NOT INTENDED FOR PRINT PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

RAKESH WAHI, M.D.

Plaintiff,

v. CIVIL ACTION NO. 2:04-CV-0019

CHARLESTON AREA MEDICAL CENTER, et al.,

Defendants.

ORDER

Pending before the court is the defendants' Motion to Dismiss Plaintiff's Amended Complaint or for Summary Judgment [Docket 17]. After a thorough review of the pending motion, responses, and supplemental memoranda, the court **FINDS** that it would be premature to treat the motion as one for summary judgment. Accordingly, the court will treat the defendants' motion as a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, the motion is **GRANTED IN PART** and **DENIED IN PART**. In addition, the court **ORDERS** the parties to engage in limited discovery and then brief the court for summary judgment purposes.

I. BACKGROUND

The following factual summary, as alleged in the Amended Complaint [Docket 12], is taken as true solely for the purpose of the motion to dismiss. The plaintiff, Rakesh Wahi, M.D. (Dr.

Wahi), has been licensed to practice medicine in West Virginia since 1993. He specializes in cardiovascular, thoracic and general surgical procedures. In January of 1993, Dr. Wahi joined the staff of the defendant Charleston Area Medical Center (CAMC), and in July of 1993 he was promoted from the defendant's probationary staff to provisional staff. CAMC is a private entity incorporated in West Virginia.

In June of 1994, Dr. Wahi started his own practice at CAMC, and also began exploring the possibility of associating himself with a separate medical group in Beckley, WV, called the "Medsurg Group." According to the Complaint, CAMC then took various steps to restrict the plaintiff's ability to practice medicine and to prevent the plaintiff from competing with CAMC. At some unspecified point subsequent to January of 1995, defendant Glenn Crotty, then chief of staff at CAMC, appointed an "investigative committee" to examine Dr. Wahi's performance as a physician. According to the Complaint, the five members of this committee (who are each named as individual defendants) were in direct economic competition with Dr. Wahi at the time the committee was formed.

Although the Complaint is unclear on this issue, CAMC appears to have suspended Dr. Wahi's privileges temporarily on or about November 6, 1996. A month later, CAMC reported this suspension to the National Practitioner's Data Bank (Data Bank). The Data Bank is a national clearinghouse established pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA). 42 U.S.C.A. §§ 11133-11134 (2004). Under the HCQIA, health care entities may qualify for immunity from civil liability for certain disciplinary actions if they report information to the Data Bank following "a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days." *Id*. § 11133(1)(A). According to Congress, the purpose

of the Data Bank and the reporting incentives is "to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." *Id*. § 11101(2). Reported information must include the physician's name and a description of the reasons for the adverse action. *Id*. § 11133(3)(A) and (B). In addition to reporting Dr. Wahi's November 6, 1996 suspension to the Data Bank, CAMC also reported Dr. Wahi on November 25, 1996, December 24, 1997, March 22, 1999, and September 13, 1999. The purpose of these latter four reports is not clearly disclosed in the Complaint.

Based on CAMC's reports to the Data Bank, the West Virginia Board of Medicine (Board) investigated Dr. Wahi and brought charges against him. The plaintiff alleges that the defendant CAMC worked closely with the Board to bring these charges and attempted to deprive him of his license to practice medicine in West Virginia. The Board dismissed the charges against Dr. Wahi on November 10, 2003.

On July 30, 1999, CAMC summarily suspended the privileges of Dr. Wahi in connection with the findings of the investigative committee. According to the complaint, Dr. Wahi requested a hearing on his suspension pursuant to the hospital's bylaws, but a hearing has never been held. Dr. Wahi alleges that these adverse professional review actions were taken as part of a conspiracy by the defendants to monopolize thoracic and cardiovascular medicine and surgery in the Charleston, Beckley, Bluefield, and Parkersburg area of West Virginia.

Based on the foregoing facts, the plaintiff has filed an eleven-count Amended Complaint against CAMC and several other defendants, both named and unnamed. The plaintiff claims that the defendants have: 1) engaged in an antitrust conspiracy under the Sherman Act (15 U.S.C. § 1); 2) engaged in antitrust monopolization under the Sherman Act (15 U.S.C. § 2); 3) violated his Fifth

and Fourteenth Amendment Due Process rights; 4) retaliated against him in violation of his First Amendment rights; 5) breached the contract between CAMC and Dr. Wahi; 6) conspired to deny him Due Process in violation of his rights under the Fifth and Fourteenth Amendments; 7) defamed him by reporting him to the Data Bank; 8) invaded his privacy and disclosed confidential information; 9) violated his civil rights under 42 U.S.C. § 1981; 10) conspired to obstruct justice and deny equal protection in violation of 42 U.S.C. § 1985; and 11) neglected to prevent the conspiracy alleged in Count 10 in violation of 42 U.S.C. § 1986. Based on these claims, the plaintiff requests injunctive relief, actual damages, and punitive damages. The defendants have moved to dismiss the Complaint for failure to state a claim upon which relief can be granted.

II. ANALYSIS

Before examining the substantive elements of the motion to dismiss, I will address two preliminary arguments raised by the defendants. First, the defendants argue that the entire action should be stayed under the doctrine of primary jurisdiction. Second, the defendants argue that the entire action should be dismissed based on collateral estoppel. I will address these arguments in turn.

A. Primary Jurisdiction Doctrine

The defendants first argue that the court should stay these proceedings pursuant to the doctrine of primary jurisdiction. I find this argument unpersuasive for the following reasons. The United States Supreme Court has identified the primary jurisdiction doctrine as "a principle, now firmly established, that in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342

U.S. 570, 574-75 (1952). Essentially, the primary jurisdiction doctrine is a discretionary tool that allows a court to *refer* certain complex factual questions to an administrative body for an *initial* determination. *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (stating that "it may be appropriate to refer specific issues to an agency for initial determination" if that referral would promote uniformity or take advantage of agency expertise). During the past century, the Court has developed a two-part test for determining when to apply primary jurisdiction.[1]

Under the first prong, a district court must consider whether referral of the case to an administrative body will promote national uniformity in the field of regulation. Under the second prong, the court must consider whether factual development of the case will benefit from agency expertise. This two-part test remains in effect, although the "administrative expertise" prong tends to receive greater emphasis. *See Tassy*, 296 F.3d at 67-68 ("Recently the expert and specialized knowledge of the agencies involved has been particularly stressed." (*quoting United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). Pursuant to this doctrine, the defendants have asked this

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[1] As originally articulated by the Court, the analysis focused primarily on promoting national uniformity within congressionally regulated schemes. *See Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 67 (2d Cir. 2002) (discussing Justice Edward White's creation of the primary jurisdiction doctrine in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)). Fifteen years after the birth of primary jurisdiction, Justice Brandeis added the second prong to the analysis. *Id*. In *Great Northern Railway Co. v. Merchants' Elevator Co.*, 259 U.S. 285 (1922), the Court indicated that courts should consider administrative expertise, as well as national uniformity, in a two-prong examination of whether to invoke the doctrine. Courts have gradually molded primary jurisdiction to emphasize the second prong. The doctrine's current incarnation, as recently articulated by Justice Breyer, "seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime." *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J., concurring).

court to stay the proceedings until Dr. Wahi has completed the peer review hearing and appeal process provided by CAMC.[2]

The defendants' argument fails under both prongs of the primary jurisdiction test. First, the peer review body created by CAMC, a private hospital, is not an administrative agency within the meaning of the primary jurisdiction doctrine. Referral of this case to the peer review body would not promote any sort of national or even statewide uniformity. Second, there are no technical questions or factual issues in this lawsuit that need to be resolved by the peer review process before

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[2] The defendants urge this court to adopt the holding of *Rogers v. Columbia/HCA of Central Louisiana, Inc.*, 961 F. Supp. 960 (W.D. La. 1997). In *Rogers*, the district court applied the doctrine of primary jurisdiction to a factual situation analogous to the case at bar, and stayed the proceedings until the plaintiff doctor completed his peer review hearing. *Id*. at 968. I respectfully decline to follow suit. In addition to the principles expressed in this opinion, I believe that the *Rogers* court mistakenly relied on principles of judicial economy in deciding to invoke the primary jurisdiction doctrine. *See id*. at 968 ("[W]e believe that judicial economy will be best served by requiring plaintiff to exhaust his administrative remedies. Perhaps a solution may be reached without further judicial intervention."). The defendants have made similar arguments in this case. *See* Motion to Dismiss at 21 ("[A]llowing the peer review process to proceed first may completely eliminate the need for a civil trial."). I believe the Second Circuit aptly described the relationship between primary jurisdiction and judicial economy in *Tassy v. Brunswick Hospital Center, Inc.*, 296 F.3d 65 (2d Cir. 2002):

> Despite ample opportunity during the ninety-five years since it created the doctrine, the Supreme Court has never identified judicial economy as a relevant factor. No doubt the reason is that considerations of judicial economy cannot assist a primary jurisdiction analysis, as it will always be more economical, from a judge's point of view, to dismiss a case or quickly refer it to an administrative agency, instead of adjudicating it himself. We are enjoined to resist this temptation because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."

Id. at 68 n. 2 (*quoting Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

the court can address the merits of the case. The plaintiff's claims fall soundly within the expertise and experience of a federal court.

Under the first part of the primary jurisdiction test, a court must consider whether deferral would promote "uniformity and consistency in the regulation of business entrusted to a particular agency." *Far East Conference*, 342 U.S. at 574. As an initial matter, this prong assumes the existence of a single regulatory body with broad jurisdiction. In this case, however, there is simply a peer review committee established by CAMC itself. While the defendants do not claim that CAMC's peer review body is an agency in the traditional sense of the word, they do contend that it is part of an administrative scheme established by Congress through the enactment of the HCQIA. In effect, the defendants contend that the HCQIA creates a myriad of miniature peer review "agencies" at hospitals around the country, and that each of these mini-agencies should be entitled to deference under the primary jurisdiction doctrine. I am not persuaded. Although Congress has clearly embraced the peer review process through its enactment of the HCQIA, it simply has not created the type of regulatory scheme traditionally designed to foster national uniformity. *See Tassy*, 296 F.3d at 69 ("The concern for consistency and uniformity is more prevalent in cases involving issues of broad applicability such as the reasonableness of rates or tariffs.").

Under the second prong of the primary jurisdiction analysis, the fundamental inquiry is whether a court should refer difficult and important questions of fact to an administrative agency for an initial, non-binding determination. Again, the lack of a true administrative body counsels against applying primary jurisdiction. I believe that there is a fundamental distinction between an independent, federal or state agency and a quasi-administrative body that is essentially attached to one of the parties in the lawsuit. For fact-finding purposes, the conclusions of an independent

agency would inherently deserve greater deference upon later review by a court, and would present stronger grounds for invocation of primary jurisdiction. Those circumstances are not present in this case.

The court finds the context and reasoning of *Johnson v. Nyack Hospital*, 964 F.2d 116 (2d Cir. 1992), illuminating. In *Johnson*, as in this case, a physician brought antitrust claims against a hospital that had terminated his privileges. *Id*. Under New York law, however, a physician who seeks restoration of his staff privileges must first file a complaint with the New York Public Health Council (PHC) before pursuing the claim in court. *Id*. at 121. The District Court dismissed the complaint under the exhaustion of administrative remedies doctrine because the plaintiff doctor had not brought his claim before the PHC. *Id*. at 122. The Second Circuit affirmed the judgment, but refused to do so based on the exhaustion rule. *Id*. Instead, the court upheld the dismissal based on the doctrine of primary jurisdiction. *Id*.

There is a crucial difference between *Johnson* and the case at bar. The PHC is an independent state agency, as opposed to an internal peer review body. In *Johnson*, after allowing the independent agency to thoroughly investigate the physician's claims, the district court was better situated to review the facts underlying termination of the physician's privileges. The defendants in this case, however, have not described a similar agency in West Virginia that could conduct an independent investigation into CAMC's decision to terminate Dr. Wahi's privileges.

Even if I were to accept the defendant's argument that CAMC's peer review committee should be deemed a de facto mini-agency for purposes of the HCQIA regulatory scheme, this case does not present the type of difficult factual questions contemplated by the primary jurisdiction doctrine. The defendants argue that the court will need to determine Dr. Wahi's medical

competence at trial, and that this type of evaluation is not a traditional area of judicial expertise. Accordingly, they assert that I should stay the proceedings and allow CAMC's peer review committee to make an initial determination of Dr. Wahi's competence. While I acknowledge that Dr. Wahi's competence may be an issue at trial, I am unpersuaded that further factual inquiries by CAMC would provide any assistance on this issue. Based on the pleadings, it appears that CAMC has had ample time to investigate Dr. Wahi during his six-year term of employment. The Complaint refers to multiple investigations by CAMC of Dr. Wahi's performance, and, in addition, the West Virginia Board of Medicine appears to have conducted evaluations of Dr. Wahi's competence. CAMC's decision to ultimately revoke Dr. Wahi's staff privileges was made five years ago, and since then the parties have twice been embroiled in state court litigation. CAMC has failed to demonstrate any additional factual inquiry that would occur if this court now required Dr. Wahi to submit to a final peer review hearing. I therefore fail to see any potential factual benefit from additional peer review proceedings conducted by CAMC.

Finally, CAMC argues that if Dr. Wahi is not required to participate in the peer review hearing, then CAMC will be deprived of its most important defense–immunity under the HCQIA–which will frustrate the public policy behind the HCQIA.[3] The defendants, however, fail to cite any cases in support of this position, and I do not agree with their narrow construction.

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[3] In enacting the HCQIA, Congress provided an incentive to encourage physicians to serve on peer review panels. This incentive is limited immunity from monetary liability for civil lawsuits filed by aggrieved doctors who suffer an adverse professional review action as a result of the peer review proceedings. As the Eleventh Circuit has noted, however, "HCQIA establishes an immunity only from liability for money damages, not a right to avoid standing trial." *See Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1322 n. 3 (11th Cir. 1994). Significantly, the HCQIA actually creates a presumption that the defendant has satisfied the immunity standards unless the plaintiff can rebut the presumption by a preponderance of the evidence. *Id*. § 11112(a).

Instead, based on a plain reading of the statute, HCQIA immunity does not depend upon absolute completion of all possible peer review proceedings. In order to qualify for immunity under the statute, "a professional review action must be taken . . . 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*." HCQIA § 11112(a)(3). Under the statute's plain meaning, immunity determinations are based upon an examination of all peer review procedures used, and do not depend solely on whether a full hearing was actually completed. There is nothing in the HCQIA that requires a physician to submit to these processes, and CAMC has not argued that Dr. Wahi was required to exhaust such procedures under the terms of his contract. Contrary to the defendants' assertions, today's decision does not deprive CAMC of immunity. The court stands ready to evaluate the procedures that CAMC "afforded" to Dr. Wahi. Those procedures may very well qualify for immunity under the HCQIA, but I will reserve that question for a later date.

A stay of these proceedings pending further peer review activity would not significantly assist the court in making factual determinations. Similarly, further peer review activity would not promote national or even statewide uniformity. Invocation of primary jurisdiction in this case would therefore strain both the doctrine itself and the policies underlying the enactment of the HCQIA. Accordingly, I **FIND** that there is no basis for applying the doctrine of primary jurisdiction to this case.

B. Collateral Estoppel

CAMC's second argument is that this action should be dismissed pursuant to the doctrine of collateral estoppel. This argument is indirectly tied to their primary jurisdiction argument. Before the filing of this complaint in federal court, Dr. Wahi filed a civil action in the Circuit Court

of Kanawha County, West Virginia, asking that court to intervene in the peer review process. Essentially, Dr. Wahi asked the court to oversee the peer review hearing and ensure that he received a fair and impartial hearing. The state court dismissed the action based on the doctrine of primary jurisdiction. The defendants now ask this court to collaterally estop the plaintiff from bringing his current claim because of the earlier state court ruling.

This argument has several distinct weaknesses. "Applying collateral estoppel 'forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate'." *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322, 326 (4th Cir. 2004) (*quoting Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998)). Here, the complaint filed by Dr. Wahi in federal court appears to be completely different, in all respects, from the complaint filed in state court, and he asks for a different manner of relief. In addition, Dr. Wahi's state court claim was never litigated fully on the merits. Instead, the state court dismissed his cause of action based on the discretionary, quasi-jurisdictional doctrine of primary jurisdiction. Accordingly, the court **FINDS** that collateral estoppel is inapplicable to this action because none of the causes of action alleged in the Complaint have ever been fully litigated on the merits.

C. Motion to Dismiss

1. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure must be granted when it appears beyond doubt that the plaintiff can prove no set of facts that would entitle that party to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, there is no requirement

that the claim properly identify the legal theory under which the plaintiff intends to proceed. Rather, "a complaint is sufficient against a motion to dismiss, if it appears from the complaint that a plaintiff may be entitled to any form of relief." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (1990).

2. Analysis

a. HCQIA Immunity

First, the defendants argue that all counts of the Complaint, except for the plaintiff's civil rights claims, are deficient and should be dismissed because the plaintiff has failed to allege that the defendants are not entitled to presumptive immunity under the HCQIA. In making this argument, the defendants rely solely on the immunity provisions of the HCQIA itself. The HCQIA does indeed create a presumption of immunity regarding professional review actions undertaken in conjunction with peer review activities. The defendants, however, have failed to persuade me that a plaintiff must allege a lack of presumptive immunity as part of a well-pleaded complaint. HCQIA immunity may play a role later in these proceedings, but there is no need for the plaintiff to allege a lack of immunity in the complaint in order to state a claim upon which relief can be granted. Accordingly, the court **FINDS** that the plaintiff is not required to allege a lack of HCQIA immunity in his Complaint and the motion to dismiss on this ground is **DENIED**.

b. Counts One and Two

In the first two counts of his Complaint, the plaintiff alleges that the defendants have: 1) engaged in an antitrust conspiracy in violation of the Sherman Act (15 U.S.C. § 1); and 2) engaged in antitrust monopolization in violation of the Sherman Act (15 U.S.C. § 2). The defendants argue that each of these counts fails to state a claim upon which relief can be granted.

First, the defendants argue that both of Dr. Wahi's antitrust claims are deficient because he has failed to plead: 1) that he is bringing the action pursuant to the Clayton Act; and 2) that the defendants' alleged violations of the Sherman Act would affect interstate commerce. The first argument lacks substance. Although the Sherman Act provides no private cause of action itself, the Clayton Act does provide a private cause of action for violations of the Sherman Act. 15 U.S.C. § 15. Despite the fact that the plaintiff failed to specify that he is bringing this claim through the private enforcement provisions of the Clayton Act, the court declines to dismiss the Complaint on this technicality.

The defendants' second argument is persuasive. In order to state a claim under sections 1 and 2 of the Sherman Act, the plaintiff must demonstrate that "the restraint in question 'substantially and adversely affects interstate commerce'" in order to establish "the interstate commerce nexus required for Sherman Act coverage." *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 743 (1976) (quoting *Gulf Oil Corp., v. Copp Paving Co.*, 419 U.S. 186, 195 (1954)). The plaintiff does not mention the words "interstate commerce" in his Complaint, nor does he describe any nexus between the defendants' alleged antitrust violations and interstate commerce. Under the deferential Rule 12(b)(6) standard, the court must not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle that party to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In addition, the Court has stated that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Rex Hosp.*, 425 U.S. at 746 (quoting *Poller v. Columbia Broad.*, 368 U.S. 464, 473 (1962)). In this case, however, the plaintiff has completely omitted an essential element of the claim. Nevertheless, I believe he should be given

the opportunity to correct this deficiency.[4] Accordingly, I **DISMISS** Counts One and Two of the Complaint without prejudice, and **GRANT** the plaintiff leave to amend these counts solely for the purpose of demonstrating an effect on interstate commerce.

c. Counts Three and Four

Counts Three and Four of the Complaint allege that the defendants have violated Dr. Wahi's rights under the Due Process Clause of the Fifth Amendment and his right to petition the government under the First Amendment, respectively. The defendants argue that both of these counts should be dismissed because both alleged violations require state action, and no such action is present in this case. For the following reasons, I agree.

In Counts Three and Four, the plaintiff argues that CAMC acted under color of federal law by reporting him to the Data Bank. In his opposition brief to the defendants' Motion to Dismiss, Dr. Wahi "clarifies" these counts by stating that they are brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The argument that CAMC acted under color of federal law by reporting the plaintiff to the Data Bank is utterly without merit. First, the Supreme Court has expressly declined to extend *Bivens* actions to suits against private corporations, even if they are acting under color of federal law. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001) ("The purpose of *Bivens* is to deter individual *federal officers* from committing constitutional violations . . . . [I]nferring a constitutional tort remedy against a private entity . . . is therefore foreclosed.") (emphasis added).

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[4] In addition, the factual similarities between *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991), and the instant case lead me to believe that the plaintiff will be able to allege sufficient facts to demonstrate an effect on interstate commerce.

Second, CAMC's report of Dr. Wahi's suspension to the Data Bank fails to constitute federal action as a matter of law. This situation is analogous to the facts of *Modaber v. Culpeper Mem'l Hosp.*, 674 F.2d 1023 (4th Cir. 1982). In *Modaber*, the Fourth Circuit held that the duty of a hospital to report revocation of a doctor's staff privileges under state law did not amount to state action. 674 F.2d at 1027 ("Making it state action merely because it is reported to medical licensing authorities would be just as nonsensical as making a private employer's decision to fire a parolee state action because it is reported to the parole commission."). Accordingly, the court **DISMISSES** Counts Three and Four of the Complaint for failure to state a claim upon which relief can be granted.

d. Count Six

Count Six of Dr. Wahi's Complaint, brought pursuant to 42 U.S.C. § 1983, alleges that the defendants have violated and conspired to violate his Fourteenth Amendment Due Process rights while acting under color of state law. Specifically, Dr. Wahi contends that CAMC, "acting in concert with the State Board of Medicine to bring these charges against Dr. Wahi for the purpose of having his medical license taken away, was acting under color of state law at all times pertinent hereto." Complaint at 20. For the following reasons, I **FIND** that Count Six states a claim upon which relief can be granted.

There is no overt state action in this case because the defendants are all private actors. Count Six, however, does state a potentially viable claim under the limited exception for acting in concert with a state official. For example, in *Dennis v. Sparks*, 449 U.S. 24 (1980), private parties who bribed a judge in order to obtain an injunction were held to have engaged in state action under section 1983. In this case, the complaint alleges that the defendants "met and conferred" with the Board's prosecutor concerning Dr. Wahi, "encouraged" the Board to pursue charges against him,

and "collaborated" and "acted in concert" with the Board during the Board's investigation of Dr. Wahi. These allegations, taken as true, adequately state a conspiracy claim under section 1983. *See, e.g., Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985) ("In order to establish a conspiracy, the plaintiff must demonstrate that the state officials and the private party somehow reached an understanding to deny the plaintiffs their constitutional rights."); *Fonda v. Gray* , 707 F.2d 435, 438 (9th Cir. 1983) ("To prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown."). Although the West Virginia Board of Medicine is not a defendant in this case, and the actual defendants are all private actors, I cannot find that the plaintiff fails to state a section 1983 conspiracy claim as a matter of law. Accordingly, I **DENY** the defendants' Motion to Dismiss Count Six of the Complaint.

e. Count Eight

In Count Eight of the Complaint, Dr. Wahi alleges that the defendants have invaded his privacy, or, in the alternative, wrongfully disclosed private facts about him. This allegation relies on a statement made by defendant Crotty, the chief operating officer of CAMC, to a newspaper reporter. The newspaper article noted that, according to Crotty, CAMC had "reported [Dr. Wahi] to the National Practitioner Data Bank." Dr. Wahi contends that this statement constitutes dissemination of confidential and private information to the general public.

The defendants counter by arguing that there is a fundamental difference between disclosure of the bare fact that Dr. Wahi had been reported to the Data Bank and disclosure of the factual contents and information contained in the report itself. Dr. Wahi's claim relies on the fact that the information in the report itself is protected as confidential by federal law: "*Information* reported to

the Data Bank is considered confidential and shall not be disclosed outside the Department of Health and Human Services." *See* 45 C.F.R. § 60.13 (emphasis added). The court **FINDS** that a plain reading of the statute means that only the information contained in a report to the Data Bank, and not the mere fact that a report was made, is protected as confidential. Accordingly, Count Eight of the Complaint is **DISMISSED** for failure to state a claim upon which relief can be granted.

f. Counts Ten and Eleven

Count Ten of the Complaint alleges that the defendants have conspired to obstruct justice and to deny equal protection of the laws in violation of 42 U.S.C. § 1985, while Count Eleven alleges neglect to prevent conspiracy in violation of 42 U.S.C. § 1986. The defendants argue that Count Ten fails to state a claim upon which relief can be granted because there is no state action in this case.

Unlike a section 1983 claim, section 1985 claims can and do target private conspiracies to violate the civil rights of a protected class. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). In his Complaint, Dr. Wahi asserts that he is a member of a protected class, that the defendants conspired to take adverse actions against him that were motivated by an invidious or class-based animus towards him, and that these actions were part of a conspiracy by the defendants to deprive the plaintiff of equal protection under the laws in violation of § 1985. Although, as the defendants note, state action is a required component of a § 1985 claim when the underlying misconduct relies on certain types of constitutional violations, *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983), here plaintiff has alleged sufficient facts to indicate a private conspiracy and private action to state a claim under § 1985. Under the deferential Rule 12(b)(6) standard, the court cannot say beyond doubt that the plaintiff cannot prove any set of facts, not

involving state action, that would entitle him to relief. Accordingly, the defendants' Motion to Dismiss is **DENIED** as to Count Ten.

Finally, the defendants argue that Dr. Wahi's § 1986 claim in Count Eleven of the Complaint must fail because it is dependent upon the existence of a valid § 1985 claim, and the defendants argue that the § 1985 claim must fail. *See Trerice v. Summons*, 755 F.2d 1081, 1085 (4th Cir. 1985) ("A cause of action based upon § 1986 is dependent upon the existence of a claim under § 1985."). Because the court has found that Dr. Wahi alleges a claim under § 1985 upon which relief can be granted, the defendants' motion to dismiss Count Eleven on this basis is also **DENIED**. Accordingly, the court **FINDS** that Counts Ten and Eleven of the plaintiff's complaint adequately state a claim upon which relief can be granted.

III. Conclusion

The defendants' Motion to Dismiss Plaintiff's Complaint is **DENIED** insofar as it requests that the court apply the doctrines of primary jurisdiction and collateral estoppel to the proceedings. The Motion is **GRANTED** as to Counts One, Two, Three, Four, and Eight of the Complaint, but the plaintiff is **GRANTED** leave to amend Counts One and Two for the sole purpose of alleging an effect on interstate commerce under the Sherman Act. The Motion is **DENIED** as to the remaining counts of the Complaint.

Furthermore, the court **ORDERS** that the parties develop an agreed discovery plan and submit it to the court within 10 days of the date of this order. The discovery plan shall include the following specifications:

1) The discovery period shall be abbreviated to 90 days.

2) Each side is limited to 10 interrogatories and 10 requests for admissions.

3) Depositions shall be taken on 5 days notice. Each deposition shall be limited to 1 hour of direct examination, 30 minutes of cross examination, and 10 minutes of redirect examination.

4) The scope of discovery shall be limited to the following issues:

   a. Whether CAMC afforded Dr. Wahi the opportunity to proceed with a peer review hearing following the suspension of Dr. Wahi's privileges;

   b. The procedures used and investigations undertaken by CAMC in conjunction with the professional review action against Dr. Wahi;

   c. Whether CAMC's Board of Trustees retained the ultimate decision-making authority in regards to Dr. Wahi's staff privileges;

   d. Any matters reasonably related to the claims set forth in Counts Five, Six, Nine, Ten, and Eleven of the Complaint, or reasonably related to defenses of those claims.

5) At the close of this limited discovery period, the parties will brief the court on whether the defendants are entitled to summary judgment based on two issues:

   a. Whether the defendants are entitled to immunity from civil liability under the HCQIA for all remaining counts except the civil rights claims alleged in Counts Six, Nine, Ten, and Eleven;

   b. Whether any issues of material fact exist regarding the claims alleged in Counts Five, Six, Nine, Ten, and Eleven.

6) After evaluating the summary judgment proceedings, the court will determine if the case shall continue, and if so, will reopen the discovery period.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party and to post this unpublished opinion at http://www.wvsd.uscourts.gov.

ENTER: October 27, 2004