there was no notice. He was never told there was a problem. He was never given an opportunity to rectify the problem. There's no, by the bylaws there's no hearing process available for physicians that have temporary privileges. He was given no hearing basis except that, you know, he was not told any time in advance that this February 2nd hearing was going to be held to discuss his staff privileges.

(Tr. 11/14/02, at 20:25-21:8 (Ms. Rose).)[66] Counsel referred to a February 2, 2000

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[65](...continued)
the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances"), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The Court has long since abandoned *Adkins*' expansive view of freedom of contract. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992).

[66]In arguing the denial of procedural due process, Dr. MacArthur's counsel retreated somewhat from her substantive due process theory:

> THE COURT: Okay. Well your idea is that in rural areas a doctor with a medical degree and a medical license has unrestricted power to practice in a local hospital?
>
> MS. ROSE: No, Your Honor, it is subject to what is called peer review. It is subject to notice and due process and that's verified in 42 U.S.C. 11112 . . . .

(Tr. 11/14/02, at 31:25-32:5.) In counsel's view, the Health Care Quality Improvement Act, 42 U.S.C. § 11112, discussed *supra*, "requires that if you're going to limit or deny privileges to a doctor you do it with adequate and (continued...)

SJHSD staff meeting at which it is alleged that Dr. MacArthur's December 1999 request for privileges was discussed, but no formal action was taken. Dr. MacArthur was not present for the February 2 meeting; he had accompanied his wife out of town for a medical procedure. (*See* Tr. 11/14/02, at 11:13-19 (Ms. Rose).) SJHSD's executive director, Cleal Bradford, also was not in attendance. Mr. Bradford's signature would have been required for any grant of provisional privileges or any further extension of Dr. MacArthur's "temporary" privileges beyond their February 2 expiration date. (*See* Tr. 11/14/02, at 16:1-21, 17:25-18:16 (Ms. Rose).)

According to the facts alleged by the plaintiffs, the SJHSD had neither granted nor denied Dr. MacArthur's request for full provisional privileges as of February 2, 2000, when his "temporary"privileges expired; the matter was tabled pending the receipt of further documentation. At that point, as counsel explained, Dr. MacArthur moved his practice to Ely, Nevada. (Tr. 11/14/02, at 18:17-19:6 (Ms. Rose).)

> THE COURT: After his temporary hospital privileges expired what did he do in reference to having that issue be examined?
>
> MS. ROSE: At that point he left.
>
> THE COURT: He went to Ely?

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[66](...continued)
fair notice and due process." (Tr. 11/14/02, at 33:7-9 (Ms. Rose).) As noted above, § 411 of the HCQIA, 42 U.S.C. § 11111, encourages the use of peer review procedures in supervising physicians' practice privileges by immunizing the review participants from civil liability arising from a review action (with specific exceptions) if that action meets § 11112's procedural criteria. The HCQIA does not impose due process *requirements* on hospitals and health care facilities; it provides an incentive for the adoption of notice-and-hearing procedures by the facilities themselves. Section 11111(a)(1) does not immunize peer review participants from liability under the federal civil rights acts, including 42 U.S.C. § 1983.

MS. ROSE: Starting May 1st I believe.

(*Id.* at 25:22-26:2.) According to counsel, Dr. MacArthur chose to go to Ely, Nevada, because the situation in San Juan County "was so inhospitable." (*Id.* at 26:12-21 (Ms. Rose); *see id.* at 37:8-38:8 (Ms. Cox).) "The working conditions in the area were so hostile, not only to him but to his patients that he felt he had no alternative but to leave . . . ." (*Id.* at 42:20-23 (Ms. Rose).)

Whether an environment is hospitable or hostile is a matter of perception, based upon an aggregation of circumstances and events. Taking plaintiffs' factual allegations as true, it appears that in providing medical care to his patients at SJHSD facilities, Dr. MacArthur experienced several unpleasant and frustrating instances involving a lack of sterile and functional medical instruments; conduct on the part of SJHSD nurses or staff that was disrespectful, ill-mannered, rude, and at times, unprofessional; and he became the subject of disparaging rumors circulated among the SJHSD support staff by a few antagonists, rumors that threatened to injure his personal reputation and his professional practice. All of these factors contributed to his perception that the SJHSD environment was inhospitable, and led ultimately to his decision in February of 2000 to forsake his request for privileges at SJHSD and move his practice to Nevada.

The essence of Fourteenth Amendment due process analysis is the implication of a liberty or property interest. *See Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972). "Under the Fourteenth Amendment, procedural due process requires notice and a

pre-deprivation hearing before property interests are negatively affected by governmental actors." *Marcus v. McCollum*, 394 F.3d 813, 820 (10th Cir. 2004). Health care professionals have been held to have a property interest in their professional licenses. *See, e.g., Seay v. Campbell*, 2005 WL 1023400 (10th Cir. 2005) ("property" interest in license to practice dentistry); Annotation, *Rights as to notice and hearing in proceeding to revoke or suspend license to practice medicine*, 10 A.L.R. 5th 1 (1993).

Some courts have expressed the view that "[h]ospital staff privileges are generally considered to be a property or liberty interest of the physician," at least where they have already been granted by a government-sponsored facility. *Beyer v. Lakeview Community Hospital*, 187 F.3d 634 (Table), 1999 WL 552606, **3 (6th Cir. 1999) (citing *Foster v. Moblike County Hosp. Bd.*, 398 F.2d 227, 229 (5th Cir. 1968)). A limitation, revocation or termination of existing hospital staff privileges would thus have due process implications.

At least two circuits have held that "[s]eeking staff privileges, which entitle a physician to admit patients to a particular hospital, has been held to be a protected liberty interest . . . ." *Silverstein v. Gwinnett Hosp. Authority*, 861 F.2d 1560, 1566 (11th Cir. 1988) (citations omitted). *See Burkette v. Lutheran General Hospital*, 595 F.2d 255, 255-256 (5th Cir. 1979) ("We have held that a physician in private practice denied staff privileges in a hospital that is subject to the fourteenth amendment possesses a protectible 'liberty' interest that can ground a complaint on such a denial. *Shaw v.*

Hospital Authority, 507 F.2d 625 (5th Cir. 1975).").[67]

To pursue a due process claim in the courts based upon a denial of hospital staff privileges, however, those privileges must in fact be *denied* before the claim may be pursued in the courts. *See Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center*, 113 Cal. Rptr. 2d 309 (Ct. App. 2001) (physician challenging hospital's denial or withdrawal of staff privileges must pursue the internal remedies afforded by that hospital to a final decision on the merits before resorting to the courts for relief); *Eufemio v Kodiak Island Hosp.*, 837 P2d 95 (Alaska 1992) (exhaustion of administrative remedies required); *Eidelson v Archer*, 645 P2d 171 (Alaska 1982). The reported cases involving due process claims and hospital staff privileges arise from the actual denial, restriction, non-renewal or revocation of staff privileges. *See generally* Annotation, *Exclusion Of, or Discrimination Against, Physician or Surgeon by Hospital*, 28 A.L.R. 5th 107 (1995 & Supp. 2004), and cases cited therein.

In this instance, the SJHSD had neither granted nor denied Dr. MacArthur's request for full one-year provisional privileges at the time that he decided to move his practice to Nevada in February or March of 2000. For his part, Dr. MacArthur did not press the issue after his "temporary" privileges expired by their own terms on February 2,

[67]The Utah courts have also entertained contractual "due process" claims involving the limitation or revocation of practice privileges at private hospitals based upon notice-and-hearing requirements found in hospital bylaws. *See, e.g.*, *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069 (Utah 1991); *Houston v. Intermountain Health Care, Inc.*, 933 P.2d 403, 408 (Utah Ct. App. 1997). In this case, Dr. MacArthur and Ms. Lyman have not pleaded such claims based upon the SJHSD medical staff bylaws, instead choosing to attack the validity of the bylaws themselves. *See infra* note 104.

2000—temporary privileges that in fact had afforded Dr. MacArthur the use of the SJHSD hospital and Blanding birthing center to treat his patients and deliver babies during most of the time that his request for full provisional privileges was pending. Close examination of plaintiffs' allegations turns up no instance in which Dr. MacArthur was denied access to SJHSD facilities to provide care to a patient during the time that his request for full privileges was pending and his temporary privileges—twice extended—remained in effect.

Taking Dr. MacArthur's factual allegations as true, the court concludes that Dr. MacArthur had not in fact been *denied* access to SJHSD facilities by any final action or determination by the SJHSD before Dr. MacArthur deliberately chose to forsake his request for full one-year SJHSD provisional staff privileges in favor of pursuing his medical practice elsewhere. Dr. MacArthur's election to move his practice out of state waived his request for staff privileges at SJHSD facilities, and mooted any § 1983 claim based upon a denial of such privileges on due process grounds. His claim of denial or exclusion never became ripe for judicial review prior to February 2, 2000, the point at which Dr. MacArthur effectively abandoned his request for SJHSD privileges. *See, e.g.*, *Unity Ventures v. Lake County*, 841 F.2d 770, 775-776 (7th Cir. 1988) (absent final governmental action denying intended use of property, § 1983 due process challenge to local land use regulation was not ripe for judicial review); *Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center*, 113 Cal. Rptr. 2d 309 (Ct. App. 2001).

His § 1983 claim cannot raise a triable issue, and must therefore be dismissed as against all of the defendants. Fed. R. Civ. P. 16(c)(1).

Ms. Lyman's § 1983 Claim

Substantive Due Process

From the colloquy at the Final Pretrial Conference, it became ever more apparent that even though plaintiffs MacArthur and Lyman have pleaded many parallel allegations concerning the question of staff privileges, their positions differ in fundamental ways. For one thing, Dr. MacArthur as a licensed physician was free to compete for patient business with other licensed physicians; Ms. Lyman, as a licensed Physician's Assistant, is required by Utah law to work under the direct supervision of a physician. Under Utah law, the scope of practice for a Physician Assistant is defined in pertinent part as follows:

> **58-70a-501. Scope of practice.**
>
> (1) A physician assistant may provide any medical services that are not specifically prohibited under this chapter or rules adopted under this chapter, and that are:
>
> (a) within the physician assistant's skills and scope of competence;
> (b) within the usual scope of practice of the physician assistant's supervising physician; and
> (c) *provided under the supervision of a supervising physician* and in accordance with a delegation of services agreement.

Utah Code Ann. § 58-70a-501 (2002) (emphasis added).[68] State Administrative Rule

[68]This statutory definition has been in effect since its enactment in 1997. *See* 1997 Utah Laws ch. 229, (continued...)

R156-70a, the Physician Assistant Practice Act Rules, provides:

> **R156-70a-501. Working Relationship and Delegation of Duties.**
>
> In accordance with Section 58-70a-501, the working relationship and delegation of duties between the supervising physician and the physician assistant are specified as follows:
>
> (1) The supervising physician shall provide supervision to the physician assistant to adequately serve the health care needs of the practice population and ensure that the patient's health, safety and welfare will not be adversely compromised. The degree of on-site supervision shall be outlined in the Delegation of Services Agreement maintained at the site of practice. Physician assistants may authenticate with their signature any form that may be authenticated by a physician's signature.
>
> (2) There shall be a method of immediate consultation by electronic means whenever the physician assistant is not under the direct supervision of the supervising physician.
>
> (3) The supervising physician shall review and co-sign sufficient numbers of patient charts and medical records to ensure that the patient's health, safety, and welfare will not be adversely compromised. The Delegation of Services Agreement, maintained at the site of practice, shall outline specific parameters for review that are appropriate for the working relationship.
>
> (4) A supervising physician shall not supervise more than two full time equivalent (FTE) physician assistants without the prior approval of the division and the board, and if patient health, safety, and welfare will not be adversely compromised.

Utah Admin Code § R156-70a-501 (2004).

While it is true that under these provisions, a Physician Assistant may provide "any medical services" not specifically prohibited that are within the range of her skills and

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[68](...continued)
§ 11.

scope of competence and the skills and scope of practice of her supervising physician, she cannot lawfully exercise the identical degree of independent professional judgment and discretion that a physician could exercise, and logically she could not be entitled as a matter of constitutional right to exercise practice privileges at hospitals, clinics and similar facilities identical to those that physicians may enjoy. (*Cf.* Tr. 11/15/02, at 34:21-39:5 (Ms. Rose).)

Limiting a Physician Assistant's practice privileges to take into account the statutory and regulatory requirement of direct supervision and review by a physician cannot operate to deprive the Physician Assistant of "liberty" or "property" otherwise guaranteed by the Fourteenth Amendment. Nor is it arbitrary or unreasonable for a health care facility to require that Physician Assistants exercise staff privileges under the supervision of a physician who currently has staff privileges at the same facility.

The restrictions on plaintiff Lyman's practice privileges at SJHSD facilities described in the Proposed Amended Complaint and at pretrial,[69] fall short of a

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[69]Starting from the premise that "[w]hile working for Dr. Redd, Mrs. Lyman applied for and received privileges with the District, with the same scope of privileges as Dr. Redd," (Proposed Pretrial Order at 27 ¶ 117; *see id.* at 39 ¶ 127 ("Mrs. Lyman's scope of privileges was originally for duties equal to Dr. Redd's."), Ms. Lyman alleges that after leaving Dr. Redd's supervision in October, 1998, her privileges were restricted in several respects: "Mrs. Lyman could not admit or discharge patients without first her supervising doctor initially and officially and physically signing off on the patient's admit or discharge," (*id.* at 48 ¶ 169); she was told on one occasion in December 1998 that she could not give orders to SJHSD staff, (*id.* at 48-49 ¶ 170); later that same day, she was told she "could use the lab and xray *only during Dr. Penn's office hours*, [and that] otherwise Ms. Lyman did not have privileges," (*id.* at 49 ¶ 186 (emphasis in original); "[l]ater the limited privileges of lab and exray [sic] were extended to her for her patients as required by State law," (*id.* at 49 ¶ 187), but in September 1999, her secretary was told "that Ms. Lyman would not be allowed to order labs until Ms. Lyman sent a letter to Dr. Redd stating who her supervising physician was." (*Id.* at 55 ¶ 213). (*See* Proposed Amended Complaint at 55 ¶ 127; 69-70 ¶¶ 169-170; 70-71 ¶¶ 186-187; 79-80 ¶ 213 (same); Tr. 11/15/02, at 8:20-10:25,

(continued...)

constitutional deprivation,[70] and thus cannot serve as the factual footing for Ms. Lyman's § 1983 claim against any of the individual defendants, including the SJHSD Board and San Juan County Commissioners. (*See* Tr. 11/15/02, at 26:14-32:17, 34:20-44:7 (Ms. Rose).) Or, looking at it another way, plaintiffs' allegations, taken as true, fail to establish a violation of a clearly established constitutional right to unrestricted practice

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[69](...continued)
17:6-11, 19:2-20:19, 22:15-20, 28:8-19, 30:4-20, 31:9-32:17, 40:22-42:3, 44:22-45:5, 46:7-20, 54:9-20.)

Ms. Lyman also alleges interference with her care for individual patients: in one instance, her request for a Holter monitor for a patient was denied (*id.* at 49 ¶ 185); on at least two occasions, her request for patient medical records was refused by Dr. Redd, (*id.* at 50-51 ¶¶ 189, 193-194); despite an understanding with the SJHSD medical staff concerning injections, "Ms. Lyman tried on several occasions to call in injections to the . . . ER (Blanding Urgent Care Clinic) and was denied every time. Ms. Lyman always had to call Dr. Penn's office and have him call the order in. requests to the Blanding Urgent Care Center for injections for patients were denied by SJHSD staff," (*id.* at 54-55 ¶ 210). (*See* Proposed Amended Complaint at 70-73 ¶¶ 185, 189, 193-194, 210 (same); Tr. 11/15/02, at 16:10-17:5, 21:19-21, 22:5-14, 26:12-25, 30:4-31:6, 39:3-40:12; *compare supra* n. 12.)

[70]Substantive due process requires that a termination, suspension, denial or restriction of a plaintiff's practice privileges not be "'arbitrary, capricious, or without a rational basis.'" *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 528 (10th Cir. 1998) (quoting *Brenna v. Southern Colo. State College*, 589 F.2d 475, 477 (10th Cir. 1978)).

> The Tenth Circuit recently reiterated the standards for evaluating substantive due process claims:
>
> > In analyzing plaintiff's substantive due process claim, the court assumes plaintiff's employment was an interest entitled to protection. In *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), we stated that "the standard for judging a substantive due process claim is whether the challenged government action would 'shock the conscience of federal judges.'" *Id.* at 573 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)) (further quotations omitted). To "satisfy the 'shock the conscience' standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power." *Id.* at 574. Rather, a plaintiff "must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.*
>
> *Babbar v. Ebadi*, 2000 WL 702428, at *10 (10th Cir. 2000).

Ferraro v. Board of Trustees of Labette County Medical Center, 106 F.Supp.2d 1195, 1202 (D.Kan. 2000).

privileges as a state-licensed Physician Assistant at publicly-sponsored medical facilities, and as a result, plaintiff's § 1983 claim against the individual defendants is barred by the doctrine of qualified immunity. Plaintiff Lyman likewise fails to allege an arguable claim of constitutional deprivation resulting from a "policy" or "custom" of the SJHSD or San Juan County, and cannot hold either entity liable under § 1983.

Procedural Due Process

Plaintiffs plead a "Lack of Notice and Due Process," (Proposed Amended Complaint at 46-52 ¶¶ 129-167; *see* Proposed Pretrial Order at 33-37 ¶¶ 161-199 (same)), but relatively few of the factual allegations pleaded under that heading pertain to Ms. Lyman, and they address the alleged alteration of dates on her CPR certification cards—cards curiously discovered to be "missing" from her SJHSD file at the time that she requested staff privileges to practice under Dr. MacArthur's supervision in December, 1999. (*See id.* at 46-48 ¶¶ 129-140, 142-146.)[71] Other than alleging that "[t]he Medical staff and Cleal Bradford and Laurie Shafer discussed Mrs. Lyman's CPR card problems

[71]Ms. Lyman also asserts that she "had sought privileges ever since they were de facto terminated by district policy after she began working for Dr. Penn, having left the practice of Dr. Redd,"in October 1998, (Proposed Amended Complaint at 40 ¶ 91), but her specific factual allegations reflect that she continued to exercise her privileges through 1999. The scope of her privileges was the subject of discussion involving Ms. Lyman, Dr. Penn and the SJHSD medical staff in which it was acknowledged by the medical staff that Ms. Lyman could, *inter alia*, request x-rays, lab work and injections for patients, and could continue to exercise privileges under local physician supervision. *See supra* at n. 69. In December of 1999, she requested *renewal* of her existing privileges, which had a renewal date of December 22, 1999. (*See* Tr. 11/15/02, at 49:6-52:6 (Ms. Rose).)

Whether certain SJHSD nurses or other employees interfered with the exercise of her existing privileges is another matter, (*see* Proposed Pretrial Order at 14 ("Privileges for Mrs. Lyman were de facto denied by nursing personnel and medical staff without any action by the District governance board.")), raising potential claims of breach of contract or the implied covenant of good faith and fair dealing, or interference with contract.

of wrong dates without Mrs. Lyman being present," (*id.* at 46-47 ¶ 133), and "[t]he medical staff and Cleal Bradford and Laurie Shafer unanimously decided to publish the altered cards to the American Heart Association by vote of the medical staff, who was considering privileges for Mrs. Lyman, without Mrs. Lyman being present," (*id.* at 48 ¶ 142), Ms. Lyman does not plead specific facts showing a denial of fair notice and an opportunity to be heard on the CPR card issue. (*Cf.* Proposed Pretrial Order at 63 ¶ 255 ("she was not notified immediately that her cards were in some way in error").) In fact, she alleges that the CPR card problem was brought to her attention, that she furnished accurate CPR certification information to the SJHSD, but that her SJHSD privileges ultimately were not renewed. She did not pursue the request any further. (*See* Tr. 11/15/02, at 52:3-53:17 (Ms. Rose).)

While the specific instances of interference with her exercise of her SJHSD privileges may raise contract-based claims under Utah law, *see infra*, Ms. Lyman has not alleged specific facts showing a denial of procedural due process guaranteed by the Fourteenth Amendment.

Misogyny & "Hostile Environment" under § 1983

Ms. Lyman complains that Dr. Redd, the "Chief of Medical Staff has a long standing animus toward women," that during the time she was employed by Dr. Redd in his private practice from June 1996 until October 1998, she observed Dr. Redd being angry and verbally abusive in dealing with his female employees, *e.g.*, referring to Ms.

Lyman as an "idiot" and another employee as an "incompetent bitch," and that

> 149. Mrs. Lyman observed that each nurse, in order to avoid Dr. Redd's tirades would turn on each other or disassociate with the person who Dr. Redd targeted that day.
>
> 150. Thus, an atmosphere of distrust and hostility permeated the office creating a hostile work and patient environment.

(Proposed Amended Complaint at 60-61 ¶¶ 143, 149-150.)

Generally, to plead a viable "hostile environment" claim, a plaintiff must show "that under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus," or other forbidden class-based discriminatory animus, such as gender. *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) (citation omitted). In a case involving discrimination on account of race, "[a] plaintiff cannot meet this burden by demonstrating "a few isolated incidents of racial enmity" or "sporadic racial slurs," or the like. *Id.* (quoting *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412-13 (10th Cir. 1987). Instead, "'there must be a steady barrage of opprobrious racial comments.'" *Chavez v. New Mexico*, 397 F.3d 826, 832 (10th Cir. 2005). Where the enmity is based upon gender, a plaintiff must likewise allege a "steady barrage" or "steady stream" of misogynistic abuse in order to sustain a "hostile environment" claim. *See, e.g.*, *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1539 (10th Cir. 1995) ("It is beyond dispute that evidence that a woman was subjected to a steady stream of vulgar and offensive epithets because of her gender would be sufficient to establish a claim under

Title VII"); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1000-1001 (10th Cir. 1996) ("Over the course of her employment, plaintiff was called a 'whore,' 'floor whore,' 'curb whore,' 'curb side cunt,' and 'bitch,' on a consistent basis. These sexual epithets have been identified as 'intensely degrading' to women." (internal quotation & citation omitted)).

"Hostile work environment harassment occurs when unwelcome sexual conduct "'unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)). According to the court of appeals,

> *Meritor* states that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67, 106 S.Ct. at 2405 (citation omitted). The mere utterance of a statement which "'engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir.1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972)).

Smith v. Northwest Financial Acceptance, Inc., 129 F.3d 1408, 1412 (10th Cir. 1997).[72]

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[72] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), clarified the elements of a claim for gender discrimination resulting from a hostile work environment. The Supreme Court held that conduct within the purview of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-1 *et seq.*, must be severe or pervasive enough to create both "an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile"--and an environment the victim-employee subjectively perceives as abusive or hostile. *Id.* at 21-22. Whether an environment is "hostile" or "abusive" is determined by looking at the totality of circumstances, such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; . . . whether it unreasonably interferes with an employee's work performance"; and the context in which the conduct occurred. *Id.* at 23. Additionally, the

(continued...)

In the context of a hostile environment claim, courts must "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Forager v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotation marks and citation omitted).

Plaintiff Lyman did not plead and does not assert a "hostile environment" claim under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-1 *et seq.* However, the court of appeals has held that, apart from Title VII, gender discrimination and sexual harassment can result in a violation of the Fourteenth Amendment right to equal protection of the law that is actionable under § 1983.[73] However, a plaintiff must allege "the state action necessary to support a § 1983 claim,"[74] and each individual defendant

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[72](...continued)
Harris Court specifically noted that any relevant factor "may be taken into account, [but] no single factor is required." *Id.*

[73] If a plaintiff can show a constitutional violation by someone acting under color of state law, then the plaintiff has a cause of action under Section 1983, regardless of Title VII's concurrent application. *See Owens v. Rush*, 654 F.2d 1370, 1380 (10th Cir. 1981) ("Title VII did not impair in any way [plaintiff's] independent, substantive rights created by the First and Fourteenth Amendments . . . . '[S]ubstantive rights conferred in the 19th Century were not withdrawn, sub silentio, by the subsequent passage of the modern statutes.'") (quoting *Novotny*, 442 U.S. at 377, 99 S.Ct. at 2351); *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984) ("Where an employee establishes employer conduct which violates both Title VII and rights derived from another source--the Constitution or a federal statute . . . the claim based on the other source is independent of the Title VII claim, and the plaintiff may seek the remedies provided by § 1983 in addition to those created by Title VII."); *cf. Meade v. Merchants Fast Motorline, Inc.*, 820 F.2d 1124, 1127 (10th Cir. 1987) ("plaintiff may properly pursue his cause of action under § 1981 for private employment discrimination despite the applicability of Title VII to the same conduct").

Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989).

[74]"To be successful, section 1983 claimants must make two showings to establish that the conduct at
(continued...)

must act under color of state law; a "state actor" must serve as the plaintiff's "supervisor or in some other way exercise state authority over her." *Noland v. McAdoo*, 39 F.3d 269, 271 (10th Cir. 1994); *see also David v. City & County of Denver*, 101 F.3d 1344, 1354 (10th Cir. 1996) (public co-employees may act under color of law if they exercise de facto authority over victim), *cert. denied*, 522 U.S. 858 (1997).[75]

Here, the "state action" requirement proves somewhat problematic. During the time Ms. Lyman worked for Dr. Redd, Dr. Redd was engaged in private medical practice, and was not a SJHSD employee. His conduct in that context would lack the requisite "state action" needed to sustain a § 1983 claim. The plaintiffs' factual allegations suggest that Dr. Redd was speaking to Ms. Lyman and his other employees as a private employer,

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[74](...continued)
issue constituted state action. 'First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.' *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). 'Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.' *Id.*" *Nieto v. Kapoor*, 268 F.3d 1208, 1215 (10th Cir. 2001).

[75]State action under § 1983 can occur when a supervisor "participates in or consciously acquiesces in sexual harassment . . . by co-workers." *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999) (quotation marks and citation omitted).

and not in any official capacity.[76] Though Dr. Redd became employed by the SJHSD in March of 1999 and would likely be held to be a "state actor" as to his conduct as SJHSD medical director or "Chief of Medical Staff,"[77] the plaintiffs' pleadings speak of the "atmosphere of distrust and hostility" that "permeated" Dr. Redd's office in Blanding at the time Ms. Lyman worked there. (Proposed Amended Complaint at 61 ¶ 150.)[78]

Qualified Immunity & Ms. Lyman's § 1983 Claim

Further, as noted above, the defendants contend that because "the alleged acts and/or omissions by County commissioners, officials or employees or Health District trustees, employees or staff members, about which plaintiffs complain, were carried out within the scope of and pursuant to their official duties as trustees, employees or staff members of the Health District, plaintiffs' claims are barred by the doctrine of qualified immunity," (Proposed Pretrial Order at 10 ¶ xxxvi), at least to the extent those claims are

[76]At that time, Dr. Redd was also a member of the SJHSD medical staff, and at different times in 1996 may have served as chief of staff. (*See* Tr. 11/15/02, at 3:20-22 (Ms. Rose). Dr. Redd's conduct *as the SJHSD chief of staff* may be state action under § 1983. *See, e.g.*, *Nieto v. Kapoor*, 268 F.3d 1208, 1215-1217 (10th Cir. 2001) (non-employee medical director of hospital department acted under color of state law for purposes of § 1983 "when undertaking his supervisory duties over plaintiffs' work" in that department and was "a state actor for purposes of section 1983."). Yet plaintiffs do not allege that Dr. Redd was acting as the SJHSD chief of staff—not as a private employer engaged in a private medical practice—in making the alleged derogatory remarks to Ms. Lyman and others who worked for him. (*See* Proposed Amended Complaint at 60-68 ¶¶ 145-166.)

[77](Proposed Amended Complaint at 60 ¶ 143.)

[78]Ms. Lyman would not have standing to bring a "hostile environment" claim under either Title VII or § 1983 for verbal abuse occurring after October or November of 1998 because at that point she was no longer employed by Dr. Redd. She was working with and being supervised by Dr. Penn; after she left Dr. Redd's supervision in 1998, Dr. Redd's derogatory remarks—rude, offensive, antagonistic and unprofessional as they may have been—could not alter the terms, conditions, or privileges of Ms. Lyman's subsequent employment.

asserted pursuant to 42 U.S.C. § 1983. Concerning individual defendants who have raised a claim of qualified immunity,

> The threshold inquiry is whether the alleged facts (or, on summary judgment, the evidenced facts) taken in the light most favorable to the plaintiff show a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

Simkins v. Bruce, 406 F.3d 1239, 1241 (10th Cir. 2005).

From the foregoing summary, it readily becomes apparent that the plaintiffs' allegations as of the eve of pretrial, taken as true and in the light most favorable to the plaintiffs, failed on their face to show a constitutional violation by the individual defendants. "[A] defamatory statement published by state officials is not for that reason alone a Fourteenth Amendment violation," 1 Nahmod, *supra*, § 3:40, at 3-117 (citing *Paul v. Davis*, 424 U.S. 693 (1976)), and the making of derogatory remarks, the infliction of verbal abuse, the honking of car horns and other potentially tortious conduct does not automatically implicate the Due Process Clause simply because the actor is employed by a local health services district or is a member of its medical staff. Nor does interference with, or even the breach of a district contract with a health services provider, caused by a district official or staff acting under his direction, necessarily result in a constitutional deprivation of "liberty" or "property" that is actionable under § 1983. Absent a constitutional deprivation, qualified immunity entitles the individual defendants to a dismissal of plaintiff Lyman's § 1983 claims.

Ms. Helen Valdez' § 1983 Claim

The facts underlying the claim of plaintiff Helen Valdez have already been summarized herein. (*See supra* at 15-17, 30-31.) Her potential civil claim under EMTALA being time-barred, at least absent leave to amend,[79] the only claim that remained pending for consideration at the time of pretrial was her § 1983 claim of purposeful national origin, gender and age discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

In order to state a viable equal protection claim under § 1983, "a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001) (citations omitted); *see also Washington v. Davis*, 426 U.S. 229, 240 (1976). To support her § 1983 claim, then, Ms. Valdez must come forward with facts indicating a discriminatory intent on the part of the defendants. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 n. 16 (1984) (§§ 1981 & 1983); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) (equal protection). She must also allege facts showing that a defendant "engaged in specific conduct that denied her equal protection of the laws." *Williams v. Bramer*, 180 F.3d 699, 701 (5th Cir. 1999).

Ms. Valdez is a white female over the age of 60, married to a Mexican-American

[79](*See supra* at 59-60.)

husband. (Proposed Pretrial Order at 69 ¶¶ 14-15.) Counsel asserts that on April 14, 1999, she was "turned away" from the San Juan Hospital emergency room because of her age, her gender, her association with her Mexican-American husband and sister-in-law, and with her then-primary care physician, Dr. Penn, who was identified as being Jewish. (*See* Tr. 11/15/02, at 59:1-15 (Ms. Rose); Memorandum of Points and Authorities Supporting Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 665), at 6-20.)[80] Counsel relies upon a "disparate treatment analysis," citing *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), based upon allegations that Ms. Valdez "was turned away, when accompanied by her Mexican-American appearing sister-in-law, by nurse Laurie Wallace," while at the same time, "[t]he white young male with no insurance in the ER waiting area was seen by Dr. Penn almost immediately after Mrs. Valdez left." (Proposed Amended Complaint at 86 ¶ 232-233; *see* Proposed Pretrial Order at 22 ¶ 66 ("Mrs. Valdez' neighbor who was a white young male and had not insurance was seen immediately.").)

Counsel's proffered inference of discriminatory treatment and discriminatory

[80]Claims of class-based discrimination against a non-minority plaintiff based upon association with the plaintiff's minority spouse have met with mixed results. *Compare, e.g., Davis v. Southeastern Pennsylvania Transp. Authority*, 924 F.2d 51 (3d Cir. 1991) (plaintiff white police officer married to African-American spouse prevailed on § 1983 anti-discrimination claim arising out of officer's discharge from employment), *with University Village Music Center v. Seattle School Dist.*, 844 F.2d 793 (Table), 1988 WL 33365, (9th Cir.1988) (unpublished disposition) (conclusory allegations that the defendants discriminated against plaintiff's business because his former wife is of Japanese descent insufficient to state a § 1983 claim).

purpose from the fact that another patient waiting in the emergency room was examined by a physician and Ms. Valdez was not collides with a key fact: Ms. Valdez was not refused screening, examination, or treatment; nor was she instructed or ordered by any emergency room personnel to leave the facility. (*See supra* at 15-17.) At pretrial, counsel argued that Ms. Valdez "was told to go"—an assertion belied by the plaintiffs' own pleadings and Ms. Valdez' own deposition testimony. (Tr. 11/15/02, at 60:7 (Ms. Rose).) Ms. Valdez explained that she decided to leave the emergency room and return home after her sister-in-law told her that she had overheard a nurse, Lori Wallace, tell the emergency room clerk who had assisted Ms. Valdez in filling out her patient admittance form to tell Ms. Valdez to go to her physician's clinic. (*See supra* at 15-16 & nn. 18-19; Tr. 11/15/02, at 57:1-4 (Ms. Rose) ("Laurie [sic] Wallace had told the receptionist, tell them to go to the clinic, it's open, something to that effect. The exact words were tell them to go to the clinic.").) Shortly before that, however, Ms. Valdez had observed Lori Wallace tell the same clerk that "she could set both her patients up in the emergency room for the physician," apparently referring to Ms. Valdez and Michael Bailey, the other individual then waiting in the emergency room. (*Id.*)

Yet Ms. Valdez did not speak directly to either the nurse or the clerk about her symptoms or ask whether or when she would be seen by a doctor at the emergency room. She left the facility, apparently assuming that she would not be examined. She explained her reticence in her deposition:

> A Well, living in San Juan County for many years and living in a Mexican-American community, you kind of learn to keep your place. You don't just voluntarily speak out. You just kind of wait until spoken to.
>
> Q How does that apply to being a woman in San Juan County?
>
> A I believe probably about the same.

(Deposition of Helen Valdez, dated December 6, 2001, at 52:17-24.) In this instance, she did not wait to be spoken to; assuming that she would not be examined at the emergency room, Ms. Valdez simply left. Taking the plaintiff's factual averments as true—in particular, the portions of the deposition testimony of Ms. Valdez and Ms. Gonzales submitted to the court by plaintiffs' counsel—it cannot fairly be said that Ms. Valdez was "turned away" from examination and treatment at the San Juan Hospital emergency room on April 14, 1999. No one on the SJHSD staff told Ms. Valdez that she would not be examined by a physician if she remained there, and both Ms. Valdez and Ms. Gonzales acknowledged that no one on the SJHSD staff expressly instructed Ms. Valdez to leave.[81]

Before Lori Wallace may be held liable under § 1983 for a constitutional deprivation purposefully inflicted upon Ms. Valdez,[82] there needs to be at least one sworn

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[81]This being so, Ms. Valdez was not denied or refused the screening, examination or stabilizing treatment for an "emergency medical condition" required by EMTALA, 42 U.S.C. § 1395dd(a), and has no arguable legal claim arising from a violation of that statute. 42 U.S.C. § 1395dd(d). (*See supra* at 56-58.)

[82]Counsel now argues the existence of a County "policy or custom" of disparate treatment of "people of color," relying largely on hearsay assertions of anecdotal evidence. (*See* Memorandum of Points and Authorities Supporting Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 665), at xii, 18-19.) This claim was neither pleaded through specific allegations in the Proposed Amended Complaint nor raised as an issue in the Proposed Pretrial Order.

averment of specific facts in the record showing that Ms. Wallace acted that "with an intent or purpose to discriminate against the plaintiff" based upon the plaintiff's membership in a protected class (or at least her identification with a protected class),[83] and that Ms. Wallace "engaged in specific conduct that denied her equal protection of the laws." None was cited or proffered at pretrial, and none was submitted in connection with either the Proposed Amended Complaint or the Proposed Pretrial Order.

At the conclusion of the pretrial colloquy concerning Ms. Valdez' claim, this court concluded:

> Looking at the statutes referred to and particularly the suggestion that implicit[ly] the complaint ought to conform with what is said to be the evidence, namely that she went to an emergency room and wasn't treated, I think under the factual scenario presented that it is insufficient to justify referring the matter to a fact-finder and under the circumstances that cause of action as alleged and as proffered should also be dismissed and I will so order.

(Tr. 11/15/02, at 117:10-18 (the Court).)

"The pretrial conference is never to be used as a substitute for trial . . . . Nevertheless, just as the Court may render judgment on immaterial issues for which there is no dispute of material fact, 'judgment may be ordered . . . if there is no triable issue left at the end of the discussion.'" *Pifcho v. Brewer*, 77 F.R.D. 356, 357 (M.D. Pa. 1977) (quoting 6 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §

[83] *Muzquiz v. W.A. Foote Memorial Hosp., Inc.*, 70 F.3d 422, 429 (6th Cir. 1995) (witness' "subjective belief that minorities would be treated differently at the hospital was simply not probative of a discriminatory animus").

1525 (1971).)

(9) Federal Antitrust Laws (15 U.S.C. §§ 1 *et seq.*)

Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (1997), cited by the Part I Plaintiffs, provides in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor" in an appropriate federal district court "and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee," expressly providing injured parties with a private civil treble damages remedy for violations of the federal antitrust laws. As a remedial provision, § 4 itself does not proscribe any specific anti-competitive conduct. Conduct "forbidden in the antitrust laws" is defined elsewhere, as in the first two sections of the Sherman Anti-Trust Act. Section 1 of the Sherman Act, 15 U.S.C.A. § 1 (1997), states in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (1997), states in part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, ...

Section 4 of the Clayton Act "requires a plaintiff to show actual injury," *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986), and "the plaintiff must still

allege an injury of the type the antitrust laws were designed to prevent." *Id.* (footnote omitted). Indeed, "[s]tanding and antitrust injury are essential elements in a private antitrust damages action brought under section 4 of the Clayton Act." *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 960 (10th Cir. 1990) (citing *Cargill*, 479 U.S. at 110; *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)). According to the court of appeals, the following factors are "to be considered in determining antitrust standing:"

> the causal connection between the antitrust violations and plaintiff's injury; the defendant's intent; the nature of the plaintiff's injury; the directness or indirectness of the connection between the plaintiff's injury and the allegedly unlawful market restraint; the speculativeness of the plaintiff's damages; and the "risk of duplicative recoveries . . . or the danger of complex apportionment of damages." *Associated Gen. Contractors*, 459 U.S. at 544, 103 S.Ct. at 912.

Id. at 962 n.15.

The "nature of the plaintiff's injury factor" is "designed to implement the requirement that only *antitrust* injuries are redressable under section 4." *Id.* (emphasis in original). "Antitrust injury" is demonstrated "'by a causal relationship between the harm and the challenged aspect of the alleged violation" of the federal antitrust laws.'" *Id.* at 961 (quoting *Alberta Gas Chems., Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1240 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988).).

> An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." . . . It is reasonable to assume that Congress did not intend to allow every person

> tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477 (1982) (citation omitted). In evaluating a private plaintiff's standing under § 4, "we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff," and "(2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under §4." *Id.* at 478.[84] The "injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall." *Id.* at 484 n.21, 486; *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (an antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").

Thus, to "prevail, a private plaintiff must establish both (1) that it has standing *and* (2) the defendant has violated the antitrust laws. . . . [T]he antitrust injury element of standing demands that the plaintiff's alleged injury result from the threat to competition that underlies the alleged violation." 2 Phillip E. Areeda, Herbert Hovencamp & Roger D. Blair, *Antitrust Law* ¶ 335, at 297 (2d ed. 2000) (footnote omitted). "Once it appears,

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[84]Ms. McCready, a subscriber to a group health care plan who had been denied reimbursement by the plan for the cost of services of a clinical psychologist, brought her suit under § 4, alleging that the plan had conspired with a professional association of physicians and psychiatrists to exclude psychologists from receiving payment under the plan for outpatient treatment of mental disorders, including psychotherapy in violation of § 1 of the Sherman Act. 457 U.S. at 467-70. The Court concluded that "the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury 'flows from that which makes defendants' acts unlawful . . . and falls squarely within the area of congressional concern." *Id.* at 484 (footnote omitted).

whether early or late in the litigation, that either requirement [of standing or antitrust violation] is lacking, the suit must be dismissed." *Id.*

At the time of the Pretrial Conference, the Part I Plaintiffs asserted that the "District employees as a pattern sought to restrain competition[;] there was inadequate impartiality in 'peer review' or in issuing privileges since the people issuing the privileges are usually in economic competition with those they are giving privileges." (Proposed Pretrial Order at 14-15.) The Proposed Amended Complaint alleged that "District employee doctors and Dr. Jones who was contracted with the District constituted about 80% or greater of the competing doctors in the area," (Proposed Amended Complaint at 30 ¶ 26), and that "[a]t all times, Dr. MacArthur and Michele Lyman were subject to District policies regarding their privileges as written and accepted by medical providers and physicians who economically competed with them." (*Id.* at 30 ¶ 27.)

In this case, then, the alleged "conduct forbidden by the antitrust laws" arises in the context of the grant, limitation, or denial of medical practice privileges at a hospital, clinic or birthing center. (*See generally id.* at 26-34 ¶¶ 1-49 ("Specific Statements of Facts – Anti-Trust Claims"); *id.* at 34-58 ¶¶ 50-168 ("Facts for 42 USC 1983, and antitrust and RICO claims"); *id.* at 58-86 ¶¶ 125-230 (same).)

Plaintiffs assert that the geographic market in which plaintiffs and the "District" health care services providers compete is San Juan County, Utah, with a "rural" or "frontier" population of over 13,000 people; the boundaries of the SJHSD are co-

extensive with those of the county. (*Id.* at 29-30 ¶¶ 19-25.) Within that geography, plaintiffs assert that the SJHSD is the sole provider of hospital and birthing center services to that population:

> 37. San Juan Hospital and Blanding Birthing Center are the only facilities in San Juan County for births and are operated solely by San Juan Health Services District.
>
> 38. Nearly all emergency ambulance deliveries are made to San Juan Hospital.
>
> 39. The next nearest hospital facility to San Juan Hospital in Monticello, Utah is about 65 miles away in either a north (Moab) or east (Cortez, Co.) direction, and about 85 miles from Blanding. Shiprock hospital is between 65 to 85 miles from southern areas of San Juan County in Shiprock, New Mexico.
>
> 40. San Juan Hospital is the sole provider for those persons with insurance but without transportation to go outside the county or with physical conditions requiring ambulance transportation.
>
> 41. Any physician delivering babies in San Juan County would need to use the closest San Juan District facilities for patients in active labor.

(*Id.* at 32-33 ¶¶ 37-41.) Further, according to plaintiffs, "With the exceptions of Dr. Jones and a Monument Valley clinic doctor, all other physicians and P.A.'s within San Juan District are employees of San Juan District," and none of these providers specialized in obstetrics and gynecology during the period that Dr. MacArthur—an obstetrician/gynecologist—sought staff privileges at SJHSD facilities. (*Id.* at 33 ¶¶ 43, 44.) The Part I Plaintiffs assert that "Dr. MacArthur's practice was in direct competition with District and District associated General Pract[it]ioners who delivered babies," and

received additional compensation for doing so. (*Id.* at 34 ¶ 48; *see id.* at 33 ¶¶ 45-47.) According to these plaintiffs, the grant or denial of privileges to Dr. MacArthur and Ms. Lyman was driven by considerations of competitive economics rather than professional practice concerns:

> 45. Without Dr. MacArthur and Michele Lyman to treated obstetric patients, the patients if they wished a local delivery when they went into labor, had to go to a doctor not specialized in the area of obstetrics.
>
> * * * *
>
> 49. In making the determination of granting privileges, the medical staff and CEOs would analyze the effect of the independent practices of Dr. MacArthur and Michele Lyman upon their income outside any formal 'peer review' context and in regards to them obtaining privileges.

(*Id.* at 33-34 ¶¶ 45, 49.)

The Proposed Amended Complaint speaks of the "anti-competitive effect" of limiting the privileges of Dr. MacArthur and Ms. Lyman:

> 42. Dr. MacArthur's limited temporary privileges preventing him from fully using the District facilities provided his patients with limited options in where they could receive their care, and prevented some from becoming his patient.
> * * * *
>
> 98. The likely and logical *per se* effect of not granting District privileges to Michele Lyman and Dr. MacArthur is that patients would not be able to choose Michele Lyman or Dr. MacArthur as providers if they wished to receive to receive their care at the hospital.

(Proposed Amended Complaint at 33 ¶ 42, 40-41 ¶ 98.)

The restriction or denial of hospital staff privileges as a result of peer review

procedures may indeed raise antitrust concerns:

> Peer review of physicians holding or applying for hospital or medical staff privileges has given rise to numerous antitrust claims. The courts have recognized that peer review has the potential to be procompetitive by ensuring that only competent, professional, and otherwise qualified practitioners are permitted to practice at health care institutions. On the other hand, staff privilege decisions can raise a risk of anti-competitive abuse insofar as they are typically made upon the recommendations of members of the medical staff who may be direct or indirect competitors of the physician under review. The courts have recognized that a denial or termination of staff privileges arguably can insulate the other medical staff members from competition by the physician under review . . . .

2 American Bar Association Section of Antitrust Law, *Antitrust Law Developments (Fifth)* 1326-1327 (5th ed. 2002) (footnote omitted).

However, civil liability under the federal antitrust laws for "anticompetitive" conduct is not without limit.

At the outset of the Final Pretrial Conference, the defendants moved to dismiss the Part I Plaintiffs' antitrust claims on the grounds that (1) the claims are barred by the "state action" doctrine announced in *Parker v. Brown*, 317 U.S. 341, 351-353 (1945); (2) the claims are barred by the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750, codified at 15 U.S.C. §§ 34-36 (2000); (3) the plaintiffs have failed to identify a specific antitrust law violation or plead the essential elements of such a violation; and (4) the plaintiffs have failed to plead an effect on interstate commerce. (Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Antitrust Claims, filed November 14, 2002 (dkt.no. 455), at 3-8.)

The Local Government Antitrust Act (15 U.S.C. §§ 34-36)

The Local Government Antitrust Act provides that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity," 15 U.S.C. § 35(a), or "based on any official action directed by a local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 36(a). Federal courts are thus precluded "from awarding monetary relief on antitrust claims brought against local government entities." *Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, (10th Cir. 1990).

> All that the Defendants need show in order to assert a valid claim of immunity from antitrust liability is that they acted in an official capacity or were directed by government officials or employees who were themselves acting in their official capacities. As previously discussed, these standards do not include a consideration of the defendant's intentions. The court considers only the objective questions: (i) whether, in light of the authority invested in a local government, its officials or employees, the actions complained of were lawful and taken within the scope of their authority, . . . or (ii) whether, if the defendant is not a local government official or employee, the actions were directed by a local government or one of its officials or employees acting within the scope of his authority.

Sandcrest, *supra*, at 1148 (citations omitted).

Cohn v. Wilkes General Hosp., 767 F. Supp. 111, 113 (W.D.N.C. 1991) (quoting *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital*, 853 F.2d 1139, 1148

(4th Cir. 1988)), *affirmed*, 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230 (1992). In *Cohn*, the court held that the statute applied to bar a chiropractor's antitrust claim against a municipal hospital, its board of trustees and medical staff arising from the hospital's denial of his request for hospital staff privileges for allegedly anti-competitive reasons.

Applying the Local Government Antitrust Act in the context of this action, it appears to bar the damages claims of plaintiffs MacArthur and Lyman as against the SJHSD, San Juan County, the defendant members of the SJHSD Board, SJHSD's administrators and medical staff, and subordinate employees. Both plaintiffs allege that the members of the SJHSD medical staff—Drs. Redd, Jones and Nelson—acted upon plaintiffs' requests for full staff privileges for anti-competitive purposes, *viz.*, to limit competition by Dr. MacArthur and Ms. Lyman with the SJHSD medical staff for patients in the San Juan County area, and that other defendants at least acquiesced in their doing so, in their capacity as SJHSD Board members, administrators or County Commissioners. (*See* Proposed Amended Complaint at 26-34 ¶¶ 1-49 ("Specific Statements of Facts – Anti-Trust Claims"); *id.* at 34-58 ¶¶ 50-168 ("Facts for 42 USC 1983, and antitrust and RICO claims"); *id.* at 58-86 ¶¶ 125-230 (same).)

Dr. MacArthur's Federal Antitrust Law Claim

By the time of pretrial, Dr. MacArthur's federal antitrust claim against the defendants sought only an award of treble damages under § 4 of the Clayton Act, 15

U.S.C. § 15. Applying the Local Government Antitrust Act to that claim leaves no viable federal antitrust claim remaining.

Apart from this statutory preclusion, Dr. MacArthur's federal antitrust claim fails on its own facts.

Plaintiffs insist that a denial of the full provisional SJHSD staff privileges requested by Dr. MacArthur in December of 1999 would be anti-competitive in both purpose and effect. Whatever force that argument may have, the fact remains uncontroverted that the SJHSD did not deny privileges to Dr. MacArthur before he elected to move his practice out of state. The SJHSD, under the authorizing signatures of Mr. Bradford and Dr. Redd, granted Dr. MacArthur "temporary" staff privileges two weeks after he made his request for full one-year provisional privileges, and extended those privileges twice through February 2, 2000. During that interim period, Dr. MacArthur exercised his temporary privileges in providing care for his patients, and he does not allege specific facts showing that he was unable to provide care for any particular patient because of any limitation of those privileges by number or duration.

Even taking as true Dr. MacArthur's allegation that his request for full privileges was placed in the hands of other SJHSD staff physicians with whom he was competing for patients—competitors who would put their own economic interests first in making such a determination—he has failed to allege any actionable "antitrust injury" to his practice during the brief period of time in which he was exploring the San Juan County

market for obstetrics and gynecological care. As explained above, § 4 of the Clayton Act "requires a plaintiff to show actual injury," *Cargill, Inc.*, 479 U.S. at 111, and "the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent." *Id.* (footnote omitted).

Moreover, because there no final determination by the SJHSD to deny Dr. MacArthur the privileges he sought, his federal antitrust claim, like his § 1983 claim, was not ripe at the time he elected to move his practice out of the area, and, thereafter was rendered moot by his absence from the San Juan County health care services market after March of 2000. *See Unity Ventures v. Lake County*, 841 F.2d at 776-777 (absent final governmental action denying intended use of property, federal antitrust claim based on local land use regulation was not ripe).

Consequently, Dr. MacArthur's federal antitrust law claims must be dismissed as against all defendants. Fed. R. Civ. P. 16(c)(1).

Ms. Lyman's Federal Antitrust Law Claim

As explained above, the effect of the Local Government Antitrust Act, 15 U.S.C. § 35(a), is to bar plaintiff Lyman's federal antitrust claim for treble damages against the defendants, limiting that claim to a request for declaratory and injunctive relief.

As explained above, to on a private civil claim under § 4 of the Clayton Act, 15 U.S.C. § 15, "a private plaintiff must establish both (1) that it has standing *and* (2) the defendant has violated the antitrust laws. . . ." 2 Phillip E. Areeda, Herbert Hovencamp &

Roger D. Blair, *Antitrust Law* ¶ 335, at 297. "Once it appears, whether early or late in the litigation, that either requirement [of standing or antitrust violation] is lacking, the suit must be dismissed." *Id.* Likewise, § 16 of the Clayton Act permits injunctive relief "against threatened loss or damage by *a violation of the antitrust laws*." 15 U.S.C. § 26 (emphasis added).

Plaintiff Lyman claims that one or more of the defendants have violated the antitrust laws, but does not allege the specific nature of that violation. (*See* Proposed Amended Complaint at 26-34 ¶¶ 1-49; *id.* at 34-58 ¶¶ 50-168; *id.* at 58-86 ¶¶ 125-230.) Gleaning the elements of a particular antitrust law violation from the dense thicket of the plaintiffs' pleadings, original or amended, proves a daunting and largely fruitless task.

Taking action that is intended to disadvantage a competitor, or that has that effect, intended or not, by itself does not violate the antitrust laws. Yet plaintiff Lyman has alleged little more than that one or more SJHSD medical staff defendants—Drs. Redd, Jones and Nelson—took their own economic interests into consideration when addressing matters involving the plaintiff's practice privileges at SJHSD facilities in 1999, or that the effect of one or another limitation upon Ms. Lyman's privileges as a Physician Assistant operated to limit her ability to compete directly with physicians in the market for medical care in the San Juan County area.

Moreover, according to Ms. Lyman's counsel, Ms. Lyman did not have SJHSD privileges after December 22, 1999, the date her existing privileges expired, her request

for renewal of her privileges in December 1999 ultimately was denied, and she made no further application for SJHSD privileges after that date:

> THE COURT: Did she subsequently apply again for privileges at the hospital?
>
> MS. ROSE: No, sir.
>
> THE COURT: The district, she never applied again?
>
> MS. ROSE: No, Sir.

(Tr. 11/15/02, at 53:13-17.) Thus, there exists no currently existing controversy between Ms. Lyman and the defendants concerning her entitlement to exercise of staff privileges at SJHSD facilities or the potential for denial of those privileges in violation of the federal antitrust laws. In this context, any claim for declaratory relief under 28 U.S.C. §§ 2201-2202 has "become moot because a declaratory judgment would no longer have any effect on defendants' behavior. *See Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1256-57 (10th Cir. 2004) (holding that an action for declaratory relief was moot when the requested declaration involved past conduct not likely to recur)." *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 883 (10th Cir. 2005); *see Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) ("[W]hat makes a declaratory judgment action 'a proper judicial resolution of a 'case or controversy' rather than an advisory opinion is the settling of some dispute which affects the behavior of the defendant toward the plaintiff.'") (quoting *Hewitt v. Helms*, 482 U.S.

755, 761 (1987)).[85]

Similar mootness problems afflict Ms. Lyman's request for injuctive relief. *See, e.g.*, *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991) ("plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future"); Moreover, if, as the Proposed Amended Complaint indicates, Ms. Lyman seeks injunctive relief "to protect patients of Mrs. Lyman and her supervising physician, and give Mrs. Lyman's patients uniform and considerate care with District staff sensitive to the unique needs of the patient," and allowing Ms. Lyman "to minimally go into any facility to at least speak and associate with her patient, regardless of whether she has privileges at the District," (Proposed Amended Complaint at 93), that relief would not be granted as "against threatened loss or damage by a violation of the antitrust laws"as provided by § 16 of the Clayton Act, 15 U.S.C. § 26. Nor would

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[85]As the court of appeals recently elaborated:

> It is not enough that a plaintiff wishes to have the moral satisfaction of a judicial ruling that he was right and his adversary was wrong; the relief sought must have legal effect in determining the present and future rights and obligations of the parties. "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000), quoting *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir.1999); *see also Colorado Off-Highway Vehicle Coalition v. United States Forest Serv.*, 357 F.3d 1130, 1133 (10th Cir. 2004) ("A 'case or controversy' no longer exists when it is impossible for the court to grant any effectual relief whatsoever to a prevailing party."); *Air Line Pilots Ass'n v. UAL Corp.*, 897 F.2d 1394, 1396-97 (7th Cir. 1990) (the test is whether the relief sought would "make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation)").

Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1263 (10th Cir. 2004).

"ordering the [SJHSD] governance board to make physicians and chiefs of staff accountable for patient complaints and treat all medical providers and physician's equally and uniformly," (Proposed Amended Complaint at 94), be tailored to redress a specific antitrust violation.

As framed in plaintiffs' pleadings, Ms. Lyman's claim under the federal antitrust laws did not assert an arguable legal theory at the time of pretrial.

(10) Utah Constitution, art. I, §§ 1, 7, 25, 26, 27

The Part I Plaintiffs point to several provisions of the Utah Constitution as a footing for their allegations of "due process violations" or "violation of Mrs. Valdez' Utah Constitutional rights" by the defendants, (Proposed Amended Complaint at 11 ¶ (3), 14 ¶ (23)):

> **Article I, Section 1. [Inherent and inalienable rights.]**
>
> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.
> * * * *
> **Article I, Section 7. [Due process of law.]**
>
> No person shall be deprived of life, liberty or property, without due process of law.
> * * * *
> **Article I, Section 25. [Rights retained by people.]**
>
> This enumeration of rights shall not be construed to impair or deny others retained by the people.

Article I, Section 26. [Provisions mandatory and prohibitory.]

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Article I, Section 27. [Fundamental rights.]

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

Utah Const., art. I, §§ 1, 7, 25-27. The Utah Constitution's Due Process Clause, Article I, § 7, provides a footing for a direct private right of action seeking a remedy for an alleged deprivation of life, liberty or property, but only in "appropriate"—that is, extraordinary—circumstances:[86]

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[86]The source of judicial authority to grant relief in "appropriate circumstances" in Utah is the common law:

> 20. We begin by identifying the source of our authority to award damages for constitutional violations. Except for the Takings Clause, the Utah Constitution does not expressly provide damage remedies for constitutional violations. Thus, aside from the Takings Clause, there is no textual constitutional right to damages for one who suffers a constitutional tort. Nor has the legislature enacted any laws authorizing damage claims for constitutional violations in general, or the violation of the Due Process Clause or the Open Education Clause in particular. Thus, there is no express statutory right to damages for one who suffers a constitutional tort. In the absence of applicable constitutional or statutory authority, Utah courts employ the common law. See Utah Code Ann. § 68-3-1 (1996). Under the common law, "individuals had access to remedies of money damages for violations of their individual rights, and these rights, enumerated in fundamental documents, were the forerunners of many of the provisions adopted in federal and state bills of rights." *Bott*, 922 P.2d at 739 (citations omitted). Hence, a Utah court's ability to award damages for violation of a self-executing constitutional provision rests on the common law. The *Restatement (Second) of Torts* supports this view. *Restatement* section 874A states that when no specific remedy is mentioned, a court may accord an appropriate remedy to one injured from the violation of a constitutional provision. *See Restatement (Second) of Torts* § 874A & cmt. a (1979). Comment (g) to section 874A suggests that a court's authority to do so arises from the common law. *See id.* cmt. g, at 306-07; *see also* Jennifer Friesen, *State Constitutional Law* § 7-5(c) (2d ed.1996) (stating that section 874A espouses a common law doctrine).
>
> 21. This common law ability to award damages for constitutional violations

(continued...)

22. To ensure that damage actions are permitted only "under appropriate circumstances," we therefore hold that a plaintiff must establish the following three elements before he or she may proceed with a private suit for damages.

23. First, a plaintiff must establish that he or she suffered a "flagrant" violation of his or her constitutional rights. *See Dick Fischer Dev. v. Department of Admin.*, 838 P.2d 263, 268 (Alaska 1992); *see also Bott*, 922 P.2d at 734-35, 739-40 (describing the level of defendants' culpability necessary to create damages liability). In essence, this means that a defendant must have violated "clearly established" constitutional rights "of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). To be considered clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted). The requirement that the unconstitutional conduct be "flagrant" ensures that a government employee is allowed the ordinary "human frailties of forgetfulness, distractibility, or misjudgment without rendering [him or her]self liable for a constitutional violation." *Bott*, 922 P.2d at 739-40.

24. Second, a plaintiff must establish that existing remedies do not redress his or her injuries. *See Schweiker v. Chilicky*, 487 U.S. 412, 425, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) (refusing to create a damages remedy for an alleged due process violation where Congress had provided meaningful safeguards or remedies); *Bush v. Lucas*, 462 U.S. 367, 378, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) (same with respect to alleged First Amendment violation); *Dick Fischer Dev.*, 838 P.2d at 268; *Bonner v. City*

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[86](...continued)

> requires policy decisions by the court, and it should be aware of them and face them candidly. . . . The court is not required to provide the civil remedy, and yet judicial tradition gives it the authority to do this under appropriate circumstances. The court has discretion and it must be careful to exercise that discretion cautiously and soundly.

Restatement § 874A cmt. d, at 303.

Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, ¶¶ 20-21, 16 P.3d 533, 537-538 (quoting *Bott v. DeLand*, 922 P.2d 732, 739 (Utah 1996)) (footnotes omitted).

of Santa Ana, 45 Cal.App.4th 1465, 53 Cal.Rptr.2d 671, 673, 676-78 (1996) (refusing to create damages remedy for alleged due process violation where alternative common law tort cause of action existed); *Restatement (Second) of Torts* § 874A cmt. h, at 309 (suggesting courts should consider the adequacy of existing remedies when deciding whether to provide a tort remedy). This second requirement is meant to ensure that courts use their common law remedial power cautiously and in favor of existing remedies. *See Lynch v. Jacobsen*, 55 Utah 129, 138-39, 184 P. 929, 933 (1919). We urge caution in light of the myriad policy considerations involved in a decision to award damages against a governmental agency and/or its employees for a constitutional violation. Moreover, we urge deference to existing remedies out of respect for separation of powers' principles. In general, the legislative branch has the authority, and in many cases is better suited, to establish appropriate remedies for individual injuries. By requiring courts to defer to relevant legislative determinations of appropriate remedies, we respect the legislature's important role in our constitutional system of government.

25. Third, a plaintiff must establish that equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her injuries. *See, e.g.*, *Bott*, 922 P.2d at 739 (stating that "if prisoners' rights under article I, section 9 are violated, injunctive relief may not be adequate to remedy prisoners' injuries"); *see also, e.g.*, *Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (stating that damages are an appropriate remedy where plaintiff was unconstitutionally terminated from her job on a congressional staff because, in part, "equitable relief in the form of reinstatement would be unavailing" in light of the fact that her former employer was no longer a congressman); *cf. Rockhouse Mountain Property Owners Ass'n, Inc. v. Town of Conway*, 127 N.H. 593, 503 A.2d 1385, 1388 (1986) (stating that damages are an inappropriate remedy for a constitutional violation where the alleged injury "can be undone" by the judiciary). This final requirement is meant to take advantage of the meaningful role equitable relief can play in redressing constitutional injuries, while not implicating so many of the difficult policy considerations raised by a decision to award damages.

Spackman ex rel. Spackman v. Board of Educ. of Box Elder County School Dist., 2000 UT 87, ¶¶ 22-25, 16 P.3d 533, 538-539 (footnotes omitted).

The Part I Plaintiffs have not even attempted to plead these three essential elements of a direct civil action under the Utah Constitution in either the Proposed Amended Complaint and the Proposed Pretrial Order. They did not raise them as issues at the Final Pretrial Conference. Nor have they addressed them in the legal memoranda submitted either prior to the Final Pretrial Conference, or since. "Failure of counsel to identify an issue for the court can result in waiver: 'If counsel fail to identify an issue for the court, the right to have the issue tried is waived.' Fed.R.Civ.P. 16 advisory committee's note." *Smith v. Gulf Oil Co.*, 995 F.2d 638, 644 (6th Cir. 1993).

Besides failing to address the essential elements of a direct civil action under the Utah Constitution, the Part I Plaintiffs have not identified the specific constitutional right(s) that come within the scope of Article I, §§ 1, 25, 26, and 27, that purportedly have been violated by the conduct of one or more of the defendants.

To date, the reported case law construing the Article I, § 25 "retained rights" provision has involved parental rights issues. *See, e.g.*, *In re J.P.*, 648 P.2d 1364 (Utah 1982); *In re K.B.E.*, 740 P.2d 292 (Utah Ct. App. 1987); *T.R.F. v. Felan*, 760 P.2d 906 (Utah Ct. App. 1988); *P.O. v. S.G.*, 927 P.2d 202 (Utah Ct. App. 1996); *J.R. v. State of Utah*, 261 F. Supp. 2d 1268 (D. Utah 2003). Article I, §§ 26 and 27 appear to be declaratory of general constitutional principles rather than an enumeration of individual constitutional rights as such. *See Ritchie v. Richards*, 14 Utah 345, 361-363, 47 P. 670 (1896) (Bartch & Miner, JJ.) (constitutional provisions prescribing formalities to be

observed in the enactment of laws are mandatory and binding on the legislature); *see generally* Comment, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?*, 1996 Utah L. Rev. 661 ("exploring the meaning of [art. I] Section 27 of the Utah Constitution").

Having considered the pleadings, proffers, arguments and memoranda submitted by counsel, the court cannot "identify the litigable issues" that plaintiffs believed would arise under these provisions. *See* Fed. R. Civ. P. 16(c)(1); *see also* Fed. R. Civ. P. 8(a)(2); Fed. R. Civ. P. 11(b); *Chavez v. New Mexico*, 397 F.3d 826, 839 (10th Cir. 2005) ("'the Court refuses to go on a fishing expedition in search of legal analysis and facts to support these claims'").

(11) Utah Unfair Practices Act (Utah Code Ann. §§ 13-5-1 *et seq.* (2001))

The Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1 through 13-5-18 (2001), disallows the use of a list of specific unfair trade practices by persons "engaged in commerce," including anti-competitive price discrimination,[87] advertising or sale of goods

[87]Utah Code Ann. § 13-5-3 (2001). Section 13-5-3(1)(a) provides:

> (1) (a) It is unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the state and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

at a price less than cost,[88] and advertising goods, wares, or merchandise that the advertiser is not prepared to supply.[89] These forbidden practices involve trade in "goods," "merchandise," "articles," "products" and "commodities," and services or facilities furnished in connection with such trade, as well as the services of someone "who performs work upon, renovates, alters or improves any personal property belonging to another person, except necessary repairs due to damage in transit . . . ." Utah Code Ann. § 13-5-12(2) (2001). As the Utah Supreme Court explains, "The immediate stimuli for the enactment of such acts were in part the rapid rise of chain stores, and in part the general sharpening of competitive practices under pressure of the depression." *Burt v. Woolsulate, Inc.*, 106 Utah 156, 160, 146 P.2d 203 (1944).

> One of the practices aimed at by these [Unfair Practices Acts] statutes is that, common in chain stores, of selling at lower prices in one locality than in another and making up losses incurred by profits in other stores. Even more important in the application of anti-discrimination statutes today is the prevention of discrimination sales by manufacturers to customers with unusually strong bargaining power who can force large price concessions. . . .

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[88]Utah Code Ann. § 13-5-7(1) (2001):

> (1) It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, is unfair competition contrary to public policy and the policy of this act and is declared to be a violation of this act.

See also Utah Code Ann. § 13-5-9 (2001) (selling goods in quantity below cost); Utah Code Ann. § 13-5-10 (2001) (advertising and segregation of below-cost goods at forced liquidation or close-out sales).

[89]Utah Code Ann. § 13-5-8 (2001).

> On the whole the anti-discrimination provisions of the Unfair Practices Acts seem best fitted to reach manufacturers and producers who, in the past have placed certain retail buyers in preferred competitive positions by giving them special rebates or other price favors. . . .

Id. (quoting Comment, *Prohibiting Price Discrimination and Sales Below Cost: The State Unfair Practices Acts*, 32 Ill. L. Rev. 816 (1938)); *see also* 54A Am. Jur. 2d *Monopolies, etc.* §§ 1077-1106 (1997); Annot., *Validity, Construction and Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost–Modern Cases*, 41 A.L.R. 4th 612 (1985).[90]

Plaintiffs allege "interference with the patients' and [plaintiffs MacArthur and Lyman]'s ability to freely contract for services with the District, with each other, with

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[90] In *Trade Comm. v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (Utah 1968), the Utah Supreme Court upheld the constitutionality of the Utah Unfair Practices Act, and elaborated upon its purpose:

> It has been argued that the purpose of statutes such as the Utah Unfair Practices Act is to preserve a competitive climate by preventing large business concerns through the unrestrained use of size and resources alone, from overwhelming and destroying their smaller competitors. These statutes it is claimed seek to preserve the right of a competitor to enter a market and compete with those already operating.
>
> It has been further argued that unrestrained price cutting on a massive scale has had disastrous effect on the small independent retailer with limited resources. That the below cost selling has become a weapon in the fight for markets and customers, characterized by the deliberate use of below cost selling to undercut, overwhelm and destroy competition, all to the benefit and further enrichment of the big interests. It is further claimed that to correct the unscrupulous conduct of these vested groups it became necessary for government to adopt such unfair trade practices acts as the one here in question.
> * * * *
> We do not suggest that a purpose to divert or capture a competitor's business is wrong or unethical. It is perfectly legitimate so long as it is not carried out unfairly. The legislature simply has declared it unfair to accomplish it through giving away goods or services or selling them for less than cost.

Id., 21 Utah 2d at 438, 441, 446 P.2d at 962-963, 965 (footnote omitted).

patients as guaranteed by the . . . Utah [U]nfair Practices Act," among other laws, (Proposed Pretrial Order at 4 ¶ (8)), and the "violation of the Utah Unfair Practices Act," (*id.* at 4 ¶ (15); Proposed Amended Complaint at 12 ¶ 14), but nowhere in their pleadings do they detail the nature of that alleged violation. Instead, plaintiffs appear to cite the Act for its general policy statement "fostering economic competition,"[91] and as a footing for an award of treble damages. (Proposed Amended Complaint at 26 ¶ 2; *id.* at 97 (Prayer for Relief) ("Mrs. Lyman is praying for damages in excess of Six (6) Million Dollars, some of which is treble damages, due to unfair practices . . . .").)

The Utah Unfair Practices Act does provide for an award of treble damages in favor of a private plaintiff who has been injured by "any act in violation of this chapter" and has sustained actual damages,[92] but such acts would be those expressly defined by the Act as "a violation of this act" or as "unlawful." Neither the Act's general purpose "to safeguard the public against the creation or perpetuation of monopolies and to foster and

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[91]Utah Code Ann. §13-5-17 (2001) reads:

> **Policy of act.**
> The Legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

[92]Under Utah Code Ann. § 13-5-14 (2001):

> Any person or the state of Utah may maintain an action to enjoin a continuance of any act in violation of this chapter, and, if injured by the act, for the recovery of damages. If, in such action, the court finds that the defendant is violating or has violated any of the provisions of this chapter, it shall enjoin the defendant from a continuance of the violation. It is not necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff is entitled to recover from the defendant three times the amount of the actual damages sustained or $2,000, whichever is greater, plus court costs.

encourage competition" nor the "liberal construction" of its terms can extend civil liability—or the Act's criminal sanctions—beyond the "unfair and discriminatory practices" expressly "prohibit[ed]" by the Act itself. Utah Code Ann. § 13-5-17 (2001).

Where, as here, the plaintiffs fail to plead or otherwise identify acts by one or more defendants that violate the Utah Unfair Practices Act's specific provisions, neither the conclusory allegation of a violation nor the generalized assertion of interference with freedom of contract can sustain their treble damages claims under that Act.

(12) Utah Civil Rights Act (Utah Code Ann. §§ 13-7-1 *et seq.* (2001))

Utah Code Ann. § 13-7-3 (2001) reads:

> **13-7-3. Equal right in business establishments, places of public accommodation, and enterprises regulated by the state.**
>
> All persons within the jurisdiction of this state are free and equal and are entitled to full and equal accommodations, advantages, facilities, privileges, goods and services in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever, without discrimination on the basis of race, color, sex, religion, ancestry or national origin. Nothing in this act shall be construed to deny any person the right to regulate the operation of a business establishment or place of public accommodation or an enterprise regulated by the state in a manner which applies uniformly to all persons without regard to race, color, sex, religion, ancestry, or national origin; or to deny any religious organization the right to regulate the operation and procedures of its establishments.

This explicit guarantee of equal treatment reflects Utah's public policy "to assure all citizens full and equal availability of all goods services and facilities offered by" business establishments, places of public accommodation and state-regulated enterprises "without

discrimination because of race, color, sex, religion, ancestry, or national origin," and the State's recognition since 1965 that "the practice of discrimination on the basis of race, color, sex, religion, ancestry, or national origin . . . endangers the health, safety, and general welfare of this state and its inhabitants." Utah Code Ann. § 13-7-1 (2001).[93] Section 13-7-4(3) provides that "[a]ny person who is denied the rights provided for in Section 13-7-3 shall have a civil action for damages and any other remedy available in law or equity against any person who denies him the rights provided for in Section 13-7-3 or who aids, incites or conspires to bring about such denial."

Plaintiffs' pleading alleges the "violation of Mrs. Valdez' state right to receive services equally with all other patients as found in Utah Code Ann. 13-7-2," (Proposed Amended Complaint at 13 ¶ (21)), but she does not allege specific facts showing discrimination against her on the basis of *her* race, color, sex, religion, ancestry or national origin, or plead specific facts from which such discrimination may reasonably be inferred. Nor does she allege specific facts showing that she was denied "full and equal accommodations, advantages, facilities, privileges, goods and services" in a "place[] of public accommodation," as guaranteed by the Utah statute.

(13) Interference with Contract and with Prospective Business Relations

The tort of "interference with contract" addresses "conduct which 'intentionally

[93]This statute was first enacted by the Utah Legislature in 1965, (1965 Utah Laws ch. 174), a watershed year for civil rights, government reform and other significant Utah legislation. A 1973 amendment added discrimination on the basis of sex to the conduct prohibited by the statute. *See* 1973 Utah Laws ch. 18, § 3.

and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract.' *Restatement (Second) of Torts* § 766 (1979). *See also Bunnell v. Bills*, 13 Utah 2d 83, 90, 368 P.2d 597, 602 (1962); W. Prosser, *Handbook of the Law of Torts* § 129 at 929-30 (4th ed. 1971); *Annot.*, 26 A.L.R.2d 1227 (1952)." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982).

"The tort of intentional interference with prospective economic relations reaches beyond protection of an interest in an existing contract and protects a party's interest in prospective relationships of economic advantage not yet reduced to a formal contract (and perhaps not expected to be)." *Leigh*, 657 P.2d at 302 (citing *Buckaloo v. Johnson*, 14 Cal.3d 815, 537 P.2d 865, 868-69, 122 Cal.Rptr. 745, 748-49 (1975); *Restatement (Second) of Torts* § 766B comment c; Prosser, *supra*, at § 130). In the *Leigh* case, the Utah Supreme Court recognized "a common-law cause of action for intentional interference with prospective economic relations," and adopted the Oregon definition of this tort. *Id.* at 304 (citing *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371, 374 (1979); *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 283 Or. 201, 205, 209, 582 P.2d 1365, 1368, 1371 (1978)). "Under this definition, in order to recover damages, the plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Id.*

The "economic relations" protected by this theory are diverse. "Driving away an individual's existing or potential customers is the archetypical injury this cause of action was devised to remedy. *E.g.*, *Guillory v. Godfrey*, 134 Cal.App.2d 628, 286 P.2d 474 (1955); *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); W. Prosser, *Handbook of the Law of Torts* § 130 (4th ed. 1971); *Restatement (Second) of Torts* § 766B(a)," *Leigh*, 657 P.2d at 306, but protection extends to "any prospective contractual relations . . . if the potential contract would be of pecuniary value to the plaintiff" (excluding contracts to marry), as well as "a continuing business or other customary relationship not amounting to a formal contract." *Restatement (Second) of Torts* § 766B comment c (1979).

The question of interference for an "improper purpose" or by an "improper means" requires the weighing of several relevant factors:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and

> (g) the relations between the parties.

Restatement (Second) of Torts § 767(a)-(g) (1979). As the *Leigh* court observed:

> In the rough and tumble of the marketplace, competitors inevitably damage one another in the struggle for personal advantage. The law offers no remedy for those damages--even if intentional--because they are an inevitable byproduct of competition. Problems inherent in proving motivation or purpose make it prudent for commercial conduct to be regulated for the most part by the improper means alternative, which typically requires only a showing of particular conduct.
>
> The alternative of improper purpose will be satisfied where it can be shown that the actor's predominant purpose was to injure the plaintiff. . . .

657 P.2d at 307 (footnote & citations omitted). As the *Restatement* explains, a competitor's interference with a prospective contractual relation is not improper if, among other things, "his purpose is at least in part to advance his interest in competing with the other." *Restatement (Second) of Torts* § 768(d) (1979).

> *g. The actor's purpose.* The rule stated in this Section developed to advance the actor's competitive interest and the supposed social benefits arising from it. If his conduct is directed, at least in part, to that end, the fact that he is also motivated by other impulses, as, for example, hatred or a desire for revenge is not alone sufficient to make his interference improper. But if his conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper.

Id. § 768 comment g.

The factual allegations underpinning Dr. MacArthur's and Ms. Lyman's interference claims were considered in some detail at the Final Pretrial Conference

(14) "state *common law* defamation (also a U. S. Constitutional right to reputation as guaranteed by the Ninth Amendment)"

(a) Utah Law of Defamation

"At its core, an action for defamation is intended to protect an individual's interest in maintaining a good reputation." *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994); *see Seegmiller v. KSL, Inc.*, 626 P.2d 968, 973 (Utah 1981) (recognizing that "the integrity of an individual's reputation is essential to his standing in society, in his vocation, and even in his family").

> In order to state a claim for defamation under Utah law, a plaintiff must show "that defendants published the statements concerning him [either in print or by spoken words], that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage." *West*, 872 P.2d at 1007-08 (footnotes omitted).

Wayment v. Clear Channel Broadcasting, Inc., 2005 UT 25, ¶ 18 n.2, ___ P.3d ___, 2005 WL 858167; *see DeBry v. Godbe*, 1999 UT 111, ¶ 8, 992 P.2d 979, 982;[94] *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988); *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 974, 976 (Utah 1981); *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814, 818-19, 820-21 (1958); Utah Code Ann. §§ 45-2-2 (1998); Tracy H. Fowler, Note, *Modernizing Defamation Law in Utah*,

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[94] According to *DeBry v. Godbe*,

> To establish her claim for defamation, the plaintiff must demonstrate that (1) the defendant published the statements in the letter concerning Ms. DeBry; (2) the statements were false; (3) the statements were not subject to privilege; (4) the statements were published with the requisite degree of fault; and (5) the statements resulted in damages. See *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994).

1980 Utah L. Rev. 535; *see also Restatement (Second) of Torts* § 558 (1972).[95] Under Utah law, "a statement is defamatory if it impeaches an individual's honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." *West*, 872 P.2d at 1008 (citing *Cox*, 761 P.2d at 561 (citing Utah Code Ann. § 45-2-2(1))). "A court simply cannot determine whether a statement is capable of sustaining a defamatory meaning by viewing individual words in isolation; rather, it must carefully examine the context in which the statement was made, giving the words their most common and accepted meaning." *Id.* at 1009 (citations omitted).

As detailed most recently in the *Wayment* opinion, the question of "requisite degree of fault" that must be shown largely turns upon whether the plaintiff is in some sense a "public figure." 2005 UT 25, ¶¶ 17-36. If a plaintiff is a non-"public" private individual, "the necessary degree of fault which must be shown in a defamation action . . . is negligence." *Seegmiller*, 626 P.2d at 973; *accord, In re I.M.L. v. State of Utah*, 2002 UT 110, ¶ 25, 61 P.3d 1038, 1045 ("in a civil action for libel 'actual malice' is required if the statement concerns a public official, whereas only negligence is required if the statement concerns a private citizen"); *see* 50 Am. Jur. 2d *Libel and Slander* § 21 (1995).

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[95]The *Restatement (Second) of Torts* § 558 identifies four elements necessary in order to establish a cause of action in defamation: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

(b) Defamation & the Ninth Amendment

Plaintiffs have not cited and this court has not found Supreme Court or Tenth Circuit case authority recognizing "a U.S. Constitutional right to reputation as guaranteed by the Ninth Amendment," (Proposed Amended Complaint at 12 ¶ (6)), at least as a theory of legal liability for injury to reputation independent of state defamation law.

Given that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803), the Ninth Amendment must be afforded a stature greater than that of a mere "inkblot,"[96] and recent scholarship argues various approaches to its interpretation.[97] At a minimum, the Ninth Amendment serves as a "constitutional 'saving clause'"[98] avoiding an overly narrow

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[96](in the words of Judge Robert Bork, *The Bork Disinformers*, Wall St. J., Oct. 5, 1987, at 22.)

[97]*See, e.g.*, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (Randy E. Barnett ed. 1989); *The Rights Retained by the People: The Ninth Amendment and Constitutional Interpretation, Volume II* (Randy E. Barnett ed. 1993); *The Bill of Rights: Original Meaning and Current Understanding* 419-451 (Eugene W. Hickok, Jr., ed. 1991); Congressional Research Service, Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation* 1503-1505 (1992 ed.); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597 (February 2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331 (2004); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. Balt. L. Rev. 169 (2003); Akhil Reed Amar, *The Bill of Rights* 119-133 (1998); John Hart Ely, *Democracy and Distrust—a Theory of Judicial Review* 34-41 (1980); Charles A. Black, Jr., *Decision According to Law* (1981); Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 Nw. U. L. Rev. 1508 (1994); Raoul Berger, *Suzanna And--the Ninth Amendment*, 1994 B.Y.U. L. Rev. 51; William Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 Yale L. J. 207 (1981).

[98]At the time of the adoption of the Bill of Rights,

> Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. See 1 Annals of Cong. 438-440 (1789). See also, *e.g.*, 2 J. Story, Commentaries on the Constitution of the United States 651 (5th ed. 1891). Madison's efforts,

(continued...)

construction of the Bill of Rights. While it may or may not "constitute[] an independent source of rights protected from infringement by either the States or the Federal Government," the Ninth Amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

> [T]he Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. . . . The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.

Id. (citations omitted).

One recent commentary asserts that reading the Ninth Amendment in light of the original intent of the Framers (and in particular, James Madison) requires the courts to strike a balance between the competing constitutional right to free speech and non-constitutional legal rights to reputation, but rejects the view that the Ninth Amendment elevates the right to reputation to constitutional status. Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 Notre Dame L. Rev. 585, 587 (2004) (the "right to reputation is not relevantly denied or disparaged

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[98](...continued)
culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

Richmond Newspapers v. Virginia, 448 U.S. 555, 579–80 & n.15 (1980) (Burger, C.J.) (plurality opinion).

unless listing certain rights in the Constitution is construed to leave reputation less protected than it would otherwise have been" under state laws, at least as they existed in 1789 or 1791.) This raises the question whether, *e.g.*, the vindication of First Amendment interests in free expression at the expense of state defamation laws protecting the reputation of "public figures" serves "to deny or disparage" unenumerated rights "retained by the people" contrary to the Ninth Amendment. *See id.* at 586, 616-621. However, that issue does not arise here, where no one has asserted that either Dr. MacArthur or Ms. Lyman are "public figures" subject to more limited protection under Utah defamation law. *See Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶¶ 17-36.

Unless the Part I Plaintiffs are attempting to extend their claims under 42 U.S.C. § 1983 to include defamatory injury to reputation (as one among the "rights, privileges, or immunities secured by the Constitution and laws" of the United States),[99] invoking the

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[99]The Supreme Court has rejected the assertion of reputation as a discrete interest protected by the Due Process Clause of the Fourteenth Amendment. Reputation alone—apart from some more tangible interests such as employment—does not implicate any "liberty" or "property" interests sufficient to invoke the procedural protection of the Due Process Clause; hence, to establish a claim under § 1983 and the Fourteenth Amendment, more must be involved than simply defamation by a state official. *Paul v. Davis*, 424 U.S. 693, 701-712 (1976).

> [A plaintiff's] interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where, as here, inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons, we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Id. at 712.

Ninth Amendment in the context of their defamation claims does not appear to make any substantive difference to the legal standards to be applied or the judicial remedies that may be available to them.[100]

(15) "Federal common law and Utah contract common law and statutory provisions that prohibit contracts of adhesion, bad faith, and lack of fair dealing. Utah Code Ann. 78-12-25(1) (1996)," including the Implied Covenant of Good Faith and Fair Dealing

Plaintiffs MacArthur and Lyman allege "bad faith void contracts that lack fair dealing," the "denial of their entitlement to a contract with the District that is based upon principles of good faith and fair dealing, with adequate consideration," and "violations of Federal common law and Utah contract common law and statutory provisions that prohibit contracts of adhesion, bad faith, and lack of fair dealing. Utah Code Ann. §§ 78-

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[100]Under Utah law, private civil damages action for common-law defamation are subject to a one-year statute of limitations: "An action may be brought within one year: . . . (4) for libel, slander, assault, battery, false imprisonment, or seduction; . . . ." Utah Code Ann. § 78-12-29(4) (2002).

> "Under Utah law, the statute of limitations begins to run when the cause of action accrues." *Retherford v. AT & T Communications of the Mt. States, Inc.*, 844 P.2d 949, 975 (Utah 1992); *see also* Utah Code Ann. § 78-12-1 (2002). "A tort cause of action accrues when all of its elements come into being and the claim is actionable." *Retherford*, 844 P.2d at 975. Pursuant to Utah Code section 78-12-29(4), "an action may be brought within one year ... for libel ... [or] slander." Utah Code Ann. § 78-12- 29(4) (2002). "[I]n libel cases, the one-year period of section 78-12-29(4) does not run until the libel is known or is reasonably discoverable by the plaintiff." *Allen v. Ortez*, 802 P.2d 1307, 1314 (Utah 1990).

Christensen v. Drossos, 2005 UT App 170, 2005 WL 851700, *1.

It appears to be uncontroverted that in this case, both Dr. MacArthur and Ms. Lyman became aware of the false and malicious rumors allegedly being circulated about them by one or more of the individual defendants contemporaneously with the rumors' circulation. For Dr. MacArthur, the pertinent events transpired between October 1999 and March 2000, at which time he relocated to Nevada. Ms. Lyman may have a timely claim for defamatory falsehoods that were known or reasonably discoverable after July 25, 1999, but some of the events of which she complains may have taken place before that date.

12-25(1) (1996)."[101] (Proposed Pretrial Order at 4-5 ¶¶ (11), (12) & (18).)

(a) Contracts of Adhesion

"A contract of adhesion is an agreement forced on one party by another who has superior bargaining strength." *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 906 n.1 (Utah Ct. App. 1995) (citing *Wagner v. Farmers Ins. Exch.*, 786 P.2d 763, 766 n. 2 (Utah Ct. App. 1990),[102] *overruled on other grounds*, *Allen v. Prudential Property and Cas. Ins. Co.*, 839 P.2d 798 (Utah 1992)). "In other words, an adhesion contract is one in which the party has no alternative." (*Id.*)

Under Utah law, "adhesion contracts" are not prohibited *per se*. Instead, the Utah Supreme Court has enumerated several equitable doctrines that may be applied to remedy over-reaching in the making of adhesion contracts, including the doctrines of estoppel, waiver, unconscionability, breach of the implied duty of good faith and fair dealing, and the rule that ambiguous language is to be resolved against the drafter. *Allen v. Prudential Property and Cas. Ins. Co.*, 839 P.2d 798, 805-807 & nn. 11-16 (Utah 1992) (rejecting proposed rule that ambiguous insurance contract provisions must be interpreted to

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[101] Utah Code Ann. § 78-12-25(1) (2002) provides that "[a]n action may be brought within four years:"

> (1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

[102] *Wagner* defined an "adhesion contract" as "'a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it basis...."'" 786 P.2d at 766 n.2 (quoting *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 54 Cal.Rptr. 104, 107, 419 P.2d 168, 171 (1966)).

effectuate the "reasonable expectations" of the insured). "[T]he existing equitable doctrines, such as waiver, estoppel, and unconscionability, apply to any contractual relationship regardless of context so long as warranted by the facts." *Id.* at 806 n.17.

(b) Implied Covenant of Good Faith and Fair Dealing

Utah has recognized that all contracts contain a covenant of good faith and fair dealing. *Beck v. Farmers Ins. Exchange*, 701 P.2d 795, 798 (Utah 1985). As the Utah Supreme Court explained in *Christiansen v. Farmers Ins. Exchange*, 2005 UT 21, ___ P.3d ___, 2005 WL 791117:

> A breach of express contract claim arises out of the express terms of the contract, and the breach is proven in relation to those terms. *See Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 2004 UT 54, ¶ 11, 94 P.3d 292 (relying on a contract's express terms to determine the intent of the parties). A claim for breach of the implied covenant of good faith and fair dealing, by contrast, is based on judicially recognized duties not found within the four corners of the contract. *See Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985). These duties, unlike the duties expressly stated in the contract, are not subject to alteration by the parties. They exist whenever a contract is entered, *see id.*, and are imposed on the parties "consistent with the agreed common purpose" of the contract, *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 200 (Utah 1991).

2005 UT 21, at ¶ 10. Under Utah law, "the covenant of good faith and fair dealing inheres in all contracts," *id.* at 11, and

> Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1991). A violation of the covenant is a breach of the contract. *Id.* at 200 (citing *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985)).

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 14, 94 P.3d 193,

> To determine the legal duty a contractual party has under this covenant, a court will assess whether a "party's actions [are] consistent with the agreed common purpose and the justified expectations of the other party." *Id.* at 200. This court determines the "purpose, intentions, and expectations" by considering "the contract language and the course of dealings between and conduct of the parties." *Id.*

Oakwood Village LLC v. Albertsons, Inc., 2004 UT 101, ¶ 43, 104 P.3d 1226, 1239-1240.

Under Utah law, "some general principles limit the scope of the covenant," including the following:

> First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree *ex ante*. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). Second, this covenant cannot create rights and duties inconsistent with express contractual terms. *See id.*; *Rio Algom Corp. v. Jimco, Ltd.*, 618 P.2d 497, 505 (Utah 1980). Third, this covenant cannot compel a contractual party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract." *Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 457 n. 13 (Utah Ct. App. 1994). Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract. *See Dalton v. Jerico Constr. Co.*, 642 P.2d 748, 750 (Utah 1982).

Oakwood Village LLC, 2004 UT 101, ¶ 45, 104 P.3d at 1240; *see Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991) (the implied covenant of good faith and fair dealing "cannot be construed . . . to establish new, independent rights or duties not agreed upon by the parties."). Generally, "the degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on contract terms." *Smith v. Grand*

Canyon Expeditions, 2003 UT 57, ¶ 20, 84 P.3d 1154, 1160.[103] In all instances, however, "[t]he reach of the implied covenant of good faith and fair dealing extends no further than the purposes and express terms of the contract." *Id.*, 2003 UT 57, ¶ 22, 84 P.3d at 1160.

The "federal common law"reading of this implied covenant finds reflection in *United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781 (8th Cir.2001), in which the Eighth Circuit, applying federal common law, was confronted with the application of the implied covenant of good faith and fair dealing to a contract term involving amortization of certain costs. *Id.* at 794-97. *Basin Electric* reversed a portion

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[103] According to Justice Nehring, author of the *Smith v. Grand Canyon Expeditions* opinion:

> [T]he implied covenant is by its very nature a pliable doctrine. It is inherently amorphous and evades definitional precision. These traits place the implied covenant directly at odds with predictability of conduct, the most basic and cherished characteristic of the contracts which the implied covenant was created to serve. As one commentator observed, "While the varieties of good faith are not quite as infinite as those of religious faith, it would be quite extraordinary if this protean concept were used in the same sense in all ... assorted instances." Farnsworth, E. Allan, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L.Rev. 666, 668 (1968).
>
> However, this answer is unsatisfactory to many who share the view made evident in the dissent that the implied covenant can too easily turn away from being an ally of contract law and become its antagonist. This happens when courts mishandle the subtle but important distinction between invoking the implied covenant to compel a contracting party to honor the "agreed common purpose" and "justified expectations' of another party to the contract, *Restatement Second of Contracts* § 205 cmt. a (1979), and injecting it to "establish new, independent rights or duties not agreed upon by the parties" or to "nullify a right granted by a contract to one of the parties." Brehany v. Nordstrom, 812 P.2d 49, 55 (Utah 1991).
>
> The parties can reduce the risk that a court will remake their contract and award one party "benefits for which it did not bargain," . . . by bargaining for terms that limit the exercise of unfettered discretion by one party or that otherwise clearly articulate the purposes and expectations of the parties. In short, the parties to a contract are best served when they fill their own gaps.

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶¶ 43-45, 94 P.3d at 204 (Nehring, J., concurring).

of the district court's judgment granted for a breach of the implied covenant of good faith and fair dealing, noting that the covenant "does not imply 'an everflowing cornucopia of wished-for legal duties,'" and "does not impose a general requirement that a party act reasonably[;][r]ather, the covenant acts as a gap filler to deal with circumstances not contemplated by the parties at the time of contracting." *Id.* at 796 (internal citations omitted). The implied covenant would not be applied in a fashion that necessitates rewriting the contract to give one party "benefits for which it did not bargain." *Id.* at 797-98.

Plaintiffs assert the "denial of their entitlement to a contract with the District that is based upon principles of good faith and fair dealing, with adequate consideration," (Proposed Pretrial Order at 4 ¶ (12)); "injuries from the defendants' by way of . . . (12) bad faith void contracts that lack fair dealing," (Proposed Amended Complaint at 11-12 ¶ (12)); and that as to Dr. MacArthur, "[e]very time he was given a contract in bad faith with amibuities [sic] upon which he relied, he has a claim." (*Id.* at 95; Proposed Pretrial Order at 64.) Yet nowhere in the Proposed Amended Complaint, the Proposed Pretrial Order, or plaintiffs' more recent written submissions do they plead specific facts identifying the "bad faith void contracts" in question, or detailing the bad faith or over-reaching involved in making those contracts.[104]

[104]If these allegations were intended to refer to the SJHSD medical staff *bylaws* that govern medical practice at District facilities, the reference is well-hidden. Under Utah law, it is understood that "[h]ospital bylaws constitute 'a contract between the hospital and the physician,'" and that "the Hospital must comply with

(continued...)

Instead, it appears that plaintiffs' counsel is attempting to weave the equitable doctrines enumerated in *Allen* into an affirmative legal duty of "fair dealing" affecting "all Utah business relations," independent of the terms of a specific contract—a duty to make all contracts on terms that accommodate the economic expectations of the plaintiffs. Indeed, plaintiffs' counsel asserts an "interference with" Dr. MacArthur's "right to pursue his profession and business affairs by lack of good faith and fair dealing inherent and mandated in all Utah business relations." (Memorandum in Support of Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), at 4.)

The Utah Supreme Court has taken the position "that the ability of a plaintiff to recover in tort for breach of the implied covenant of good faith and fair dealing in a contract 'has the potential for distorting well-established principles of contract law and will not be permitted.'" *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1046 (Utah 1989) (Durham, J.) (quoting *Beck v. Farmers Insurance Exchange*, 701 P.2d 795, 799 (Utah

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[104](...continued)
those bylaws when taking actions which effect its staff." *Houston v. Intermountain Health Care, Inc.*, 933 P.2d 403, 408 (Utah Ct. App. 1997) (quoting *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069, 1076 (Utah 1991)).

In contrast to *Rees* and *Houston*, the plaintiffs in this action do not seek to enforce the provisions of the SJHSD bylaws, or even to enforce the implied covenant of good faith and fair dealing as an implied term of the bylaws "contract." They list no claim for breach of contract. Instead, they apparently contend that the SJHSD "medical staff bylaws in and of themselves are "unconstitutional [unconscionable?], violative of covenants of good faith and fair dealing." (Tr. 11/14/02, at 43:5-9 (Ms. Rose).) Yet this view of the medical staff bylaws would necessarily hold them to be unenforceable and of no legal effect—leaving plaintiffs MacArthur and Lyman with no procedural mechanism by which they could have obtained or maintained practice privileges at SJHSD facilities.

1985)). Utah law thus does not recognize an independent tort cause of action based upon "good faith and fair dealing" apart from the purposes and terms of an existing contract, and in contrast to equitable doctrines such as unconscionability, the implied covenant cannot serve as a basis for invalidating a contract.

(16) "privacy rights and statutory entitlements to have their credential files and patient files accurately kept by the district under Medicaid and Utah Health Department statutes and regulations"

The confidentiality of individual patients' medical information has been a matter of long-standing concern, acknowledged in the Hippocratic Oath (ca. 400 B.C.E.).[105]

> Drawing from its rich history, confidentiality remains widely acknowledged as a fundamental ethical tenet of medicine, as patients must be willing to confide sensitive and personal information to health care professionals. Therefore, its value in the context of the patient-physician relationship stems partly from the need for patients to trust their physicians, and for physicians to express their loyalty to patients.

Council on Ethical and Judicial Affairs, American Medical Association, *Privacy in the Context of Health Care* (CEJA Report 2-I-01), at 2 (December 2001), *available at* <http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_2i01.pdf> Concern for the protection of patient confidentiality and privacy finds current expression in the American Medical Association's Principles of Medical Ethics: "A physician shall respect the rights

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[105]The Oath of Hippocrates, 4th Century, B.C.E., reads in part:

> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.

Ludwig Edelstein, *The Hippocratic Oath: Text, Translation, and Interpretation* (1943).

of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law." American Medical Association, *Principles of Medical Ethics* ¶ IV (2001), *available at* <http://www.ama-assn.org/ama/pub/category/2512.html>.[106]

In Utah, the maintenance and protection of the confidentiality of medical records involves the application of both legal and ethical standards. The Utah Medical Practice Act Rules (Rule R156-67) currently provide:

> **R156-67-602. Medical Records.**
>
> In accordance with Subsection 58-67-803(1), medical records shall be maintained to be consistent with the following:
>
> (1) all applicable laws, regulations, and rules; and
>
> (2) the Code of Medical Ethics of the Council on Ethical and Judicial Affairs as published in the AMA Policy Compendium, 2001 edition, which is hereby incorporated by reference.

Utah Admin. Code § R156-67-602 (2005); *see* Utah Code Ann. § 58-67-803(1) (2002) ("Medical records maintained by a licensee shall: (a) meet the standards and ethics of the profession; and (b) be maintained in accordance with division rules made in collaboration with the board.").

The advent of electronic storage and computer access to patient medical records

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[106]The terms "confidentiality" and "privacy" address distinct, yet overlapping concerns: "In the context of health care, emphasis has been given to confidentiality, which is defined as information told in confidence or imparted in secret. However, physicians also should be mindful of patient privacy, which encompasses information that is concealed from others outside of the patient-physician relationship." *Privacy in the Context of Health Care*, *supra*, at 3.

and health information has increased patient privacy and confidentiality concerns, as one recent commentary explains:

> [As] access to medical information of a sensitive nature has grown, those in the medical community and privacy advocates began to recognize the need for broad privacy protections to medical data. The result of this campaign is the Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule"), a set of regulations promulgated by the Secretary of Health and Human Services ("HHS"). The Privacy Rule was required by the Health Insurance Portability & Accountability Act of 1996 ("HIPAA"), then popularly known as the Kennedy-Kassenbaum Act. At the time, HIPAA received significant attention, because it made it easier for an employee to maintain health insurance after leaving a job. HIPAA also provided that if Congress did not pass legislation pertaining to medical privacy within a specified time, HHS would promulgate regulations to that affect. HHS issued a proposed rule in October 1999, and after an unusually long and contentious comment period and a clerical error that nearly derailed the regulations at the last second, the Privacy Rule was implemented in early 2001.

Kevin B. Davis, *Privacy Rights in Personal Information: HIPAA and the Privacy Gap Between Fundamental Privacy Rights and Medical Information*, 19 J. Marshall J. Computer & Info. L. 535, 536 (2001) (footnotes omitted).

In enacting the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), Congress mandated the establishment of national standards for protection of the privacy of individually identifiable health and medical information. As indicated, the U.S. Department of Health and Human Services promulgated such standards in 2001, and most health plans and health care providers that are covered by the new rule were required to comply with the new standards by April of 2003. *See Standards for Privacy of Individually Identifiable*

Health Information, 65 Fed. Reg. 82462 (Dec. 28, 2000), *codified at* 45 C.F.R. Parts 160, 164 (2004).[107]

Prior to the enactment of HIPAA, Utah law already afforded some degree of legal protection for the privacy and confidentiality of patient medical records. *See, e.g.*, *Hoopiiaina v. Intermountain Health Care*, 740 P.2d 270, 272 (Utah Ct. App. 1987) ("Confidentiality of patient information is required by Utah Code Ann. § 78-25-25 (1987) and Chapter 7.404 of the Utah State Department of Health, Hospital and Psychiatric Hospital Rules and Regulations, Medical Records Department (1984 Revision).").[108] Utah law may afford some common-law privacy protection for medical records as well.[109]

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[107]In mid-2001, HHS released an FAQ-style "Guidance" commentary explaining the new "Privacy Rule" standards and requirements. HHS Office for Civil Rights, *Standards for Privacy of Individually Identifiable Health Information* (2001), *at* <http://www.hhs.gov/ocr/hipaa/finalmaster.html> (July 6, 2001; last revised January 14, 2002).

[108]Originally adopted in 1971 (1971 Utah Laws ch. 213, § 1), Utah Code Ann. § 78-25-25 (2002) addressed attorney access to patient medical records, and was repealed and re-enacted in 2003 in light of HIPAA and the HHS Privacy Rule. *See* Utah Code Ann. § 78-25-25 (Supp. 2004); 2003 Utah Laws ch. 64, § 2.

[109]Under Utah law, to prevail on a claim of public disclosure of embarrassing private facts, a plaintiff must establish the following essential elements:

> (1) the disclosure of the private facts must be a public disclosure and not a private one;
>
> (2) the facts disclosed to the public must be private facts, and not public ones; [and]
>
> (3) the matter made public must be one that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

Shattuck-Owen v. Snowbird Corp., 2000 UT 94, ¶ 11, 16 P.3d 555, 558 (quoting *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 117, at 856-857 (5th ed. 1984) (footnote omitted))). *See also Restatement (Second) of Torts* § 652D (1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.") *Shattuck-Owen* notes that the *Restatement (Second) of Torts § 652D* (1977) "contains another element requiring that the matter made public

(continued...)

At this point, however, this court need not reconstruct the pre-HIPAA Utah law of confidentiality of patient medical records; plaintiffs assert the breach of such confidentiality, but plead no specific facts by which such a breach could be established. Plaintiffs asserted at the time of the Pretrial Conference that "Mrs. Lyman had patient files disappear, and patients['] confidentiality breached," (Proposed Pretrial Order at 13), that "[p]atients of Michele Lyman were subjected to . . . (3) breach of confidentiality of any medical treatment they did receive in the District facilities," (*id.* at 30 ¶ 139), that "[c]onfidentiality of her patients was broken on more than one occasion by medical staff and other SJHSD personnel," (*id.* at 51 ¶195), but with no specific factual allegations as to particular instances in which such a breach of confidentiality has occurred, or in which it is alleged there was a public disclosure of a patient's embarrassing private medical information.[110] Moreover, absent such specific factual allegations, the court need not decide the threshold question whether the remaining Part I Plaintiffs have the requisite standing to assert claims for a breach of confidentiality or invasion of privacy affecting

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[109](...continued)
not be 'of legitimate concern to the public,'" but did not "decide whether to adopt this requirement as an element of the invasion of privacy tort we address today." 2000 UT 94, ¶ 11 n.1, 16 P.3d at 558 n.1.

[110]The Proposed Amended Complaint asserts that "some of Mrs. Lyman's patients[] were subjected to community gossip for conditions that were supposed to be private," (Proposed Amended Complaint at 17-18), at least implying some breach of confidentiality. That assertion is omitted from the recitation of contested issues of fact in the Proposed Pretrial Order, replaced by the equally conclusory assertions that "Patients of Michele Lyman were subjected to . . . (3) breach of confidentiality of any medical treatment they did receive in the District facilities, . . . (6) false rumors as to their medical conditions," still without any reference to particular instances. (Proposed Pretrial Order at 30 ¶ 139.)

third persons, *viz.*, their patients. *Cf. Singleton v. Wulff*, 428 U.S. 106 (1976) (plurality opinion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Tileston v. Ullman*, 318 U.S. 44 (1943); Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277 (1984).[111]

(17) Negligent and Intentional Infliction of Emotional Distress

(a) Intentional Infliction of Emotional Distress

In *DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, the Utah Supreme Court reiterated the essential elements of a claim of intentional infliction of emotional distress:

> In *Samms v. Eccles*, we stated the elements of such a claim:
>
> > [A]n action for severe emotional distress, though not accompanied by bodily impact or physical injury, [may lie] where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.
>
> 11 Utah 2d 289, 293, 358 P.2d 344, 346-47 (1961).

1999 UT 111, ¶ 25, 992 P.2d at 986.[112] "To prevail on her claim of intentional infliction of emotional distress," a plaintiff "must prove that the defendants either intentionally or

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[111] Ordinarily, a litigant "'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[112] *Godbe* affirmed the district court's conclusion that the plaintiff's "intentional infliction of emotional distress claim could not survive summary judgment because Godbe's conduct was not outrageous and intolerable under *Samms*." *Id.*

recklessly engaged in intolerable and outrageous conduct that caused her severe emotional distress." *Retherford v. AT & T Communications*, 844 P.2d 949, 967 (Utah 1992).[113]

(b) Negligent Infliction of Emotional Distress

The Utah Supreme Court first expressly recognized a cause of action for negligent infliction of emotional distress in *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988).

> In *Johnson*, after surveying the various tests that courts in this country have developed to determine liability for the negligent infliction of emotional distress, we adopted the position taken by section 313 of the *Restatement (Second) of Torts* (1965), as explained in the comments accompanying that section. Section 313's approach, also referred to as the zone of danger approach, allows recovery to plaintiffs who suffer emotional distress because of another's negligence, though they do not suffer any physical impact, only if the plaintiffs are placed in actual physical peril and fear for their own safety. Johnson, therefore, does not provide recovery to plaintiffs who are not within the zone of danger created by a defendant's negligence.

Boucher By and Through Boucher v. Dixie Medical Center, 850 P.2d 1179, 1181 (Utah, , 1992).[114] The comments to *Restatement* § 313 "restrict the scope of a claim for negligent

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[113]Intentional infliction of emotional distress, in contrast to negligent infliction of emotional distress, does not require that plaintiff actually be at risk of bodily harm. *See Restatement (Second) of Torts* § 312.

[114]Section 313 of the *Restatement (Second) of Torts* reads:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
>
> > (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
> >
> > (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(continued...)

infliction of emotional distress"[:]

> Comment "a" declares that the "rule stated in this Section does not give protection to mental and emotional tranquillity in itself." *Restatement (Second) of Torts* § 313 cmt. a (1965). Comment "c" articulates a form of "reasonable person" test by noting that in contrast to the section 312 rule for intentional creation of emotional distress, "one who unintentionally but negligently subjects another to such emotional distress does not take the risk of any exceptional physical sensitiveness to emotion which the other may have unless the circumstances known to the actor should apprise him of it." *Restatement (Second) of Torts* § 313 cmt. c (1965). These comments recognize the fact that "[w]e cannot permit every claim for negligent infliction of emotional distress to go to a jury under such varying standards as each trial judge may choose." *Johnson*, 763 P.2d at 785 (Zimmerman, J., concurring in part).

Harnicher v. University of Utah Medical Center, 962 P.2d 67, 70 (Utah 1998). One restriction that "provides a check on feigned disturbances, thereby ensuring the genuineness of claims"[115] is the requirement that plaintiffs who claim to be the direct victim of negligent infliction of emotional distress must allege resulting illness or bodily harm, including clinically identifiable mental illness. *See id.* at 71-72 (affirming summary judgment against plaintiffs who "had not suffered any bodily harm or physical injury that would support an action for negligent infliction of emotional distress");

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[114](...continued)

> (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

Restatement (Second) of Torts § 313 (1965); *see also Hansen v. Sea Ray Boats*, 830 P.2d 236, 240-241 (Utah 1992) (discussing § 313).

[115]*Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974 (Utah 1993).

Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 974 (Utah 1993) ("emotional disturbance that is not severe enough to result in illness or physical consequences is likely to be in the realm of the trivial. Such a disturbance is likely to be so temporary and subjective that to attempt to compensate it would unduly burden defendants and the courts. *See Restatement (Second) of Torts* § 436A cmt. b (1965); . . .").[116]

Given that *Restatement (Second) of Torts* § 313(1) does not give protection to mental and emotional tranquility *per se*, "[c]onsequently, much of the '"emotional distress" which we endure ... is not compensable.' *Thing v. La Chusa*, 48 Cal.3d 644, 257 Cal.Rptr. 865, 771 P.2d 814, 829 (1989) (denying recovery for negligent infliction of emotional distress where mother of injured child arrived at the scene after accident had already occurred)." *Harnicher*, 962 P.2d at 72. To sustain a claim of negligent infliction of emotional distress, "the emotional distress suffered must be severe; it must be such that 'a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" *Mountain Fuel*, 858 P.2d at 975 (quoting *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509, 520 (1970)).

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[116] As *Mountain Fuel* explains:

> The language used in section 313 of the Restatement provides some guidance. Subsection (1) allows recovery for "illness or bodily harm." *Restatement (Second) of Torts* § 313(1) (1965) (emphasis added). The drafters' use of "or" rather than "and" shows an intention to allow a plaintiff to recover not only where bodily harm results from emotional trauma, but where "illness" results as well. "Illness" is "an unhealthy condition of body or mind." *Webster's New Collegiate Dictionary* 566 (1981). From this we conclude that either physical or mental illness may support the . . . cause of action.

858 P.2d at 974-975.

(c) The Part I Plaintiffs' Emotional Distress Claims

Intentional and negligent infliction of emotional distress "are claims for . . . different torts, each with separate elements," and "[o]bviously, [a] plaintiff must make the necessary allegations in his complaint to support each separate claim, and at trial plaintiff must prove all of the elements of each claim to recover for that cause of action," each by a preponderance of the evidence. *Heiner v. Simpson*, 2001 UT 39, ¶¶ 8, 9, 23 P.3d 1041, 1043 (footnote omitted); *id.* 2001 UT 39 ¶ 7 n. 3, 23 P.3d at 1043 n.3.

Court and counsel reviewed the factual allegations underlying Ms. Lyman's claim of intentional infliction of emotional distress in light of this analytical framework at the Final Pretrial Conference. (*See infra* at 174-176.)

(18) Fraud

Under Utah law,

> The elements that a party must allege "to bring a claim sounding in fraud" are (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage. *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1066-67 (Utah 1996) (citations omitted); *Educators Mut. Ins. Ass'n. v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029, 1032 (Utah 1995); *accord Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991).

Armed Forces Ins. Exchange v. Harrison, 2003 UT 14, ¶ 16, 70 P.3d 35, 40.

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments

of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." "Simply stated, a complaint must 'set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" *Schwartz v. Celestial Seasonings, Inc.*,124 F.3d 1246, 1252 (10th Cir. 1997) (quoting *Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)). At a minimum, Rule 9(b) requires that a plaintiff set forth the "who, what, when, where and how" of the alleged fraud. *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)); *see also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999) ("[T]he 'circumstances' required to be pled with particularity under Rule 9(b) are 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby.'") (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1297, at 590 (2d ed.1990)).

> Thus, while a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule. One of the main purposes of the rule is to apprise the defendant of fraudulent claims and of the acts that form the basis for the claim. . . . In other words, "[i]n cases in which *fraud lies at the core of the action*, the rule does not permit a complainant to file suit first, and subsequently to search for a cause of action."

Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985) (quoting *Lopez v. Bulova Watch Co.,*

Inc., 582 F.Supp. 755, 766 (D.R.I.1984) (emphasis added)).[117] *See also* Annotation, *Construction and application of provision of Rule 9(b), Federal Rules of Civil Procedure, that circumstances constituting fraud or mistake be stated with particularity*, 27A.L.R. Fed. 407 (1976 & Supp. 2004).

As discussed above, plaintiff Lyman alleges that her CPR certification cards, "a necessary component of her ability to obtain privileges were altered purposefully," that "the cards were stolen from her file at least on two if not three occasions," that "the forged documents were mailed to the American Heart Association," and that "the doctors would have profited from Mrs. Lyman not being able to work . . . ." (Proposed Pretrial Order at 63 ¶ 255; *see also id.* at 14, 29 ¶¶ 129-131, 34 ¶¶ 174-175.) No less than five essential elements of fraud are omitted from her allegations, *viz.*, that the altered cards were sent to the American Heart Association "[1] for the purpose of inducing the other party to act upon it and [2] that the other party, acting reasonably and in ignorance of its falsity, [3] did in fact rely upon it [4] and was thereby induced to act [5] to that party's injury and damage." *Secor v. Knight*, 716 P.2d 790, 794 (Utah 1986) (quoting *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980)).

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[117]Once past the pleading stage, a party must then prove the elements of fraud by clear and convincing evidence:

> "A finding of fraud must be based on the existence of all its essential elements . . . . '[F]raud is a wrong of such nature that it must be shown by clear and convincing proof and will not lie in mere suspicion or innuendo.'" *Taylor v. Gasor, Inc.*, 607 P.2d 293, 294-95 (Utah 1980) (internal citations omitted) (quoting *Lundstrom v. Radio Corp. of Am.*, 17 Utah 2d 114, 117-18, 405 P.2d 339, 341 (1965)).

Armed Forces Ins. Exchange v. Harrison, 2003 UT 14, ¶ 27, 70 P.3d at 43.

"[I]n order to prevail on a claim of fraud [or misrepresentation], *all the elements of fraud* must be established by clear and convincing evidence." *Id.* (emphasis added). Under Rule 9(b) those missing elements of reasonable reliance, causation and injury are among the "circumstances constituting fraud" that must be pleaded with particularity. Absent such pleading, plaintiffs' fraud claim remains vulnerable to dismissal pursuant to Fed. R. Civ. P. 9(b), independent of a motion under Rules 12(b)(6) or 56.

Would plaintiffs' state law fraud claim fare better in a Utah state court? In applying Utah's parallel civil rule, the Utah Supreme Court has held that "the mere recitation by a plaintiff of the elements of fraud in a complaint does not satisfy the particularity requirement." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14,¶ 16, 70 P.3d at 40. Rather, Utah Rule 9(b) requires a complaint to recite "[t]he relevant surrounding facts '"with sufficient particularity to show what facts are claimed to constitute [the fraud] charges."'" *Id.* (quoting *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (quoting *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990, 991 (1962))). Moreover, as the Utah Court of Appeals recently observed in *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974, "rule 9(b) also imposes a much more basic and fundamental requirement: a requirement of clarity and conciseness":

> In *Heathman* [*v. Hatch*, 13 Utah 2d 266, 372 P.2d 990 (1962)], the Utah Supreme Court affirmed the dismissal of the plaintiff's complaint because the complaint, which was "33 legal size typewritten pages" in length, did not comply with rule 9(b). 372 P.2d at 991-92. The Court stated the following regarding the complaint's noncompliance with that rule:

> Without burdening this opinion with the details of plaintiff's much too long and involved complaint, it is sufficient to say that its shortcomings are such that it was well within the discretion of the trial court to conclude that it failed to comply with [rules 8(a) and 9(b)], and, accordingly, to grant the motion to dismiss. The objective of these rules is to require that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed; and, if so, so that there will be a clearly defined foundation upon which further proceedings by way of responsive pleadings and/or trial can go forward in an orderly manner.

Id. at 992.

2003 UT App 339, ¶ 23, 79 P.3d at 980 (footnote omitted). As *Coroles* explains, pleading a fraud claim without specifying the facts upon which it is based "essentially dumps upon the trial court . . . the burden of sifting through the hundreds of paragraphs of alleged facts to ascertain whether Plaintiffs have 'allege[d] ... facts necessary to make all their elements of fraud.' *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995)."

> Such an approach is unacceptable. It is Plaintiffs' responsibility, not the courts', to set forth "[t]he relevant surrounding facts" in such a manner that it is evident "'"what facts are claimed to constitute [the fraud] charges."'" *Armed Forces*, 2003 UT 14 at ¶ 16, 70 P.3d 35 (citations omitted) (emphasis added). *See Arena Land & Inv. Co. v. Petty*, No. 94-4196, 1995 WL 645678, at *1, 1995 U.S.App. LEXIS 31140, at *3 (10th Cir. Nov. 3, 1995) ("The third amended complaint is wordy, repetitive and fails to allege the necessary elements of the claims it is asserting. Indicative of the complaint's inadequacy is the fact that it rambles on for sixty-four pages before reaching the first claim for relief. It is neither the court's nor the appellees' role to sift through a lengthy, conclusory and poorly written complaint to piece together the cause of action.").

Id. at ¶ 27, 79 P.3d at 980-81 (footnote omitted).

Here, this court is—as was the Utah Court of Appeals in *Coroles*—"unable to ascertain """what facts are claimed to constitute [the fraud] charges."""" 2003 UT App 339, ¶ 27 n.12 (quoting *Armed Forces Insurance Exchange v. Harrison*, 2003 UT 14, ¶ 16, 70 P.3d 35 (citations omitted)).

Summary re: the Part I Plaintiffs' Causes of Action

Whether the Part I Plaintiffs' claims had any arguable legal merit or raised genuine issues for trial—a question of further formulation of the issues for trial under Fed. R. Civ. P. 16(c)(1)—was addressed in some detail at the Final Pretrial Conference. Accepting the Proposed Amended Complaint as the best articulation of the Part I Plaintiffs' claims as of the time of pretrial,[118] it becomes apparent that many of plaintiffs' theories of liability had already failed as a matter of law—one because the statute in question simply does not afford plaintiffs a private civil remedy, the others because they are legally meritless: either the essential elements of the cause of action have no bearing upon the specific facts alleged by these plaintiffs (even if those facts are taken as true and all reasonable inferences are drawn in their favor), or because the plaintiffs have pleaded the claims in conclusory terms, without alleging any specific facts that would provide a viable factual footing for these claims, that is, without a plain statement of the claim showing that they

[118] As noted above, almost all of its allegations were repeated verbatim as the "Plaintiffs' Statement of Contested Issues of Fact" in Section 5 of the Proposed Pretrial Order.

are entitled to relief. *See* Fed.R.Civ.P. 8(a)(2).[119] These legally meritless claims include those pleaded as arising under (*i*) RICO, 18 U.S.C. §§ 1961 *et seq.*; (*ii*) the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248; (*iii*) the Health Care Quality Improvement Act, 42 U.S.C. § 11112; (*iv*) the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd; (*v*) the "Medicare Patient Bill of Rights,"or freedom-of-choice provision, 42 U.S.C. § 1395a; (*vi*) 42 U.S.C. § 1981; (*vii*) 42 U.S.C. § 1985(3); (*viii*) 42 U.S.C. § 1983; (*ix*) the federal antitrust laws; (*x*) the Utah Constitution, art. I, §§ 1, 7, 25, 26, 27; (*xi*) the Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1 *et seq.*; (*xii*) the Utah Civil Rights Act, Utah Code Ann. §§ 13-7-1 *et seq.*; (*xiii*) "Federal common law and Utah contract common law and statutory provisions that prohibit contracts of adhesion, bad faith, and lack of fair dealing," including the implied covenant of good faith and fair dealing; (*xiv*) "privacy rights and statutory entitlements to have their credential files and patient files accurately kept by the district under Medicaid and Utah Health Department statutes and regulations"; (*xv*) negligent infliction of emotional distress; and (*xvi*) fraud. Those claims may properly be dismissed as frivolous pursuant to Fed. R. Civ. P. 16(c)(1) because they are based upon an indisputably meritless legal theory, or are footed upon conclusory assertions rather than specific facts, as reflected in

[119]Further, absent leave to amend her pleadings in some fashion, plaintiff Valdez' EMTALA claim—pleaded as a cause of action for the first time in the Proposed Amended Complaint and mirrored in the Proposed Pretrial Order—was clearly time-barred. *See* 42 U.S.C. § 1395dd(d)(2)(C). Plaintiff Lyman's defamation claim may be time-barred as to any actionable conduct known of or reasonably discoverable prior to July 25, 1999.

the Proposed Amended Complaint and the Proposed Pretrial Order.[120] *Cf. Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (claim "based on an indisputably meritless legal theory"or founded on "clearly baseless" factual contentions may be dismissed as "frivolous" under 28 U.S.C. § 1915); *Green v. Seymour*, 59 F.3d 1073, 1077 (10th Cir. 1995) (complaint is "frivolous" under 28 U.S.C. § 1915 "'where it lacks an arguable basis either in fact or law.'"); *Olson v. Stotts*, 9 F.3d 1475, 1476 (10th Cir. 1993) (claim is "frivolous" under 28 U.S.C. § 1915 "if the factual contentions supporting the claim are 'clearly baseless,' . . . or the claim is based on a legal theory that is 'indisputably meritless,'"); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (to be "frivolous" under 28 U.S.C. § 1915, "a claim must rely on 'an indisputably meritless legal theory' or a 'clearly baseless' . . . factual scenario"); *Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001) (complaint is "frivolous" if it "lacks an arguable basis in law or fact, and a complaint lacks such a basis if it relies on an indisputably meritless legal theory."); *Walker v. City of Bogalusa*, 168 F.3d 237 (5th Cir. 1999) (claim is "frivolous" under 42 U.S.C. § 1988 if "it is 'so lacking in arguable merit as to be groundless or without

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[120]Neither Fed. R. Civ. P. 16(c)(1) nor the accompanying advisory committee notes articulate the legal standard to be applied in determining whether a claim or defense is "frivolous" within the meaning of the rule. The advisory committee note to the 1983 amendment to Rule 16 makes general reference to a case from the D.C. Circuit, *Meadow Gold Products Co. v. Wright*, 108 U.S.App.D.C. 33, 278 F.2d 867 (D.C. Cir. 1960). That case states that "the primary purpose of the pre-trial procedure is to 'define the claims and defenses of the parties for the purpose of eliminating unnecessary proof and issues, lessening the opportunities for surprise and thereby expediting the trial,'"but does not speak of "frivolous" claims. 278 F.2d at 869 (quoting *Rosden v. Leuthold*, 107 U.S.App.D.C. 89, 92, 274 F.2d 747, 750 (D.C. Cir. 1960)).

Some guidance may be gleaned from case law construing analogous rule and statutory language, *e.g.*, 28 U.S.C. § 1915(e) (2000). *Cf.* Fed. R. Civ. P. 11(b)(2) (claims and defenses "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law").

foundation'" (quoting *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983) (construing 42 U.S.C. §2000e-5(k)) (quoting *Jones v. Texas Tech University*, 656 F.2d 1137, 1145 (5th Cir. 1981))); *Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003) (complaint may be deemed "frivolous" under 42 U.S.C. § 1988 "only when the 'result is obvious or the . . . arguments of error are wholly without merit'" (quoting *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981))); *Davis v. Target Stores Div. of Dayton Hudson Corp.*, 87 F. Supp. 2d 492, 494 (D. Md. 2000) (claim is "frivolous" under Title VII (42 U.S.C. § 2000e-5(k)) "if a plaintiff presents no evidence to support his claim or if he has gone forward on the basis of no colorable legal theory"); *see also* Annotation, *Standards for determining whether proceedings in forma pauperis are frivolous and thus subject to dismissal under 28 U.S.C.A. sec. 1915(d)*, 52 A.L.R. Fed. 679 (1981 & Supp. 2004); Annotation, *Right of defendant in civil rights case to receive award of attorney's fees under Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C.A. sec. 1988)*, 104 A.L.R. Fed.14 (1991 & Supp. 2004); *Black's Law Dictionary* 601 (5th ed. 1979) ("A pleading is 'frivolous' when it is clearly insufficient in its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent.").

Pretrial Determination of the Part I Plaintiffs' Claims

For the reasons explained in some detail above, the Final Pretrial Conference concluded with a bench ruling dismissing the Part I Plaintiffs' remaining federal claims

on the grounds that they did not have an arguable basis in law and lacked sufficient support in plaintiffs' factual allegations to raise a triable issue, even where those allegations are taken as true and viewed in the light most favorable to the plaintiffs. (*See* Tr. 11/15/02, at 113:9-118:7 (the court)); Fed. R. Civ. P. 16(c)(1).)

Plaintiffs' counsel subsequently objected to the dismissal of the Part I Plaintiffs' claims at the Final Pretrial Conference on the grounds that (1) no summary judgment motion was pending at the time of the Final Pretrial Conference, and plaintiffs did not receive ten days' notice that summary judgment would be considered; (2) no notice was given to the plaintiffs that the pretrial hearing was in actuality a hearing of dismissal of all of their claims; (3) several issues of material fact were raised in the pretrial conference; and (4) dismissal with prejudice, without leave to amend, operates as a "severe sanction" that should only be imposed in extraordinary cases. According to plaintiffs' counsel, there are "two types of dismissal" under the Federal Rules: Rule 12(b) dismissal and Rule 56 summary judgment—or three, *viz.*, as a discovery sanction (Rule 37(b)(2)(C))—a view that fails to take into account Rule 16(c)(1) and the function of the final pretrial conference. (*See supra* at 4-7 ("The Final Pretrial Conference (Fed. R.Civ. P. 16(c))").)

The court's expectations concerning the proposed pretrial order and the final pretrial conference were spelled out for counsel in explicit terms at the hearing on August 22, 2002:

> THE COURT: A pretrial order is a joint product. *I'm interested in isolating the genuinely disputed factual issues. I'm interested in isolating*

> *the genuinely disputed legal issues if any.* I want a roster of all your witnesses on all sides. I want a roster of all your exhibits for your cases in chief.
>
> MS. ROSE: Roster of exhibits and witnesses.
>
> THE COURT: I'm interested in having the attorneys sign off on the suggested form of pretrial order so that I know that you've agreed to it even if you agree to disagree as to the identified issues, and I'm interested as I said in giving you a little more time here.
> * * * *
> We're interested in *identifying the issues, identifying both legal propositions and factual propositions*, the witnesses, the exhibits.
> And then at pretrial *I'm interested in counsel being prepared to talk theory, that is legal theory, legal authority, statutory authority or case authority and be able to talk facts*, this is what this witness is going to tell us Judge. That way *we can try to screen what's here and see what's genuinely disputed and what genuinely deserves a fact finder trial.*

(Transcript of Hearing, dated August 22, 2002, at 31:23-32:9, 32:25-33:9 (the court) (emphasis added).) And this was not the only occasion in which the court expressed its expectations concerning pretrial to counsel in open court, and on the record. (*See* Minute Entry, dated July 2, 2002 (dkt. no. 386); Minute Entry, dated October 8, 2002 (dkt. no. 427).) These expressed expectations comport with both the purpose and function of Rule 16(c) and the requirements of the court's Local Rules, particularly DUCivR 7-1(d): "Preparation for this final pretrial conference should proceed pursuant to Fed. R. Civ. P. 16 and should include (i) preparation by plaintiff's counsel of a recommended pretrial order . . . , and (ii) *preparation for resolution of unresolved issues in the case*." (Emphasis added.)

As explained in some detail herein, this court addressed these plaintiffs' claims in

the context of the Final Pretrial Conference, and did so pursuant to Rule 16(c)(1), applying Rule 16(c)(1) standards, using the parties' Proposed Pretrial Order as a guide—not pursuant to Rule 56, applying Rule 56(c) standards; not pursuant to Rule 12(b)(6), working solely within the confines of the written pleadings; and not in the context of the imposition of discovery sanctions against the plaintiffs pursuant to Rule 37(b)(2).[121]

Claims Against San Juan County and the SJHSD

As explained above, the pretrial examination of the Part I Plaintiffs' causes of action leads to the conclusion that these plaintiffs have no viable federal causes of action against either San Juan County or the San Juan Health Services District. The remaining state tort law claims involve intentional torts allegedly committed by one or more individual defendants.

Claims Against the Individual Defendants

The colloquy at the Final Pretrial Conference confirmed that as against the individual defendants—Commissioner Tyron Lewis, Commissioner Bill Redd, County Attorney Craig Halls, Reid Wood, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Dr. Lloyd Val Jones, Dr. Manfred Nelson, Rick Bailey, Marilee Bailey, Ora Lee Black, Gary Holliday, Carla Grimshaw, Gloria

[121] *See, e.g., Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (district court acted within its discretion under Fed. R. Civ. P. 37(b)(2)(C) in dismissing complaint with prejudice as sanction for violation of discovery order when securities fraud plaintiff failed to appear for scheduled deposition notwithstanding court's order and warning that court would dismiss complaint if plaintiff did not comply with order).

Yanito, and Julie Bronson—the Part I Plaintiffs have failed to allege legally viable § 1983 claims against these defendants, even taking plaintiffs' factual allegations as true and treating them in the light most favorable to the plaintiffs. Plaintiffs' federal antitrust claims fail as against these defendants as well.

As against County Attorney Craig Halls, the Part I Plaintiffs have alleged no wrongful conduct whatsoever. Essentially the same may be said for defendant Carla Grimshaw. Defendants Ora Lee Black and Gloria Yanito are alleged to have communicated directions concerning Ms. Lyman's staff privileges that purportedly originated with Dr. Redd, the SJHSD medical director, or Ms. Schafer, the patient care director. By themselves, these allegations do not state an arguable legal claim under the plaintiffs' remaining state tort law theories. Nor does it appear that any remaining state law claim was pleaded against defendant Lori Wallace. (*See* Proposed Pretrial Order at 5-6 ¶¶ (20)-(25).)

Likewise, the Part I Plaintiffs complain of the County Commissioners and SJHSD Board members *inaction* on their behalf, but allege no intentionally tortious acts by any of these defendants that establish any of the elements of the remaining state law causes of action for interference with contract, interference with prospective business relations, defamation and intentional infliction of emotional distress.

Dr. MacArthur's State Law Tort Claims

As against defendant Julie Bronson (and possibly Marilee Bailey, Laurie Schafer and Cleal Bradford, (*see* Proposed Pretrial Order at 25 ¶ 96)), Dr. MacArthur alleges facts that, when taken in the light most favorable to him, may support a state law defamation claim. Whether he alleged a non-frivolous claim of interference with contract or interference with prospective business relations against those few individual defendants who were directly involved with his request for full provisional staff privileges appears more doubtful. He did not allege facts that would support a claim for intentional infliction of emotional distress against any defendant.

Dr. MacArthur's federal claims having been dismissed pursuant to Fed. R. Civ. P. 16(c)(1), this court declines to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) (2000) over his remaining state law tort claims of defamation against Ms. Bronson (or others), and interference with contract/prospective business relations against Dr. Redd, Mr. Bradford or others who had direct involvement with Dr. MacArthur's December 1999 request for full one-year provisional privileges pursuant to the SJHSD medical staff bylaws. *See* 28 U.S.C. § 1367(c)(3) (2000). Dr. MacArthur has pleaded no other non-frivolous state tort claims against any other defendant.

Ms. Lyman's State Law Tort Claims

From an examination of the Proposed Amended Complaint, the Proposed Pretrial Order and through the colloquy at the Final Pretrial Conference, it became increasingly

apparent that Ms. Lyman was not claiming a *denial* of practice privileges as much as she was alleging intentional interference by some defendants with the *exercise* of practice privileges which Ms. Lyman understood she had already been granted by the SJHSD and which remained in effect until December 22, 1999. She alleges a series of incidents in which her orders for laboratory tests, heart monitors, injections, x-rays and other routine procedures would be refused or ignored, often at the instance or direction of Dr. Redd. (*See supra* n. 69 and accompanying text.)

While such incidents may not amount to a constitutional deprivation actionable under § 1983—and subject to claims of qualified immunity—they may constitute at least a colorable state tort claim. An excluded practitioner may be able to avoid the qualified privilege barrier to § 1983 claims by pleading and proving that an individual defendant's actions were taken to satisfy a personal grudge, not in the best interests of the hospital, and therefore constituted an intentional tort, such as interference with contractual relations. *See, e.g., Straube v Emanuel Lutheran Charity Bd.*, 287 Or. 375, 600 P.2d 381 (1979), *cert. denied*, 445 U.S. 996 (1980). In addition, non-tort theories such as breach of contract may be available to remedy discrepancies between reasonable expectations as to practice privileges and restrictions imposed upon their actual exercise.

> Because the Hospital bylaws constitute "a contract between the hospital and the physician," *Rees*, 808 P.2d at 1076, the Hospital must comply with those bylaws when taking actions which effect its staff. Moreover, we agree with the weight of authority which grants deference to hospital officials' professional judgment. Under this authority, courts require that a hospital only "substantially comply" with its bylaws. *See, e.g.*, *Owens v. New*

> *Britain Gen. Hosp.* , 627 A.2d 1373, 1379-80 (Conn. App. 1993), *aff'd* , 643 A.2d 233 (Conn. 1994); *Friedman v. Memorial Hosp.*, 523 N.E.2d 252, 253 (Ind. App. 1988); *Smith v. Our Lady of the Lake Hosp.*, 639 So. 2d 730, 755 (La. 1994); *Mahmoodian v. United Hosp. Ctr., Inc.*, 404 S.E.2d 750, 755 (W. Va.), *cert. denied*, 502 U.S. 863, 112 S. Ct. 185 (1991); *see also Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1066-67 (Utah 1981) (finding substantial compliance with policies in college personnel manual sufficient to withstand due process attack); *see generally* Kathleen M. Dorr, Annotation, *Exclusion of, or Discrimination Against, Physician or Surgeon by Hospital*, 28 A.L.R. 5th 107, §3, at 152-67 (1995 & Supp. 1996) (collecting cases). Substantial compliance with the bylaws adequately serves their primary purpose, which is to ensure fair procedures for staffing decisions. See, e.g., *Owens*, 627 A.2d at 1379-80.

Houston v. Intermountain Health Care, Inc., 933 P.2d 403, 408 (Utah Ct. App. 1997).[122]

Plaintiff Lyman may also have viable state tort claims against Dr. Redd for defamation and intentional infliction of emotional distress. Defamation claims under Utah law are constrained by the one-year limitations statute, but claims for intentional infliction of emotional distress have a much longer temporal reach:

> Utah Code section 78-12-25(3) permits an action for intentional infliction of emotional distress to be brought within four years of actionability. *See* Utah Code Ann. § 78-12-25(3) (2002) ("An action may be brought within four years ... for relief not otherwise provided by law."); *see also Retherford*, 844 P.2d at 975 (applying section 78-12-25(3) to determine the statute of limitations for the plaintiff's intentional infliction of emotional distress claim).
>
> In *Retherford*, the Utah Supreme Court noted that "[b]ecause of the nature of [an intentional infliction of emotional distress] cause of action, it can be difficult to determine when all its elements--intentional, outrageous conduct proximately causing extreme distress--have come into being. Of particular difficulty is the element of injury--extreme emotional distress."

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[122] In dealing with the enforcement of the terms of written hospital bylaws, presumably the Utah six-year limitations statute for actions based upon written contracts would apply. *See* Utah Code Ann. § 78-12-23(2) (2002).

> 844 P.2d at 975. However, the difficulty in determining when the emotional distress occurred is generally limited to situations "where a defendant subjects a plaintiff not to a single outrageous act, but to a pattern or practice of acts." *Id.*

Christensen v. Drossos, 2005 UT App 170, 2005 WL 851700, *1. Furthermore, "[W]hen conduct that would give rise to a claim of intentional infliction of emotional distress is continuous and ongoing, and it is unclear when the plaintiff suffered severe emotional distress, the statute of limitations begins to run from the time the last injury is suffered or the tortious conduct ceases." *Hatch v. Davis*, 2004 UT App 378, ¶ 44, 102 P.3d 774, 785 (footnote omitted).

Ms. Lyman's federal claims having been dismissed at the conclusion of the Final Pretrial Conference, this court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over her remaining state law tort claims. *See* 28 U.S.C. § 1367(c)(3). Those claims, therefore, will be dismissed *without* prejudice.

Summary re: the Final Pretrial Conference

As the court explained at the conclusion of the Final Pretrial Conference, "The effort is again to sort out as best we can what the contentions are and the footings for those contentions," a process "resulting in the orders that the court has indicated." (Tr. 11/15/02, at 228:8-10 (the court).)

In revisiting that sorting process in the process of preparing this more formal written disposition of the issues presented, the court has elaborated upon the legal and factual bases for its bench ruling in somewhat greater detail. The court has also taken this

opportunity to clarify the jurisdictional disposition of the plaintiffs' few remaining state law claims in the interest of avoiding at least some confusion concerning those matters.

Initially, the court had called upon counsel for the prevailing parties to prepare proposed forms of order memorializing the court's bench ruling at the pretrial conference, consistent with this court's local rule, DUCivR 54-1(a) & (b):

> **(a) Orders in Open Court.** Unless otherwise determined by the court, orders announced in open court in civil cases must be prepared in writing by the prevailing party, served within five (5) days of the court's action on opposing counsel, and submitted to the court for signature pursuant to the provisions of section (b) of this rule.
>
> **(b) Orders and Judgments.** Unless otherwise determined by the court, proposed orders and judgments prepared by an attorney must be served upon opposing counsel for review and approval as to form prior to being submitted to the court for review and signature. Approval will be deemed waived if no objections are filed within five (5) days after personal service or eight (8) days after service by mail.

The preparation of proposed forms of order led to another series of objections, revisions, hearings, and supplemental memoranda on the same. (*See* Plaintiff's Formal Objection to the Court assigning the drafting of the Final Dismissal Order to the Defense Counsel, filed November 20, 2002 (dkt. no. 458); Proposed Final Order of Dismissal with Prejudice, received November 22, 2002; Proposed Order Denying Plaintiffs' Rule 15 Motion to Amend, received November 26, 2002; Plaintiffs' Objection to the Form of the Proposed Dismissal Order, filed November 27, 2002 (dkt. no. 465); Plaintiffs' Objection to the Defendants' Proposed Order Denying the Plaintiffs' Motion to Amend the Complaint, filed December 27, 2002 (dkt. no. 477); Transcript of Hearing, dated February

24, 2003, at 26:17-31:15, 71:8-12; Proposed Order of Dismissal With Prejudice, received March 4, 2003; Objection to the Defendants' Proposed Order of Dismissal With Prejudice, filed March 10, 2003 (dkt. no. 511); Transcript of Hearing, dated December 19, 2003; Supplemental Objections to the Final Orders of Dismissal of Federal and State Law Claims, filed December 29, 2003 (dkt. no. 585).

In preparing this written disposition of the Part I Plaintiffs' claims, the court has also taken the opportunity to address several of the objections raised by the plaintiffs to the proposed forms of order earlier submitted by counsel,[123] particularly where those objections were directed against the substance of the court's bench ruling or the conduct of the pretrial conference, as opposed to the *form* of the proposed orders reflecting that ruling. *Cf.* DUCivR 54-1(b).

PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

It has long been understood that "[t]he Federal Rules encourage litigants to plead only a simple statement, in sequence, of the events which have transpired, coupled with a direct claim by way of demand for judgment." *Meadow Gold Products Co. v. Wright*, 278 F.2d 867, 869 (D.C. Cir. 1960) (citing *Gins v. Mauser Plumbing Supply Co.*, 148 F.2d 974 (2d Cir. 1941)). From the commencement of this litigation, plaintiffs' counsel

[123](*See, e.g.*, Plaintiffs' Objection to the Form of the Proposed Dismissal Order, filed November 27, 2002 (dkt. no. 465), at 3, 5 ("the Plaintiffs should be allowed to know what legal theories and facts and rules the Court was relying upon for dismissing each Plaintiffs' claim in the pretrial setting. Plaintiffs should not be forced to ferret out by intuition what the Court meant, was thinking at the time, or intended . . . . Plaintiffs respectfully request the Court itself to identify the claims of the Plaintiffs and the reasons for their dismissal.").)

has taken a dramatically different approach to pleading the Part I Plaintiffs' claims, at times shuffling each plaintiff's factual allegations and legal assertions together as one would a deck of playing cards, sacrificing narrative sequence in favor of argumentative characterizations and conclusory assertions.

Plaintiffs' Proposed Amended Complaint was no exception. Filed a week before the Final Pretrial Conference, "Plaintiffs' Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," and "Memorandum of Fact and Law in Support," filed November 6, 2002 (dkt. no. 438), sought leave to file the Proposed Amended Complaint in order to correct any deficiencies in the plaintiffs' pleadings referred to by the Tenth Circuit in *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002), and to amend plaintiffs' pleadings to conform to the evidence and clarify the remaining issues. *See* Fed. R. Civ. P. 15(b). The defendants did not have an opportunity to respond to that motion before the Final Pretrial Conference began on November 14, 2002.

At the conclusion of the Final Pretrial Conference on February 15, 2002, the court made a bench ruling denying the motion for leave to amend:

> MS. ROSE: I've put in a motion to amend the complaint and I drafted it in 2 parts. Since these plaintiffs have been dismissed is there any way of procedurally just looking at amending the complaint for the second part?
>
> THE COURT: Well I dealt with the important aspect of the amended complaint, namely the emergency room problem and I've dealt with that and I'll simply deny the motion to amend.

> MS. ROSE: No, no, I meant no, Your Honor, I'm sorry, I didn't mean for these 3 plaintiffs that have been dismissed, I understand they are gone. What I'm talking about is I amended the complaint that I originally filed for Singer, Riggs and Dickson and is that motion for amending that part of the complaint still viable?
>
> THE COURT: No, the motion is denied.

(Tr. 11/15/02, at 119:8-23.) The court again addressed the matter at the February 24, 2003 hearing on all pending motions. (*See* Transcript of Hearing, dated February 24, 2003, at 36:21-23 ("We dealt with the question of amendments and I have indicated to you that as an amendment the answer is no." (the court).) A proposed form of order denying the motion was submitted to the court, as were objections thereto, and the proposed order has not been entered.

Having reviewed the record in this matter in preparing this written disposition, the court has again examined the motion for leave to amend as well as the Proposed Amended Complaint. The allegations of the Proposed Amended Complaint, prolix and circuitous as they are, correspond far more closely to the issues as framed by counsel in the Proposed Pretrial Order than do the even more prolix and partially obsolete allegations of the original Complaint, as earlier amended. (*See* Complaint (Verified), filed July 25, 2000 (dkt. no. 1); "Amendments to the Complaint; Correction of Errors," filed August 1, 2000 (dkt. no. 3).)

While generally, motions to amend a complaint to conform to the evidence "are made at trial or in the immediate aftermath of trial," Steven Baicker-McKee, et al.,

Federal Civil Rules Handbook 337 (2000 ed.), the express language of Rule 15(b) does not limit such motions to that context.

Viewing the Proposed Amended Complaint as the best statement of plaintiffs' claims as of the time of pretrial, and given the close relationship between the proposed pleading and the Proposed Pretrial Order, it likely would serve the interests of clarity of the record to grant the leave to amend as requested, and direct the filing of the Proposed Amended Complaint *nunc pro tunc* to November 14, 2002, the date of the Final Pretrial Conference. Granting leave to amend on that basis avoids confusion between the Part I Plaintiffs' claims as pleaded in the original Complaint and their claims as addressed in the context of pretrial, and does so without reviving any claims that were disposed of in the course of the Final Pretrial Conference. Granting leave to amend also serves to clarify the remaining plaintiffs' claims as pleaded in *Part II* of the Proposed Amended Complaint, concerning the enforcement of certain orders of the Navajo Tribal Court. Therefore, the court concludes that its earlier bench ruling concerning the "Plaintiffs' Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," filed November 6, 2002 (dkt. no. 438), should be vacated and the motion should be granted *nunc pro tunc* to November 14, 2002.

THE PART I PLAINTIFFS' MOTIONS FOR RECONSIDERATION

In the months since the November 2002 pretrial conference, court and counsel have addressed matters concerning the claims of the remaining three plaintiffs, Singer,

Riggs and Dickson, and the questions of Navajo Tribal Court jurisdiction they have raised. In addition, the court has heard, considered and ruled upon a series of motions filed by the parties, including a request for a settlement conference, which was granted, (*see* Minute Entry, dated July 6, 2004 (dkt. no. 657)), but apparently to no avail. (*See* Minute Entry, dated September 28, 2004 (dkt. no. 663).)

Shortly after the reported failure of the settlement conference, the Part I Plaintiffs' filed a series of motions for reconsideration of the court's bench rulings at the Final Pretrial Conference, coupled with motions for summary judgment in favor of the Part I Plaintiffs pursuant to Fed. R. Civ. P. 56. (*See* Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 664); Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670); Plaintiff Lyman's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' [sic] Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed December 28, 2004 (dkt. no. 695).) Responsive memoranda were filed by the defendants, followed by the plaintiffs' reply memoranda and several additional motions.[124]

[124](*See* "Plaintiffs' MacArthur, Lyman, Valdez' Motion for Sanctions," filed January 25, 2005 (dkt. no. 703); San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff Valdez' Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Motion for Summary Judgment, filed

(continued...)

Except to the extent that a motion under Fed. R. Civ. P. 60(b) or Fed. R. Civ. P. 59(e) is deemed a "motion for reconsideration," the Federal Rules do not expressly provide for such motions. Nevertheless, in this circuit, a "motion for reconsideration" may be made on one or more specific grounds:

> Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *See Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law.

Servants of the Paraclete v. John Does, I-XVI, 204 F.3d 1005, 1012 (10th Cir. 2000).

Here, the Part I Plaintiffs urge reconsideration of this court's November 15, 2002 bench ruling on most, if not all of the available grounds. (*See* Memorandum of Points and Authorities Supporting Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 665), *passim*; Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims

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[124](...continued)
November 29, 2004 (dkt. no. 673); San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff MacArthur's Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Cross-Motion for Summary Judgment, filed December 13, 2004 (dkt. no. 682); Motion for an Extension of Time to Respond to MacArthur's November 29, 2004 Motion for Summary Judgment (Health District), filed December 14, 2004 (dkt. no. 684); Health District Defendants' Joinder in Motion, filed December 21, 2004 (dkt. no. 690); Motion for an Extension of Time to Respond to Lyman's December 26, 2004 Motion for Summary Judgment (Health District), filed January 14, 2005 (dkt. no. 699); San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff Lyman's Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Cross-Motion for Summary Judgment, filed January 18, 2005 (dkt. no. 701); Joinder in San Juan County Defendants' Combined (1) Memorandum in Opposition to Plaintiff Lyman's Motion to Reconsider and (2) Motion for an Extension of Time to Respond to Cross-Motion for Summary Judgment, filed February 3, 2005 (dkt. no. 706).)

and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), *passim*; Memorandum in Support of Plaintiff Lyman's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' [sic] Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed December 28, 2004 (dkt. no. 696), *passim*.) They also raise additional issues *not* addressed at pretrial, particularly as to the nature of the relationships between various defendants, their liability insurers and their counsel of record.

The court has reviewed and considered the Part I Plaintiffs' motions for reconsideration and supporting memoranda and exhibits as part of the process of preparing this written embodiment of that bench ruling, and has referred to them more than once in the foregoing analysis of the plaintiffs' various claims. The Part I Plaintiffs' "new evidence previously unavailable" consists largely of deposition testimony of a SJHSD officer obtained in another federal lawsuit relating conversations about non-parties, or evidence of collateral matters concerning the background and credibility of one or more of the individual defendants, (*e.g.*, unrelated prior criminal convictions). The plaintiffs also complain of materials not produced by the defendants in discovery in this action. They also use these motions as an opportunity to adjust their legal contentions and theories of liability.

In large part, however, the Part I Plaintiffs' motions for reconsideration simply reargue the same legal claims grounded upon the same factual allegations as were set

forth in the Proposed Amended Complaint and the Proposed Pretrial Order, and discussed in some detail at the Final Pretrial Conference.

Having examined the motions for reconsideration, the court concludes that in each instance, the motion presents no exceptional circumstances justifying relief from the court's prior bench ruling as it has been further explicated herein. *Cf. Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990) ("Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances."). The Part I Plaintiffs have failed to point to "new evidence previously unavailable" that materially alters the existing factual footing for their claims; nor have they established a "need to correct clear error or prevent manifest injustice" as to any claim that has been dismissed on its merits, as detailed above.

Therefore, the Part I Plaintiffs' motions for reconsideration should in each instance be denied in all respects.[125]

[125]The denial of plaintiffs' motions for reconsideration renders moot their accompanying motions for summary judgment. Thus, no further response by the defendants to the latter motions is required. (*See* Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 5-6.)

"Plaintiffs' MacArthur, Lyman, Valdez' Motion for Sanctions," filed January 25, 2005 (dkt. no. 703), shall likewise be denied.

CONCLUSION

With the determination of the Part I Plaintiffs' motions for reconsideration and for sanctions, this court's consideration of these plaintiffs' claims against the remaining defendants draws to a close. Based upon detailed examination in the context of the Final Pretrial Conference, the Part I Plaintiffs' claims have been dismissed pursuant to Fed. R. Civ. P. 16(c)(1), on the merits and with prejudice, with the exception of the remaining state tort law claims of plaintiffs MacArthur and Lyman for interference with contract, interference with prospective business relations, defamation and/or intentional infliction of emotional distress as against defendants Redd, Jones, Schafer, Nelson, and Bradford, as well as defendants Bronson and Marilee Bailey (defamation only), over which this court declines to exercise supplemental jurisdiction, *see* 28 U.S.C. § 1367(c); those claims shall be dismissed without prejudice.

The claims asserted and issues raised by the remaining plaintiffs, Singer, Riggs and Dickson, and the defenses and issues raised by the remaining defendants in response to those plaintiffs' claims, currently remain under advisement, and will be addressed in a separate written disposition to be issued in due course. The claims of plaintiffs Singer, Riggs and Dickson having already been submitted for decision, the remaining defendants need not answer or otherwise respond to the plaintiffs' Amended Complaint, which has been directed to be filed herein, *nunc pro tunc* to November 14, 2002.

Good cause thus appearing therefor,

IT IS ORDERED that the "Plaintiffs' Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence & the 10th Cir. Court 10-7-02 Opinion," and "Memorandum of Fact and Law in Support," filed November 6, 2002 (dkt. no. 438), shall be and hereby is GRANTED *nunc pro tunc* to November 14, 2002; the Clerk of the Court is directed to file the proposed Amended Complaint annexed thereto in the record in this action (Civil No. 2:00-CV-584BSJ)[126] and enter the same upon the docket forthwith;

IT IS FURTHER ORDERED that the claims of plaintiff Dr. Steven MacArthur shall be and hereby are DISMISSED with prejudice as against all of the defendants named herein, except that the court declines to exercise supplemental jurisdiction over his claims for intentional interference with contract, intentional interference with prospective business relations and defamation as against defendants Dr. James Redd, Dr. L. Val Jones, Laurie Schafer, Dr. Manfred Nelson, and Cleal Bradford, Julie Bronson and Marilee Bailey, *see* 28 U.S.C. § 1367(c); those claims are hereby DISMISSED without prejudice;

IT IS FURTHER ORDERED that the claims of plaintiff Michele Lyman shall be and hereby are DISMISSED with prejudice as against all of the defendants named herein, except that the court declines to exercise supplemental jurisdiction over her claims for intentional interference with contract, intentional interference with prospective business

[126]The caption of the Proposed Amended Complaint erroneously refers to "civil no. 92-C-1071TS," a case currently assigned to Chief Judge Benson.

relations, defamation and intentional infliction of emotional distress as against defendants Dr. James Redd, Dr. L. Val Jones, Laurie Schafer, Dr. Manfred Nelson, and Cleal Bradford, *see* 28 U.S.C. § 1367(c); those claims are hereby DISMISSED without prejudice;

IT IS FURTHER ORDERED that the claims of plaintiff Helen Valdez shall be and hereby are DISMISSED with prejudice as against the defendants named herein, and in particular defendants Lori Wallace and the San Juan Health Services District;

IT IS FURTHER ORDERED that Plaintiff Valdez's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed October 26, 2004 (dkt. no. 664), is hereby DENIED;

IT IS FURTHER ORDERED that Plaintiff MacArthur's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed November 23, 2004 (dkt. no. 670), is hereby DENIED;

IT IS HEREBY ORDERED that Plaintiff Lyman's Motion for the Court to Reconsider its Motion to Dismiss Plaintiff's Valdez' [sic] Discrimination Claims and Plaintiffs' Cross-Motion for Summary Judgment, filed December 28, 2004 (dkt. no. 695), is hereby DENIED;

IT IS FURTHER ORDERED that "Plaintiffs' MacArthur, Lyman, Valdez' Motion for Sanctions," filed January 25, 2005 (dkt. no. 703), is hereby DENIED; and

IT IS FURTHER ORDERED that a printed copy of the Proposed Pretrial Order, received by the court on November 12, 2002, shall be lodged by the Clerk of the Court in the file as part of the record in this action, and that an electronic (.pdf format) copy of the Proposed Pretrial Order shall be appended by the Clerk of the Court to the electronic (.pdf format) copy of this Memorandum Decision & Order and be made available as part of the permanent CM/ECF case record in this action.

DATED this 13 day of June, 2005.

BY THE COURT:

BRUCE S. JENKINS
United States Senior District Judge