

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA**

<b>ALEXANDER A. STRATIENKO, M.D.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 07-CV-00258</b>
	)	
<b>CHATTANOOGA-HAMILTON COUNTY</b>	)	<b>COLLIER/SHIRLEY</b>
<b>HOSPITAL AUTHORITY and MEL TWIEST,</b>	)	
<b>M.D., individually and in his official capacity as</b>	)	
<b>Chief Medical Officer of Chattanooga-</b>	)	
<b>Hamilton County Hospital Authority, V.</b>	)	
<b>STEPHEN MONROE, JR., M.D., MITCHELL</b>	)	
<b>L. MUTTER, M.D., DANIEL F. FISHER,</b>	)	
<b>M.D., and NITA SHUMAKER, M.D.,</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANT MEL TWIEST M.D.’S BRIEF IN SUPPORT  
OF HIS MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Defendant, Mel Twiest, M.D. (“Dr. Twiest”), in his individual capacity, by and through counsel, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and submits this Brief in Support of his Motion for Summary Judgment.

**BACKGROUND FACTS**

The following facts may be taken as undisputed for the purposes of ruling on this Motion only. The Defendant, Chattanooga-Hamilton County Hospital Authority (“Erlanger”), is a governmental entity and political subdivision of the State of Tennessee. *See, e.g., Ketron v. Chattanooga-Hamilton County Hosp. Auth.*, 919 F.Supp. 280, 284 (E.D. Tenn. 1996) (Collier, J.); *Fitten v. Chattanooga-Hamilton County Hosp. Auth.*, No. 1:01-CV-152, 2002 WL 32059748, 1 (E.D. Tenn. Oct. 21, 2002) (Edgar, J.). Erlanger was created by the Tennessee Legislature pursuant to Chapter 297 of the Tennessee Private Acts of 1976. *Id.*

Dr. Twiest was hired by Erlanger in June of 2001 in the position of Chief Medical Officer. (Def. Twiest's Mot. Summ. J. Ex. A, Def. Twiest Dep. 14:6-22, Oct. 22, 2004.) While Dr. Twiest had previously practiced as a general surgeon, he ceased doing so prior to being hired by Erlanger as Chief Medical Officer. (*See* Def. Twiest's Mot. Summ. J. Ex. A, Def. Twiest Dep. 8:21-10:8, Oct. 22, 2004). As Chief Medical Officer, Dr. Twiest was an employee of Erlanger. (Def. Twiest's Mot. Summ. J. Ex. B, Brexler Dep. 126:10-19, July 25, 2008.) Dr. Twiest remained employed by Erlanger in the role of Chief Medical Officer until he retired on January 27, 2006. (Def. Twiest's Mot. Summ. J. Ex. C, Def. Twiest Dep. 7:20-25, June 23, 2008.)

As Chief Medical Officer (and Senior Vice President for Medical Affairs), Dr. Twiest was responsible for coordinating all medical staff affairs, supporting the organized medical staff and was responsible for other corollary activities that Erlanger's Chief Executive Officer felt appropriate to be under the Chief Medical Officer's jurisdiction. (Def. Twiest's Mot. Summ. J. Ex. A, Def. Twiest Dep. 14:23-15:5, Oct. 22, 2004.) Dr. Twiest was also the Chief Executive Officer's designee with regard to issues of summary suspension of medical staff membership or clinical privileges. (Def. Twiest's Mot. Summ. J. Ex. B, Brexler Dep. 178:22-179:15, 180:4-181:9.) As the designee of the Chief Executive Officer, Dr. Twiest had authority under Section 4.2 of the Medical Staff By-Laws to summarily suspend the medical staff membership status or all or any portion of the clinical privileges of a physician whenever the physician's conduct required immediate action be taken to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient, employee or other person present in the Health System, *or to prevent disruption to hospital operation*. (Court File No. 7, Pat Eller Aff. Ex. A, Medical Staff By-Laws ¶ 4.2-1.)

At approximately 1:30 p.m. on September 16, 2004, Dr. Twiest, received a call from Erlanger's Chief Nursing Officer, Denise Ray, who informed him that she had received a call from Cardiac Catheter Lab ("Cath Lab") personnel stating that Plaintiff had "hit" Defendant Dr. Stephen Monroe ("Dr. Monroe"). (*See* Def. Twiest's Mot. Summ. J. Ex. A, Twiest Dep. 155:13-21, October 22, 2004; Court File No. 6-2 Ex. C, Twiest Aff. ¶ 5; Def. Twiest's Mot. Summ. J. Ex. D, Ray Dep. 10:25-11:10, 13:13-14:21, Sept. 29, 2008.)

Dr. Twiest spoke with Dr. Monroe who told Dr. Twiest that he had been "hit" by Dr. Stratienko. (Court File No. 6-2 Ex. C, Twiest Aff. ¶ 5; Def. Twiest's Mot. Summ. J. Ex. E, Monroe Dep. 101:15-102:3, Oct. 29, 2004.) After speaking with Dr. Monroe about the incident, Dr. Twiest went to the Cath Lab and discussed the situation with Craig Cummings (the Invasive Cardiology Manager of the Cath Lab and the Electrophysiology Lab) and Denise Ray (the Chief Nursing Officer). (Court File No. 6-2 Ex. C, Twiest Aff. ¶ 6; Def. Twiest's Mot. Summ. J. Ex. F, Cummings Dep. 6:8-22, Oct. 20, 2004.)

Dr. Twiest was told that Missy Fugatt, R.N. ("Ms. Fugatt") had witnessed the event and he interviewed her in the presence of Craig Cummings and Denise Ray. (*See id.*) Missy Fugatt told him that:

"They were not shouting at each other, and she really did not describe a lot of hostility in the discussion. The conversation had to do with Dr. Monroe telling Dr. Stratienko not to talk about him in the way that he had been talking about him. She told them that she would leave, but one or both of them told her she did not need to leave, so she stayed. Suddenly, Dr. Stratienko stood up and instead of going around the table to avoid Dr. Monroe, he put his hands on Dr. Monroe's chest and shoved him against the wall."

(Def. Twiest's Mot. Summ. J. Ex. N, Mel Twiest Note to File of Sept. 16, 2004; Def. Twiest's Mot. Summ. J. Ex. A, Twiest Dep. 66:20-24; 148:1-13; 148:24-149:5, Oct. 22, 2004.)

According to Missy Fugatt, she told Dr. Twiest that:

“I don’t recall what was said after that until Stratienco was yelling @ Monroe and said something like you do whatever the “F” you need to do or something. I was turned around by this point, seeing Stratienco getting out of his seat quickly & and appeared to lunge towards Monroe, it appeared that Stratienco pushed Monroe, because Monroe was tripping backwards....”

(Def. Twiest’s Mot. Summ. J. Ex. M, Missy Fugatt Notes of Sept. 21, 2004; Def. Twiest’s Mot. Summ. J. Ex. G, Fugatt Dep. 25:19-26:25, October 21, 2004.)

Dr. Twiest later spoke with Defendant Nita Shumaker, M.D. (“Dr. Shumaker”) regarding the incident. (Court File No. 6-2 Ex. C, Twiest Aff. ¶ 7.) Dr. Shumaker was Secretary of the Medical Staff and a Member of the Medical Executive Committee. (Def. Twiest’s Mot. Summ. J. Ex. H, Shumaker Dep. 54:20-23, Dec. 1, 2004.) Dr. Twiest “called and told [her] that there had been an incident, that Dr. Stratienco had pushed Dr. Monroe. [Dr. Twiest] had spoken to the nurse who had witnessed the incident, and he was calling to ask [Dr. Shumaker’s] advice about how to proceed.” (*Id.* 80:16-20.) Dr. Shumaker told Dr. Twiest that she thought Dr. Stratienco should be summarily dismissed pending evaluation for his behavior. (*Id.* 86:9-12.) She said that because she felt that one physician pushing another in anger was out-of-control behavior and needed evaluation. (*Id.* 86:13-16.)

Dr. Twiest also communicated with various other members of the medical staff leadership regarding the incident. (*See* Court File No. 6-2 Ex. C, Twiest Aff. ¶¶ 8-9, 11, 13.) Dr. Twiest also spoke with Erlanger’s outside and in-house legal counsel about the incident on September 16, 2004. (*See* Def. Twiest’s Mot. Summ. J. Ex. A, Def. Twiest Dep. 191:12–192:10, Oct. 22, 2004.)

In discussing the reasons for the summary suspension of Plaintiff, Dr. Twiest testified that the suspension was “primarily” to prevent the disruption of hospital operations. (*See id.* 201:3–18, 206:13-209:19.) However, he also that felt an evaluation of Plaintiff was needed to

determine whether there might be a risk to the health or safety of an employee. (*Id.* 200:14–201:2, 209:4–209:19.)

On September 16, 2004, Dr. Twiest also spoke with Jim Brexler, Erlanger’s Chief Executive Officer. (Court File No. 6-2 Ex. C, Twiest Aff. ¶ 12.) Under questioning by Plaintiff’s attorney with regard to that discussion, Mr. Brexler confirmed that Dr. Twiest, in connection with the suspension, was acting as his designee on delegated authority from Mr. Brexler:

Q With regard to the designation of Dr. Twiest as your designee, is there anything in his job description that reflects that?

A Again, I would have to look at the job description to determine that. But as it relates to the summary suspension in question, my recollection of those events is that when the event occurred and a question as to what action was to be taken was being determined, Dr. Twiest called me, informed me that there had been an altercation, whatever, a complaint registered. I asked if he had reviewed, or was there validation of the issue, et cetera. *He gave me some description of what he had done to review it, which validated that there were actions and that he was -- he believed that a summary suspension was required, and I -- and although it wasn't in a written format, I said, well, then you need to take the action that you think is appropriate.*

So that conversation did occur. It was verbal. It was taken and very much appropriate for the role of a Chief Medical Officer as a delegated officer reporting directly to me. Subsequent to that action, then, there is a set of issues that are called for in the medical staff bylaws by which the Medical Executive Committee was called into session and validated the summary suspension.

*And so it set in motion a series of things that took place. But Dr. Twiest was absolutely acting on delegated authority from me.*

(Def. Twiest’s Mot. Summ. J. Ex. B, Brexler Dep. 180:4-181:9 (emphasis added).)

Dr. Twiest tried to arrange a meeting with Plaintiff on the date of the incident, but Plaintiff refused to meet allegedly due to patient scheduling. (Def. Twiest’s Mot. Summ. J. Ex.

H, Shumaker Dep. 94-95.) Dr. Twiest then tried to schedule a meeting with Plaintiff first thing on the morning of September 17, 2004, but Plaintiff refused to meet until around noon. (*Id.*)

Dr. Twiest and Dr. Woods Blake, immediate past Chief of Staff, met with Plaintiff at approximately 12:00 p.m. on September 17, 2004 to discuss the incident. (Court File No. 6-2 Ex. C, Twiest Aff. ¶14.) At the meeting, Dr. Stratienco gave Dr. Twiest a copy of a Note to File he had written about the incident wherein Dr. Stratienco said:

“I told him that he can take ‘any f\*\*\*ing action you want but just get out of my face’. With a candy bar in my right hand, I pushed him out of the doorway with my left and exited the break room.”

(*See* Def. Twiest’s Mot. Summ. J. Ex. I, Pl. Stratienco Dep. 144:13-145:2, Oct. 27, 2004 (expletive deleted from original).) Dr. Twiest read the note and made the final decision to suspend Dr. Stratienco’s clinical privileges. (*See* Def. Twiest’s Mot. Summ. J. Ex. P, Def. Twiest Note to File of Sept. 17, 2004; Def. Twiest’s Mot. Summ. J. Ex. A, Def. Twiest Dep. 212:21-213:7, Oct. 22, 2006.) Dr. Twiest also gave Plaintiff a copy of a letter dated September 16, 2004, informing Plaintiff of the summary suspension. (Court File No. 6-4, Letter of September 16, 2004 from Def. Twiest to Pl. Stratienco.)

On September, 22, 2004, the Credentials Committee voted to uphold the summary suspension of Dr. Stratienco. (Court File No. 6-2 Ex. C, Twiest Aff. ¶ 16.) On September 24, 2008, the Medical Executive Committee also voted to uphold the summary suspension and the recommendation of the Credentials Committee. (*Id.* ¶ 17.) By letter dated September 27, 2004, Dr. Stratienco was notified of his rights to a hearing regarding the suspension. (*Id.* ¶ 18.)

## **STANDARD OF REVIEW**

In respect to summary judgment, the moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may bear this burden by either producing evidence that demonstrates the absence of a genuine issue of material fact, or by simply “ ‘showing’-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case.” *Id.* at 325. The nonmoving party must then present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Celotex*, 477 U.S. at 322. A mere scintilla of evidence is not enough. *Anderson*, 477 U.S. at 252.

## **LAW AND ARGUMENT**

While the Plaintiff has chosen not to include specific counts in his Complaint, it appears that Plaintiff asserts the following federally-derived claims against the defendants: “violation of the Health Care Quality Improvement Act” of 1986, 42 U.S.C. § 11101 *et seq.* (Court File No. 1-2, Second Am. Compl. ¶¶ 2.c., 36); deprivation of procedural and substantive due process, and equal protection under the United States Constitution (*Id.* ¶¶ 2.a., 27-28); and finally “federal anti-trust laws” (*Id.* ¶ 34). Plaintiff also asserts state-law claims for breach of contract (*Id.* ¶ 26); interference with prospective business relationships (*Id.* ¶¶ 2.f, 37, 39, 42); interference with contractual relations (*Id.* ¶¶ 2.g, 37, 39, 42); civil conspiracy (*Id.* ¶ 44-45); procurement of breach of contract (*Id.* ¶ 46); Tennessee Peer Review Law, Tenn. Code Ann. § 63-6-219 (*Id.* ¶ 2.d.), Tennessee “state . . . antitrust laws” (*Id.* ¶ 34); and deprivation of procedural and substantive due process, and equal protection under the Tennessee Constitution (*Id.* ¶¶ 2.a., 27-28). Dr. Twiest moves for summary judgment on each of Plaintiff’s claims, and will address each in turn.

**A. Federally-Derived Claims.**

**i. The HCQIA does not Provide a Private Right of Action.**

Courts have repeatedly held that the Health Care Quality Improvement Act (“HCQIA”), 42 U.S.C. § 11101 *et seq.*, does not establish a private right of action. *See, e.g., MacManus v. Chattanooga-Hamilton County Hosp. Auth.*, No. 1:08-cv-96, 2008 WL 2115733, at \*9 (E.D. Tenn. May 19, 2008) (Mattice, J.); *Carter v. Bluecross Blueshield of Tenn.*, No. 1:05-cv-304, 2006 WL 1129390 (E.D. Tenn. Apr. 24 2006) (Mattice, J.). In fact, Plaintiff has acknowledged the same in his prior briefing in this case. (*See* Court File No. 33, Pl’s Reply, at p. 2.) Accordingly, summary judgment in favor of Dr. Twiest on any such claim is appropriate.

**ii. Deprivation of Rights under the United States Constitution Does Not Give Rise to a Private Right of Action.**

In his Second Amended Complaint, Plaintiff claims deprivations of his rights of procedural due process, substantive due process, and equal protection. However, constitutional violations against state officials are not cognizable directly under the constitution (or by virtue of general federal question jurisdiction). *See Sanders v. Prentice-Hall Corp.*, 178 F.3d 1296, 1999 WL 115517, at \*1 (6th Cir. 1999)). The exclusive remedy for violations of the United States Constitution are under 42 U.S.C. § 1983, but Plaintiff has not plead any such cause of action. Accordingly, Dr. Twiest is entitled to summary judgment on all of Plaintiff’s claims purporting to arise directly under the United States Constitution.

Had Plaintiff attempted to assert a § 1983 claim, it would nonetheless fail both due to Dr. Twiest’s qualified immunity and due to a lack of merit. On the issue of the merits of such a claim, Dr. Twiest adopts the law and argument set forth at Section VII.B and VII.C in the Memorandum of Law in Support of Motion for Summary Judgment of Defendant Nita Shumaker, M.D., which are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c).

**iii. Plaintiff's Federal Antitrust Claim Fails for Multiple, Independent Reasons.**

Although Plaintiff fails to identify the federal antitrust statute he is alleging to have been violated by Dr. Twiest, Section 1 of the Sherman Act, 15 U.S.C. § 1, most closely fits his allegations. Section 1 prohibits unreasonable restraints on trade “effected by a contract, combination, or conspiracy . . . .” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). Any federal antitrust claim fails for multiple, independent reasons.

**a. Plaintiff's Federal Antitrust Claim is Barred by the State Action Doctrine.**

Plaintiff's claim is barred by the state action doctrine originally set forth in *Parker v. Brown*, 317 U.S. 341 (1943). Recently, the Sixth Circuit explained the underpinnings of the *Parker* state action doctrine:

Under the so-called “state action doctrine,” it is well established that antitrust law does not apply to states acting as sovereigns. *Parker v. Brown*, 317 U.S. 341, (1943). The Supreme Court has determined that principles of federalism and state sovereignty provide blanket protection for states, but political subdivisions of the states are not automatically immune from antitrust liability. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991). Political subdivisions of states are beyond the reach of the antitrust laws only when they act pursuant to a “clearly expressed state policy.” *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985).

*Jackson, Tenn. Hosp. Co., LLC v. W. Tenn. Healthcare, Inc.*, 414 F.3d 608, 611-12 (6th Cir. 2005) (footnotes omitted). In the instant case, the protection from federal antitrust laws enjoyed by the State of Tennessee extends to Erlanger, a political subdivision of the State of Tennessee, and to Dr. Twiest, the Chief Medical Officer and Senior Vice President of Medical Affairs of Erlanger, because Dr. Twiest was acting pursuant to a clearly expressed state policy which authorizes Erlanger to appoint officers, hire employees and regulate hospital privileges. *See id.*

It is well settled that Erlanger is a political subdivision of the state. *See, e.g., Ketron v. Chattanooga-Hamilton County Hosp. Auth.*, 919 F.Supp. 280, 284 (E.D. Tenn. 1996) (Collier,

J.); *Fitten v. Chattanooga-Hamilton County Hosp. Auth.*, No. 1:01-CV-152, 2002 WL 32059748, 1 (E.D. Tenn. Oct. 21, 2002) (Edgar, J.). At the time of Plaintiff's suspension, Dr. Twiest was employed by Erlanger as its Chief Medical Officer and Senior Vice President for Medical Affairs. In issuing Plaintiff's suspension, he acted pursuant to clearly delegated authority from Erlanger's Chief Executive Officer allowing him to issue summary suspensions of medical staff membership or clinical privileges on behalf of Erlanger. (Def. Twiest's Mot. Summ. J. Ex. B, Brexler Dep. 178:22-179:15, 180:4-181:9) This authority is recognized in the Medical Staff By-Laws.<sup>1</sup> Dr. Twiest's complained-of actions can be deemed those of Erlanger for purposes of the state action doctrine.<sup>2</sup> Accordingly, Dr. Twiest is entitled to the protection of the state action doctrine. *See Hallie*, 471 U.S. at 40.

In 1996 the Tennessee General Assembly adopted the Private Act Hospital Authority Act, Tenn. Code Ann. § 7- 57-601 *et seq.*, to extend the powers of the metropolitan hospital

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<sup>1</sup> As the designee of the Chief Executive Officer, Dr. Twiest had authority under Section 4.2 of the Medical Staff By-Laws to summarily suspend the medical staff membership status or all or any portion of the clinical privileges of a physician whenever the physician's conduct required immediate action be taken to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient, employee or other person present in the Health System, or to prevent disruption to hospital operation. (Court File No. 7, Pat Eller Aff. Ex. A, Medical Staff By-Laws ¶ 4.2-1.)

<sup>2</sup> As Dr. Twiest was the properly designated Authority official (and therefore state official) acting within his designated authority, the Court need not analyze Dr. Twiest as a private actor pursuant to *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). According to the Court in *Midcal*, even a private actor may be extended the protection of the state action doctrine if, in addition to a showing of a clearly expressed state policy required of state subdivisions, he shows that he was actively supervised by the state itself. *Id.* This additional requirement is not applicable to sub-state actors, *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 445 (6th Cir. 2007) (citing *Hallie*, 471 U.S. at 46-47), such as Dr. Twiest. If, however, the Court opts to apply the *Midcal* private-actor analysis to Dr. Twiest, his position as Chief Medical Officer and Senior Vice President of Medical Affairs for Erlanger as well as his role as designee of Chief Executive Officer of Erlanger for issues dealing with summary suspension is sufficient to find active state supervision. *Cf. Patrick v. Burget*, 486 U.S. 94, 100-05 (1988) (finding insufficient state supervision, under Oregon law, over privately employed doctors serving on a hospital's executive committee).

authorities to the private act hospitals such as Erlanger. This Act expressly extends authorization to Erlanger to appoint officers and hire employees, Tenn. Code Ann. § 7-57-301(9), and regulate the hospital privileges of Plaintiff, Tenn. Code Ann. § 7-57-301(16). Moreover, the State of Tennessee grants this authorization “*regardless of the competitive consequences thereof.*” Tenn. Code Ann. § 7-57-502(c) (emphasis added). In interpreting this very provision, the Sixth Circuit concluded that

the legislative language and surrounding circumstances . . . demonstrate[s] that the Tennessee legislature invested public hospital corporations with very broad powers to ensure their continued viability; authorized them to exercise many powers, such as contracting for services and acquiring property, that could easily lead to anti-competitive consequences; and then specifically stated that such activities could be undertaken without regard to the effects of such activity on competition. This constitutes the authorization necessary to invoke the state action doctrine.

*Jackson*, 414 F.3d at 614. Accordingly, the State of Tennessee has authorized Dr. Twiest’s actions for purposes of the state action doctrine. Therefore, Plaintiff’s federal antitrust claims do not lie against Dr. Twiest and summary judgment should be entered in Dr. Twiest’s favor in respect to any such claims.

**b. Plaintiff’s Federal Antitrust Claim is Barred by the Local Government Antitrust Act.**

The Local Government Antitrust Act (“LGAA”) is codified at 15 U.S.C. §§ 34-36, and “establish[es] as a general rule that antitrust damages are not recoverable from any local government.” *Opdyke Inv. Co. v. City of Detroit*, 883 F.2d 1265, 1266 (6th Cir. 1989). This includes employees of local governments. 15 U.S.C. §§ 35, 36. Specifically, 15 U.S.C. § 35(a) states:

No 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.

Similarly, 15 U.S.C. § 36(a) states:

No 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) in any claim against a person based on any official action directed by a local government, or official or employee acting in an official capacity.

Section 4 of the Clayton Act provides the damages remedy for violations of the Sherman Act.

In the instant case, any action taken by Dr. Twiest in respect to the summary suspension of Plaintiff was taken in his capacity as Chief Medical Officer and Senior Vice President of Medical Affairs of Erlanger.<sup>3</sup> As a result, the LGAA provides Dr. Twiest with immunity from monetary damages as to any antitrust claim set forth by Plaintiff.

**c. Plaintiff's Federal Antitrust Claim Fails on the Merits.**

Plaintiff has failed to set forth a valid Section 1 claim. "To establish an antitrust violation, a plaintiff must show a contract, combination, or conspiracy that affects interstate commerce and unreasonably restrains trade." *Lie v. St. Joseph Hosp. of Mount Clemens*, 964 F.2d 567, 568 (6th Cir. 1992) (citation omitted). The Sixth Circuit has noted that

The Supreme Court has set out two kinds of analysis to examine whether agreements run afoul of antitrust laws: the first employs a presumption that an agreement is an antitrust violation, thus invoking a *per se* illegality rule to classify the agreement; the second, called 'rule of reason' analysis, 'requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.'

*Id.* at 569 (citing *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982)).

The instant case does not involve a *per se* restraint on trade. "*Per se* violations involve 'agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate

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<sup>3</sup> For a more thorough discussion of how Plaintiff cannot show that Dr. Twiest acted outside of his capacity as Chief Medical Officer and Senior Vice President, *see infra* at 18-19.

study of the industry is needed to establish their illegality.’’ *Id.* (citing *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 692 (1978)). Examples of *per se* illegal restraints on trade are boycotts and price fixing. *Id.* (citing *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 432-36 (1990)). This case simply involves the suspension of Plaintiff’s privileges, and does not involve such obvious restraints of trade as a boycott. Indeed, Plaintiff has presented no competent proof whatsoever demonstrating *any* anticompetitive activity on behalf of Dr. Twiest, who is not even a competitor of Plaintiff, much less activity that would be considered “so plainly anticompetitive” so as to constitute a *per se* violation. As a result, a *per se* application is not warranted.

Therefore, Plaintiff must employ a “rule of reason” analysis to be successful in his antitrust claims. Under that analysis, “it is necessary to ‘evaluate [the agreement] by analyzing the facts peculiar to the business, the history of the restraint, and the reasons it was imposed . . . to form a judgment about the competitive significance of the restraint.’” *Id.* (citing *Nat’l Soc’y of Prof’l Engineers*, 435 U.S. at 692). In this case, Plaintiff cannot produce any evidence whatsoever to provide this analysis.

### **1. Plaintiff has Failed to Define the Relevant Market.**

Plaintiff has not defined the relevant market for his antitrust claims. For this argument, Dr. Twiest adopts the facts, law and argument set forth in respect to this issue at Section IV.B.1 in the Memorandum of Law in Support of Motion for Summary Judgment of Defendant Nita Shumaker, M.D., which are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c). For the reasons set forth therein, Plaintiff’s claims should be dismissed on summary judgment.

## **2. Plaintiff has Failed to Show an Antitrust Injury.**

Plaintiff has failed to show an antitrust injury. For this argument, Dr. Twiest adopts the facts, law and argument set forth in respect to this issue at Section IV.B.2 in the Memorandum of Law in Support of Motion for Summary Judgment of Defendant Nita Shumaker, M.D., which are incorporated herein by reference pursuant to Fed. R. Civ. P. 10(c). For the reasons set forth therein, Plaintiff's claims should be dismissed on summary judgment.

## **3. The Intracorporate Conspiracy Doctrine Bars Plaintiff's Antitrust Claim.**

The "intracorporate conspiracy" doctrine recognized by the Sixth Circuit in *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 611 (6th Cir. 1990), bars Plaintiff's antitrust claims. This application of this doctrine is discussed at length in Section IV.C of the Memorandum of Law in Support of Motion for Summary Judgment of Defendant Nita Shumaker, M.D. Dr. Twiest was an employee of Erlanger and was not a competitor of Dr. Stratienco. To the extent the doctrine operates to bar claims against Dr. Shumaker, the doctrine would also bar any antitrust claim against Dr. Twiest.

### **B. State-Law Claims.**

#### **i. Tennessee Antitrust Laws Do Not Apply to Plaintiff's Services.**

In his Second Amended Complaint, Plaintiff alleges violations of "state antitrust laws" due to his summary suspension, but does not specify any particular state antitrust law that he is alleging to have been violated. The Tennessee Trade Practices Act ("TTPA"), T.C.A. § 47-25-101, *et seq.*, codifies Tennessee antitrust law. Based on the language of Section 47-25-101, Tennessee courts have consistently held that "the TTPA applies only to tangible goods, not intangible services." *Bennett v. Visa U.S.A. Inc.*, 198 S.W.3d 747, 751 (Tenn. Ct. App. 2006) (citing *McAdoo Contractors, Inc. v. Harris*, 439 S.W.2d 594 (Tenn. 1969)).

It is undisputed that Plaintiff is a cardiologist who provides health related services to his patients. Although the services he provides may involve certain incidental products, such as stents, use of those products in providing those services does not change the nature of his claim for purposes of disposition. Plaintiff does not allege that Dr. Twiest unlawfully attempted to control the price of the products incidental to his services. Accordingly, his claim is not cognizable under the TTPA and summary judgment is proper. *See Baird Tree Co. v. City of Oak Ridge*, No. E2007-01933-COA-R3-CV, 2008 WL 2510581, at \*7 (Tenn. Ct. App. June 24, 2008).

**ii. Tennessee Constitutional Deprivations do not Grant a Private Right of Action.**

Plaintiff's claims for violation of his rights secured by the Tennessee Constitution are equally specious. Tennessee courts have held that there is no authority for recovery of damages for violation of the Tennessee Constitution. *See Lee v. Ladd*, 834 S.W.2d 323, 324 (Tenn. Ct. App. 1992). Moreover, Tennessee does not recognize an implied cause of action for the direct violation of state constitutional civil rights. *Bowden Bldg. Corp. v. Tenn. Real Estate Com'n*, 15 S.W.3d 434, 447 (Tenn. Ct. App. 1999). Accordingly, Dr. Twiest is entitled to summary judgment in respect to any claims based upon a violation of his state constitutional rights.

**iii. Tennessee Peer Review Law does not Grant a Private Right of Action.**

As set forth above, the HCQIA does not provide for a private right of action. Similarly, no court has recognized a private right of action in the Tennessee Peer Review Law, Tenn. Code Ann. § 63-6-219. Moreover, the Court is "not privileged to create [a private right of action] under the guise of liberal interpretation of the statute." *Premium Finance Corp. of Am. v. Crump Ins. Serv. of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998). The burden of proving the existence of a private right of action lies with the plaintiff. *Id.*

Here, the text of the Tennessee Peer Review Law itself makes clear that the Tennessee General Assembly did not intend to provide with it a private right of action. The Peer Review Law itself expressly instructs that it should be read *in conjunction* with the HCQIA, which does not provide a private right of action. Tenn. Code Ann. § 63-6-219(b)(1). Given the similar policies of the HCQIA and the Peer Review Law, which are to encourage candid review of physicians' professional conduct by protecting the forced disclosure of peer review information, and the lack of statutory language or case law stating otherwise, this Court may conclude that Plaintiff has failed to satisfy his burden to demonstrate that the Peer Review Law creates a private cause of action for physicians under review.

**iv. Plaintiff's Breach of Contract Claim Fails to Establish a Contract.**

In his Second Amended Complaint, Plaintiff claims a breach of contract based upon an alleged violation of Medical Staff Bylaws. Any breach of contract claim against Dr. Twiest is subject to dismissal because no contract exists between Dr. Twiest and Plaintiff. At most, the Medical Staff Bylaws create a contract between Plaintiff and Erlanger—not the Plaintiff and Dr. Twiest. *See Eyring v. Fort Sanders Parkwest Med. Ctr.*, NO. 03A01-9607-CV-00240, 1997 WL 294457, at \*9 (Tenn. Ct. App. June 4, 1997) (emphasis added) (citing *Lewisburg Cmty. Hosp. v. Alfredson*, 805 S.W.2d 756 (Tenn. 1991)) (“A hospital’s failure to follow its bylaws is subject to a lawsuit, because the bylaws of a private hospital constitute a contract with a physician on its staff.”). Here, there is no evidence to suggest that Dr. Twiest himself entered directly into any contract with Plaintiff or intended to assume any liability to Plaintiff or to any other of the hundreds of physician privileged to practice at Erlanger. As such, summary judgment is proper on Plaintiff’s breach of contract claim.

Moreover any breach of contract claim should fail as there is no consideration flowing between Dr. Twiest and Plaintiff. *See Hughes v. Pullman*, 36 P.3d 339 (Mont. 2001) (holding that a hospital's bylaws do not create a contract between the reviewed physician and the physician members of an ad hoc peer review committee as there is no consideration flowing between the physicians.). Accordingly, Dr. Twiest is entitled to summary judgment based upon any breach of contract claim alleged against him.

**v. Business Torts: Interference with Prospective Business Relationships, Interference with Contractual Relations, and Procurement Of Breach of Contract.**

**a. Plaintiff's Business Tort Claims Fail Because Dr. Twiest's Actions Were Privileged.**

In addition to his breach of contract claim, Plaintiff asserts several tort-based claims which stem from the allegation that Dr. Twiest interfered with the business relationship between Plaintiff and Erlanger and, by extension, between Plaintiff and his current and prospective patients. Each of these claims shares the same fundamental nexus—that Dr. Twiest suspended Plaintiff's privileges in violation of the Medical Staff Bylaws, thereby interfering with the relationship between Plaintiff and Erlanger, and resulting in interference with Plaintiff's relationships with his current and future patients.

Plaintiff's claims, however, cannot lie against Dr. Twiest where his actions in respect to the summary suspension of Plaintiff were privileged. In *Forrester v. Stockstill*, 869 S.W.2d 328 (Tenn. 1994), the Tennessee Supreme Court addressed the issue of whether an officer, director, or employee of a corporation could be held liable for wrongfully interfering with another employee's business relationship. *Id.* at 330-31.

Since a corporation can act only upon the advice of its officers and agents and since important societal interests are served by corporations receiving candid advice from these persons, . . . officers, directors, and employees [are] immune

from claims of intentional interference with employment if they act within the general range of their authority and their actions were substantially motivated by an intent to further the interest of the corporation.

*Waste Conversion Sys., Inc. v. Greenstone Indus., Inc.*, 33 S.W.3d 779, 782 (Tenn. 2000) (citing *id.* at 334-35). Thus,

*Forrester* indicates that Tennessee has recognized a privilege against an interference of contract claim when there is unity of interest between the interfering party and the breaching party. *Forrester* also shows that the claim can be alleged successfully *only when the interfering party is a third party not closely tied to the operations of the breaching corporation.*

*Id.* (emphasis added). This privilege applies to common law procurement or inducement of breach of contract claims as well as those under Tenn. Code Ann. § 47-50-109, *Nelson v. Martin*, 958 S.W.2d 643 (Tenn.1997), overruled in part by *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002), and is not limited to the employment-contract context, *see Nelson v. Metric Realty*, No. M2000-03204-COA-R3-CV, 2002 WL 31126649, at \*9-\*10 (Tenn. Ct. App. Mar. 17, 2003) (applying the privilege to a settlement contract). Although termed a “privilege,” this rule is not an affirmative defense; Plaintiff bears the burden to show that no unity of interest existed between Dr. Twiest and Erlanger. *Rennell v. Through the Green, Inc.* No. M2006-01429-COA-R3-CV, 2008 WL 695874, at \*6 (Tenn. Ct. App. Mar. 14, 2008) (quoting *Waste Conversion Sys.*, 33 S.W.3d at 783).

In the instant case, Dr. Twiest cannot be liable for interfering with Plaintiff’s business relationships with Erlanger or, by extension his current or future patients because Dr. Twiest acted within the “general range” of his authority and his actions were “substantially motivated by an intent to further the interest of” Erlanger. *See id.*

Plaintiff cannot show that Dr. Twiest acted outside the general range of his authority. In fact, the uncontested proof shows that Dr. Twiest was authorized to issue summary suspensions

in general, and was specifically authorized to issue Plaintiff's summary suspension. Mr. Brexler, Erlanger's CEO, delegated his general authority to issue summary suspensions to Dr. Twiest. (*See* Def. Twiest's Mot. Summ. J. Ex. B, Brexler Dep. 180:4-181:9.) Further, Mr. Brexler authorized Dr. Twiest to summarily suspend Plaintiff. (*Id.*) Even if Plaintiff could somehow show that Dr. Twiest erred in his application of the pertinent By-Laws or exercised poor judgment, Plaintiff still could not show that Dr. Twiest acted outside the *general* range of his authority in respect to the summary suspension of Plaintiff. *See McConnell v. Jones*, 228 S.W.2d 117, 122 (Tenn. Ct. App.1949) (holding that an employee may act in the course of his employment even in disobedience of the employer's specific instructions).

Moreover, Dr. Twiest has testified that the reason for the suspension was primarily to prevent the disruption of hospital operations. (*See* Def. Twiest's Mot. Summ. J. Ex. A, Def. Twiest Dep. 199-200 Oct. 22, 2004). He also that felt an evaluation of Plaintiff was needed to determine whether there might be a risk to the health or safety of an employee. (*Id.*) Both lines of reasoning are, of course, congruent with Erlanger's interests. Plaintiff may disagree as to whether such a suspension was necessary or warranted as a result of Plaintiff's conduct, but he can produce no credible evidence in this matter to suggest that Dr. Twiest was not substantially motivated by an intent to further his employer's interests.

**b. Plaintiff's Business Tort Claims Fail on Their Merits.**

**1. Plaintiff's Common Law and Statutory Claim of Inducement To Breach A Contract are without Merit.**

The elements to an action for inducement to breach a contract are as follows: (1) there was a legal contract; (2) the wrongdoer had sufficient knowledge of the contract; (3) the wrongdoer intended to induce its breach; (4) wrongdoer acted maliciously; (5) the contract was breached; (6) the act complained of was the proximate cause of the breach; and (7) damages

resulted from the breach. *Baldwin v. Pirelli Armstrong Tire Corp.*, 927 F. Supp. 1046, 1055 (M.D. Tenn. 1996).<sup>4</sup> In the instant case, there is no evidence that Dr. Twiest *intended to induce a breach* of any contract. Moreover, there has been no showing of *malice* on behalf of Dr. Twiest. For purposes of procurement of breach, “malice is ‘the wilful violation of a known right.’” *Prime Co. v. Wilkinson & Snowden, Inc.* 2004 WL 2218574, at \*4 (Tenn.Ct.App.,2004) (internal quotation omitted).<sup>5</sup> Additionally, Dr. Twiest submits that there has been no breach of a contract at all. Finally, Plaintiff has not produced any evidence that any breach caused damages to Plaintiff. As a result, these claims should be dismissed.

## **2. Plaintiff’s Claim for Interference with Prospective Economic Relationships Lacks Merit.**

A claim for interference with prospective economic relationships requires (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means; and (5) damages resulting from the tortious interference. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002).

In this case, Plaintiff can offer no evidence that Dr. Twiest ever intended to cause the breach or termination of any of Plaintiff’s alleged business relationships. Moreover, Plaintiff can

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<sup>4</sup> The language of Tennessee Code Annotated § 47-50-109 is very similar: “It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto . . .”

<sup>5</sup> The question of whether Dr. Twiest acted with malice is separate from the issue of whether his actions were privileged as discussed above. *Rennell v. Through the Green, Inc.*, No. M2006-01429-COA-R3-CV, 2008 WL 695874, at \*7 n.4 (Tenn. Ct. App. Mar. 14, 2008).

show no improper motive or use of improper means by Dr. Twiest. To establish an improper motive the plaintiff must prove that defendant's "predominant purpose was to injure plaintiff." *Watson's Carpet and Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 176 (Tenn. Ct. App. 2007). With regard to "improper means," the *McCormick* Court provided some examples. The Court described these "improper means" generally that are unethical, illegal, independently tortious, or that violate an established standard of a trade or profession. *See id.* Indeed, there is no proof that Dr. Twiest's actions were motivated by anything other than furthering Erlanger's interests by proper means approved by Erlanger. In fact, expert witness, Dr. Gerald Hickson,<sup>6</sup> has opined that Dr. Stratienco's behavior in pushing another physician warranted his summary suspension. (Def. Twiest's Mot. Summ. J. Ex. J, Hickson Dep. 6:21-7:1, 33:4-35:12, 46:16-20; Def. Twiest's Mot. Summ. J. Ex. Q, Hickson Expert Report 3.)<sup>7</sup>

Plaintiff must also offer sufficient proof of, *inter alia*, Dr. Twiest's "knowledge of [those] relationship[s] and not a mere awareness of the plaintiff's business dealings with others in general . . . ." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). In this case, Plaintiff can show only that Dr. Twiest was generally aware of Plaintiff's patients in the aggregate. Plaintiff cannot, however, demonstrate that Dr. Twiest was cognizant of even one specific business relationship between Plaintiff and one of his current patients, let alone one of Plaintiff's possible future patients or other potential business interests, at the time of the summary suspension. Finally, Plaintiff cannot prove any damages as a result any alleged

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<sup>6</sup> Dr. Hickson is the Associate Dean for Clinical Affairs and Director of Medicine at Vanderbilt University. A complete list of qualifications of Dr. Hickson may be found in his Expert Report and his Curriculum Vitae set forth as Attachment A thereto. (Def. Twiest's Mot. Summ. J. Ex. Q, Hickson Expert Report Attachment A.)

<sup>7</sup> Further discussion of Dr. Hickson's opinions in this regard can be found at page 25, *infra*. They are incorporated in this section by reference pursuant to Fed. R. Civ. P. 10(c).

interference by Dr. Twiest with a prospective business relationship. Accordingly, Plaintiff's claim should be dismissed.

**vi. Plaintiff's Conspiracy Claim Fails for Multiple, Independent Reasons.**

Finally, Plaintiff alleges that Dr. Twiest conspired with all the other named defendants to wrongfully suspend Plaintiff. "An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau-Med*, 71 S.W.3d at 703. "Civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy." *Watson's Carpet and Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007). "[I]t cannot be that a conspiracy to do a thing is actionable where the thing itself would not be." *Forrester v. Stockstill*, 869 S.W.2d 328, 330 (Tenn. 1994) (quoting *Felts v. Paradise*, 158 S.W.2d 727, 729 (1942)).

Plaintiff's conspiracy claim fails for two independent reasons. First, Dr. Twiest acted in his capacity as Chief Medical Officer for Erlanger and in the general scope of his employment. Second, as established above, Plaintiff has failed to establish a predicate tort underlying his claim of conspiracy.

**a. Dr. Twiest Acted in his Capacity as Chief Medical Officer for Defendant CHCHA and in the General Scope of his Employment.**

Where a defendant works as an agent for another defendant entity, the agent and the defendant entity are treated as a single entity for purposes of the conspiracy. *Trau-Med*, 71 S.W.3d at 703. There can be no claim of conspiracy where the conspiratorial conduct alleged is essentially a single act by a single corporation acting through its officers, directors, employees, and other agents, each acting within the scope of his or her employment. *Id.* at 703-04. As set

forth above, and reflected in Plaintiff's Second Amended Complaint, Erlanger allegedly acted through Dr. Twiest to effect the action on which Plaintiff bases his conspiracy claim— Plaintiff's summary suspension. Further, and again as explained above, Dr. Twiest acted within the general scope of his employment. Accordingly, Plaintiff's conspiracy claim fails.

**b. Plaintiff Has Failed to Establish a Predicate Tort Underlying his Claim of Conspiracy.**

“A conspiracy is not actionable where the thing itself is privileged.” *McCormick*, 247 S.W.3d 179-180. “Since liability for civil conspiracy depends on the performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort.” *Id.* at 180 (quoting *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983)). As set forth above, each underlying tort alleged in Plaintiff's Second Amended Complaint fails against Dr. Twiest because of his relationship with his employer; his authority to issue summary suspensions; and his adherence to the general scope of this authority. Accordingly, Plaintiff's claim for conspiracy fails.

**vii. Punitive Damages.**

Plaintiff also seeks punitive damages under Tennessee law. Punitive damages against appropriate if, and only if, Plaintiff has shown *by clear and convincing evidence* that Dr. Twiest has acted either intentionally, recklessly, maliciously, or fraudulently. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must *be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.* *Id.* A person acts *intentionally* when it is the person's purpose or desire to do a wrongful act or to cause the result. *Id.* A person acts *recklessly* when the person is aware of, but consciously disregards a substantial and unjustifiable risk of injury or

damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under all the circumstances. *Id.* A person acts *maliciously* when the person is motivated by ill will, hatred or personal spite. *Id.*

As Plaintiff can offer no compelling evidence that Dr. Twiest's actions were motivated by anything other than furthering Erlanger's interests by proper means approved by Erlanger, summary judgment on this issue is appropriate. Moreover, Plaintiff cannot establish that Dr. Twiest grossly deviated from a recognized standard of care so as to constitute recklessness. Indeed, expert witness, Dr. Gerald Hickson, has opined that Dr. Stratienco's behavior in pushing another physician warranted his summary suspension. (Def. Twiest's Mot. Summ. J. Ex. J, Hickson Dep. 6:21-7:1, 33:4-35:12, 46:16-20, Nov. 20, 2008; Def. Twiest's Mot. Summ. J. Ex. Q, Hickson Expert Report 3.)<sup>8</sup> Dr. Hickson testified that summary suspension was necessary to reduce the likelihood of imminent danger to the health of patients and personnel at the hospital. *Id.* In the short term, disruptive behavior creates a stressful work environment where medical personnel are likely to lose focus and increases the probability of "slips and lapses," the most common cause of medical errors. (Def. Twiest's Mot. Summ. J. Ex. J, Hickson Dep. 38:2-11, 41:1-13.) In the long term, team members may lose commitment, quit the organization or experience lessened task performance whenever the party who demonstrated the behavior arrives in the Cath Lab. (*Id.*)<sup>9</sup> For the foregoing reasons, Dr. Twiest is entitled to summary judgment on the issue of punitive damages.

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<sup>8</sup> See Footnote 6 *supra* in respect to Dr. Hickson's qualifications.

<sup>9</sup> Such concerns have been substantiated in this case. In fact, the proof shows that Dr. Stratienco's behavior on September 16, 2004 continued to disrupt hospital operations after the date of the incident. Lynda Stanley testified that people in the Cath Lab had considered "getting positions elsewhere, I think, due to stress." (Def. Twiest's Mot. Summ. J. Ex. K, Stanley Dep. 87:5-22, Dec. 1, 2004.) Dr. Walter Puckett, Chief of Cardiology at Erlanger testified on September 18, 2008 that contentiousness among cardiologists at Erlanger grew worse after this

**CONCLUSION**

Based upon the foregoing, Dr. Twiest respectfully submits that this Court should grant summary judgment to Dr. Twiest, enter judgment in his favor, award his costs incurred in this matter, and grant such additional relief as the Court deems necessary and appropriate.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I do hereby certify that the foregoing pleading has been filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile, or hand delivery. Parties may access this filing through the Court's electronic filing system.

This 14th day of December, 2008.

s/Timothy L. Mickel  
TIMOTHY L. MICKEL

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incident. (Def. Twiest's Mot. Summ. J. Ex. L, Puckett Dep. 112:3-113:3, Sept. 18, 2008.) In his opinion, because of the turmoil, he had not been able to hold meetings among the cardiologists and doctors had quit coming to meetings because it was so uncomfortable. (*Id.* 113:4-19.) This is consistent with the testimony of Dr. Monroe, who testified that he no longer went to Cardiac Council meetings at Erlanger after the incident because the meetings were uncomfortable. (Def. Twiest's Mot. Summ. J. Ex. R, Monroe Dep. 147:7-148:22, June 25, 2008.)