IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. PEREZ, D.O. and	**:**	
POTTSTOWN X-RAY SPECIALISTS, P.C.,	**:**	
Plaintiffs,	**:**	
	:	
v.	**:**	**Civil No. 97-3334**
	:	
POTTSTOWN MEMORIAL MEDICAL	**:**	
CENTER,	**:**	
JOHN J. BUCKLEY,	**:**	
JOFFRE P. LEWIS, M.D.,	**:**	
JOHN K. MORAN, M.D.,	**:**	
EDWARD DELGROSSO, M.D.,	**:**	
MAYHEEP GOYAL, M.D., and	**:**	
TRI-COUNTY IMAGING GROUP, P.C.,	**:**	
Defendants.	**:**	

MEMORANDUM

Cahn, C.J. **July ___, 1998**

Before the court are three motions for summary judgment: Pottstown Memorial Medical Center's and John J. Buckley's motion; John K. Moran, M.D.'s, Edward DelGrosso, M.D.'s, Mayheep Goyal, M.D.'s, and Tri-County Imaging Group, P.C.'s motion; and Joffre P. Lewis's motion. In these summary judgment motions, Defendants argue that the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101-11152, and the Pennsylvania Peer Review Protection Act ("PRPA"), 63 Pa. Cons. Stat. §§ 425.1-425.4, immunize them from Plaintiffs' claims for damages. For the reasons that follow, the court will grant the motions.

I. Background

The evidence, viewed in the light most favorable to Plaintiffs, establishes the following relevant facts.

A. The Parties

Plaintiff Perez is the former chairman of PMMC's radiology department. In addition, Perez is a former shareholder, director, and the former president of Plaintiff X-Ray, a Pennsylvania professional corporation that provided exclusive radiology services to PMMC from August 1992 to July 1997.

Defendant PMMC is a non-profit community hospital with its principal place of business in Pottstown, Pennsylvania. Defendant Buckley is PMMC's President and CEO. Defendant Lewis was, at all times relevant to this action, a shareholder, director and officer of X-Ray. Defendants Moran, DelGrosso, and Goyal were, until July 1997, associates of X-Ray. Defendant Tri-County is a Pennsylvania professional corporation that Defendant Moran incorporated on January 22, 1997.

B. Moran, DelGrosso, and Goyal Complain about Perez

On or about July 29, 1996, Buckley met with Moran, DelGrosso, and Goyal to discuss a business dispute that the X-Ray associates had with Perez and Lewis. The crux of the dispute was that Perez and Lewis wanted to change certain X-Ray bylaws before making Moran, DelGrosso, and Goyal shareholders.[1] At this meeting, Moran, DelGrosso, and Goyal told Buckley that they strongly believed Perez was incompetent as a radiologist. They discussed with Buckley examples of cases which they felt illustrated Perez's alleged incompetence.

[1]For example, Perez and Lewis wanted to amend the bylaws to provide that X-Ray could terminate a shareholder only on a unanimous vote of the shareholders, rather than on a majority vote. This amendment would protect Perez and Lewis from the voting power that Moran, DelGrosso, and Goyal would have as shareholders.

C. The First Independent Review

In response to Moran's, DelGrosso's, and Goyal's complaints about Perez's medical skills, and after consulting with the Executive Committee of PMMC's Board of Directors, Buckley hired QualVal Systems, Inc. to conduct a review of PMMC's radiology department. QualVal is a risk and quality management-consulting firm that conducts quality assessments at health care organizations. Neither Buckley nor anyone else at PMMC told QualVal that Perez presented a potential problem.

QualVal selected Dr. Richard J. Cobb to review PMMC's radiology department. At all times relevant to this action, Cobb served as the Chief of Radiology at New York's Bassett Healthcare, a teaching hospital affiliated with Columbia Presbyterian Hospital. Cobb agreed to participate in QualVal's review, but, when he learned how many cases QualVal wanted reviewed in a short time period, requested that QualVal engage a second physician. QualVal agreed, and Cobb selected Dr. Dalal, a Bassett radiologist who performed mostly interventional procedures.

QualVal developed a protocol for the PMMC review: random selection of cases. Vicki King, QualVal's Manager of Clinical Performance Review, selected for review, from a twelve-week sample of diagnostic procedures, twenty-eight patient files from each PMMC radiologist. In addition, King selected "high volume, high risk, problem prone cases" from among all interventional cases performed by PMMC radiologists from January 1, 1996 to December 31, 1996 for review.

On January 4-5, 1997, Cobb and Dalal reviewed the cases randomly selected by QualVal. During the review, Cobb and Dalal conferred with each other as if they were working on their own cases at Bassett. They noticed that Perez diagnosed a number of pulmonary emboli in

patients where no pulmonary emboli existed. As a result of the misdiagnoses, Perez unnecessarily inserted vena cava filters in those patients. Cobb and Dalal knew that the physician whose work they found troubling was Perez because each file that Cobb and Dalal reviewed contained the name of the physician who had handled that case.

On the afternoon of January 5, 1997, Cobb and Dalal requested a meeting with Buckley and Saylor, the Vice President for Medical Affairs at PMMC. At this meeting, Cobb and Dalal communicated their concerns about Perez's interventional skills. Cobb and Dalal did not, however, state that Perez was placing patients in immediate jeopardy or recommend corrective action.

On January 6, 1997, Cobb and Dalal met with each PMMC radiologist individually to discuss the individual radiologists' impressions of the radiology department. These interviews did not alter the conclusions that Cobb and Dalal reached based on the random review.

Also on January 6, 1997, Cobb, Dalal, and King had an exit interview with Buckley and Saylor. When Buckley asked Cobb and Dalal whether Perez posed an immediate threat to patient safety, King interjected that QualVal needed to aggregate the review data before the disclosure of any final conclusions. King agreed to provide, and testified at the Ad Hoc Fair Hearing ("the Hearing"), discussed infra, that she did provide, a final written report to PMMC by January 10, 1997.

The written report, titled "Clinical Performance Review Report" ("the Report") and dated February 6, 1997, reads, in relevant part:

> Significant problems were identified with the management of patients being worked up for suspected pulmonary emboli by physician 104745 [Perez]. In cases reviewed, there is liberal use of IVC filters on patients with insufficiently

> documented work-up and no proven evidence of pulmonary emboli. This is a definite marked deviation from the recognized standard of care in the area of Interventional Radiology. It is the opinion of the reviewing physicians that the Medical Staff, Hospital and Board of Directors have the ultimate responsibility to insure proper medical care to all patients and should act on this above mentioned matter immediately. Corrective action pursuant to Medical Staff By-Laws is indicated immediately. It is the opinion of the reviewing physicians that so long as there is restriction of interventional privileges and proctoring of remaining privileges, and that there are no significant incidents of risk of patient harm, this action should be sufficient. The proctoring of remaining privileges has been recommended due to the concern on the part of the reviewing physicians that potential problematic patterns and trends were identified within the area of non-Interventional Radiology. Should the results of this internal proctoring result in validation of these potential problematic patterns and trends, there should be consideration of restriction of non interventional privileges.

(PMMC's and Buckley's Reply ("PMMC Reply"), App. II, Ex. G., at 4.) The Report also reflects that Perez deviated from recognized standards of care in fifteen cases, with apparent harm in ten of those cases. Finally, the Report lists cases of Perez's that Cobb and Dalal concluded belonged in the following categories: insufficient documented indications for the procedure (8 patients); indications for the procedure are inadequate or not appropriate (2 patients); relevant previous radiological studies not reviewed when available (5 patients); invasive radiographic study is of poor quality (3 patients); diagnosis is not effectively communicated (1 patient); unnecessary additional tests/studies recommended (1 patient); appropriate test/study for the differential diagnosis were recommended (1 patient); appropriate follow-up test/study not recommended (2 patients); complications of unusual or unexpected severity encountered (1 patient); reviewer disagrees with radiographic report (16 patients); and reviewer would have managed case differently (16 patients).

D. The Summary Suspension of Perez's Interventional Privileges

On January 8, 1997, Moran, DelGrosso, and Goyal approached Buckley and explained

that a patient had presented for a pulmonary arteriogram and Perez was on call. Moran, DelGrosso, and Goyal warned Buckley that Perez posed a threat of immediate danger to this patient.[2]

Buckley called Cobb for advice. Cobb promptly returned Buckley's call. Saylor, DelGrosso, Moran, and Goyal heard Buckley's and Cobb's conversation through the speaker phone. Cobb stated that it was highly probable that Perez would unnecessarily place a vena cava filter in the patient, which would be potentially dangerous.

Following the call, Buckley consulted privately with Dr. Joseph Krantzler, Chief of PMMC's Medical Staff. When Krantzler agreed with Buckley's suspension recommendation, Buckley summarily suspended Perez's interventional privileges. Buckley notified Perez of this adverse action on January 8, 1997, orally and in writing.

The January 8, 1997 letter notifying Perez of the suspension reads, in relevant part,

> Pursuant to the findings which were relayed to me by telephone this morning by Dr. Richard J. Cobb, I am implementing Section 6.5 (adverse corrective action) Subsection B (immediate corrective action) of the Medical Staff Bylaws. Specifically, effective immediately, your Medical Staff privileges to perform interventional radiologic studies are being summarily suspended. The basis of this suspension stems from the findings of both radiologists who, after their review of a random sample of your cases, have determined there is probable cause to believe that safety of patients undergoing interventional studies performed by you will be jeopardized.
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> * * *
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> Finally, according to Article VII (Hearing Procedure and Appeal) of the Medical Staff Bylaws, if you would like to request a hearing on this matter, please be advised that you have thirty (30) days from today's date to request such a hearing. Your procedural rights relating to Article VII of the Medical Staff Bylaws are attached for your review.

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[2]Moran, DelGrosso, and Goyal had planned to confront Buckley on January 8, 1997 to ask why Perez's privileges had not been suspended regardless of whether a patient presented for a pulmonary arteriogram.

(PMMC's and Buckley's Mot. ("PMMC Mot."), App., Tab 1, Ex. E.)

In addition to summarily suspending Perez's interventional privileges, Buckley also initiated an overreading of Perez's noninterventional cases.[3] Buckley described this process as follows: "current non-interventional cases of Dr. Perez's were reviewed by a second radiologist after Dr. Perez's evaluation to ensure that an accurate and appropriate diagnosis had been made." (PMMC Mot., App., Tab 1, ¶ 26.)

E. The Summary Suspension of Perez's Noninterventional Privileges

On or before January 13, 1997, Buckley learned that the overreads suggested that Perez might have misdiagnosed a significant number of cases. As a result, Buckley and Krantzler scheduled an emergency meeting of the Medical Executive Committee for January 14, 1997. The MEC met on January 14, 1997, made no decision about Perez's privileges, and scheduled another meeting for January 17, 1997.

At the January 17, 1997 meeting, the MEC voted unanimously to ratify Buckley's summary suspension of Perez's interventional privileges. In addition, the MEC summarily suspended Perez's noninterventional privileges. The MEC notified Perez of these adverse actions by letter dated January 21, 1997. The January 21, 1997 letter reads, in relevant part,

> These actions were taken based on concerns raised by referring physicians on the Pottstown Memorial Medical Center Medical Staff, staff Radiologists within the Department of Diagnostic Radiology as well as concerns raised by two (2) outside objective Radiologists.
>
> Based on the input from these three (3) sources, the Medical Executive Committee felt that there is probable cause to believe that patient safety may be jeopardized if your privileges were to remain intact. These actions were

[3]Subsequent to the suspension, Perez agreed to relinquish his position as Chairman of the Radiology Department.

> implemented pursuant to the PMMC Medical Staff Bylaws, Section 6.5 (Adverse Corrective Action) subparagraph B (Immediate Corrective Action).
>
> According to Article VII (Hearing Procedure and Appeal) of the Medical Staff Bylaws, if you would like to request a hearing on item #2 above, please be advised that you have thirty (30) days from today's date to request such a hearing.

(Id. at Ex. F.)

F. Perez Requests a Hearing

By letter dated January 13, 1997, Perez requested a hearing pursuant to Article VII of the Medical Staff Bylaws regarding Buckley's suspension of his interventional privileges. By letter dated January 31, 1997, Perez requested a hearing pursuant to Article VII regarding the MEC's summary suspension of his noninterventional privileges.

G. The Second Independent Review

Subsequent to the MEC's suspension of Perez's noninterventional privileges, Saylor gave Buckley a list of cases that Moran, DelGrosso, and Goyal had compiled to demonstrate Perez's alleged incompetence. Upon receiving this information, Buckley engaged QualVal to conduct an independent, focused review.

PMMC selected cases for the focused review. The review included the cases compiled by Moran, DelGrosso, and Goyal to demonstrate Perez's alleged incompetence, cases identified by Cobb and Dalal in the first QualVal review as Perez problem cases, and cases from the overreading that Buckley ordered on or about January 8, 1997.

QualVal recommended recruiting physicians other than Cobb and Dalal to conduct the focused review. PMMC agreed. The new physicians selected were: Dr. Floyd A. Osterman, Jr., Chief of Interventional Radiology at the Johns Hopkins Hospital and the Johns Hopkins

University; Dr. Paul S. Wheeler, Associate Professor of Radiology at the Johns Hopkins Hospital and the Johns Hopkins University; and Dr. Harold Moskowitz, Assistant Clinical Professor of Radiology and Lecturer in Surgery at the Yale Medical School. Osterman reviewed the interventional cases, Wheeler reviewed the noninterventional cases, and Moskowitz reviewed the interventional and noninterventional cases.

Although QualVal did not prepare a written report summarizing Osterman's, Wheeler's, and Moskowitz's conclusions, Osterman, Wheeler, and Moskowitz testified on behalf of PMMC at the Hearing.[4] Osterman testified that, inter alia, in a number of cases, Perez inserted vena cava filters in patients without sufficient evidence of pulmonary emboli. Wheeler testified that Perez's noninterventional radiology skills would not be acceptable in a first-year resident. According to Wheeler, Perez consistently overreported the existence of disease. Of the forty films Wheeler reviewed, Wheeler's conclusions differed from Perez's conclusions in all but one case. Moskowitz testified that he disagreed with Perez's reading and interpretation of many films, that Perez had a problem of overreading disease in the interventional and noninterventional areas, and that Perez's conclusions may have led to unnecessary interventions.

H. PMMC Withdraws the Suspension of Perez's Privileges

On or about February 6, 1997, PMMC withdrew Perez's suspension. In return, Perez agreed to take a leave of absence from PMMC until the Hearing occurred and the Ad Hoc Fair Hearing Committee ("the Committee") reached a decision. Because Perez's suspension lasted less than thirty-one days, PMMC did not file a report with the National Practitioner Data Bank.

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[4]The Ad Hoc Fair Hearing is discussed in detail infra.

I. The Ad Hoc Fair Hearing

In January, 1997, Perez requested a hearing as soon as possible, and PMMC agreed to commence a hearing. On April 10, 1997, PMMC informed Perez that the hearing, which would address the summary suspension of Perez's interventional and noninterventional privileges, would take place May 13-15, 1997.[5] Perez requested that PMMC postpone the hearing because Perez's expert witness was unavailable on May 13-15, 1997. PMMC refused to postpone the hearing, but added an extra hearing date, June 16, 1997, so that Perez's expert could testify.

The Committee consisted of five members of PMMC's medical staff. These Committee members did not compete economically with Perez. Nor had they participated in the MEC's decisions regarding Perez's privileges.

PMMC presented its case on May 13-15, 1997, and Perez presented his case on June 16, 1997. PMMC's case consisted of the testimony of eleven witnesses, including Drs. Cobb, Dalal, Osterman, Wheeler, and Moskowitz. In addition, PMMC provided the Committee with summary reports of fifty-six Perez cases reviewed.[6] Perez's case consisted of the testimony of Perez and his expert, Dr. Arthur C. Waltman.

The Committee issued a written Report and Recommendation on July 21, 1997 ("the Report and Recommendation"). The Report and Recommendation communicates the Committee's conclusion that "[t]he suspensions of Dr. Perez's staff privileges were supported by evidence to establish the professional conduct by Dr. Perez jeopardizes, or threatens to

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[5]In the April 10, 1997 letter notifying Perez of the hearing dates, PMMC also disclosed the names of the witnesses whose testimony PMMC planned to present.

[6]Two of the fifty-six cases were not reviewed as part of either QualVal review.

jeopardize, the safety and best interest of patients and was not arbitrary, unreasonable, or capricious" and recommends "confirmation of the adverse corrective action concerning the medical staff privileges of Dr. Perez." (PMMC Reply, App. II, Ex. A, at 8,1.) The Committee reasoned that five independent, well-qualified radiologists testified to Perez's professional deficiencies; Perez's expert did not discredit the findings of the independent radiologists; and Perez admitted that, due to workload and business pressures, he failed to devote a proper amount of time to his cases. The Committee noted that "a factual basis for the suspension is substantiated without consideration of the testimony of the X-Ray radiologists." (Id. at 12.)

J. Perez Appeals, and the PMMC Board Suspends Perez's Privileges

Perez appealed the Committee's decision. On October 6, 1997, PMMC's Appellate Review Committee affirmed the Report and Recommendation. On October 27, 1997, PMMC's Board of Directors affirmed the Appellate Review Committee's decision, and made it the final decision of the Board.

K. Procedural History

On May 9, 1997, prior to the Hearing, Perez filed a Complaint and a Petition for Temporary Restraining Order and for Preliminary Injunction. In the Petition, Perez requested that the court delay the Hearing scheduled to commence May 13, 1997, and enjoin Defendants "from preventing plaintiff, Raymond J. Perez, D.O., from access to the medical center, use of staff and equipment, and the practice of medicine." (Proposed Order at 2.) On May 13, 1997, the Honorable Herbert J. Hutton denied Perez's petition.

On May 30, 1997, Perez filed an Amended Complaint, adding X-Ray as a plaintiff and Tri-County as a defendant. After this action was reassigned to this court's docket on October 17, 1997,

Plaintiffs filed a Second Amended Complaint with leave of court.

In the Second Amended Complaint, Plaintiffs allege that all Defendants are liable for: violating the HCQIA (Count II); federal antitrust violations (Count III); and intentional interference with existing and prospective economic relations (Count X). Count I is a shareholder derivative claim against Defendants Lewis, Moran, DelGrosso, Goyal, and Tri-County. The remaining counts of the Second Amended Complaint allege tort and contract claims against various subgroups of Defendants. Plaintiffs request damages and equitable relief.

At a hearing on January 12, 1998, Defendants withdrew their then-pending motions to dismiss and requested that the court entertain summary judgment motions focused on the issue of whether the HCQIA or the PRPA immunize Defendants from Plaintiffs' damages claims. The court agreed and allowed discovery limited to this issue. Defendants' summary judgment motions are now ripe for adjudication.

II. Discussion

A court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The HCQIA includes a rebuttable presumption of immunity, see 42 U.S.C.A. § 11112(a) (West 1995), discussed infra, which "results in an unusual standard" for summary judgment, Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 633 (3d Cir. 1996) (internal quotation marks omitted). When a defendant moves for summary judgment

on the basis of HCQIA immunity, the proper inquiry is whether the plaintiff has produced "evidence that would allow a reasonable jury to conclude that the [defendant's] peer review disciplinary process failed to meet the standards of the [HCQIA]." Id. See also Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992) ("Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that [the plaintiff] has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of [the HCQIA]?)"

A. Statutory Framework

Congress passed the HCQIA "to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior." H.R. Rep. No. 99-903, at 2 (1986), reprinted in 1986 U.S.S.C.A.N. 6287, 6384. Prior to the HCQIA, "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourage[d] physicians from participating in effective professional peer review." 42 U.S.C.A. § 11101(4) (West 1995). Moreover, "incompetent physicians [were able] to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." Id. at § 11101(2).

Section 11111(a) of the HCQIA, read together with § 11112(a)(1)-(4), provides that if a professional review body[7] takes a professional review action[8]

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[7] "Professional review body" means "a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." 42 U.S.C.A. § 11151(11) (West 1995).

[8] "Professional review action" means

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on

> **(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)[,]

then the professional review body, and any person who is part of or assists the body,[9] "shall not be liable in damages . . . with respect to the [professional review] action." Section 11112(a) creates a rebuttable presumption that a professional review action meets the requirements of § 11112(a)(1)-(4), subject to certain exceptions not relevant to this case.

The HCQIA contains detailed provisions regarding adequate notice and hearing procedures. Section 11112(b), the safe harbor, lists conditions which, if met, satisfy § 11112(a)(3). Section 11112(b) explains, however, that "[a] professional review body's failure to meet the conditions

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> the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of the physician.

Id. at § 11151(9).

[9]Defendants eligible for immunity include:

> (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.

Id. at § 11111(a)(1)(A)-(D). In addition, a person "providing information to a professional review body regarding the competence or professional conduct of a physician" may enjoy HCQIA immunity unless the person provides information knowing it is false. Id. at § 11111(2).

described in this subsection [11112(b)] shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." "The ultimate inquiry is whether the notice and hearing procedures were adequate." Sklaroff v. Allegheny Health Educ. Research Found., No. Civ. A. 95-4758, 1996 WL 383137, at *8 (E.D. Pa. July 8, 1996) (citations and internal quotation marks omitted), aff'd, 118 F.3d 1578 (3d Cir. 1997). Section 11112(c)(2) provides that a notice and hearing, or other adequate procedures, may be conducted after the professional review action if "the failure to take such an action may result in an imminent danger to the health of any individual."

In assessing whether a professional review action meets the four standards set forth in § 11112(a), a court should examine the totality of the circumstances through an objective lens. Mathews, 87 F.3d at 635. "[A] defendant's subjective bad faith is irrelevant." Id. If the record reflects that "the professional review action would further quality health care," then the court should find all eligible defendants immune. Id. "The real issue is the sufficiency of the basis for the [Hospital's] actions." Id. (quoting Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1335 (11th Cir. 1994)).

B. HCQIA Immunity

The parties do not dispute that PMMC took professional review actions against Perez in this case. Buckley's summary suspension of Perez's interventional privileges, the MEC's summary suspension of Perez's noninterventional privileges, and the Board's final decision to suspend Perez's privileges meet the HCQIA's definition of professional review action.[10]

[10]The court notes that the parties did not identify which parts of the peer review process they contend meet the definition of professional review action. For clarity, the court will explain why it did not treat the Committee's Report and Recommendation or the Appellate Review Committee's recommendation as a professional review action. Section § 11112(a)(3) requires that a professional review body take a professional review action after adequate notice and

In addition, the parties do not dispute that Defendants Buckley, PMMC, Moran, DelGrosso, Goyal or Lewis qualify as defendants eligible for immunity under the HCQIA, although Plaintiffs do dispute that Defendant Tri-County is potentially immune. Plaintiffs reason that "Tri-County did not participate in the professional review activity and/or the professional review action vis-a-vis Perez." (Pls.' Br. at 48.) This argument lacks merit. See Mathews, 883 F. Supp. 1016, 1025-26 (E.D. Pa. 1995) (holding that principles of corporate liability shield a professional corporation composed of individual peer review participants from liability for the individuals' acts in connection with the peer review process, insofar as the HCQIA immunizes the individuals), aff'd, 87 F.3d 624 (3d Cir. 1996).[11] If there is no genuine issue of material fact as to whether the professional review actions at issue in this case meet the standards of § 11112(a), then all Defendants, including Tri-County, will avoid Plaintiffs' damages claims.

1. Standards for Professional Review Actions

Plaintiffs argue that they have produced evidence from which a reasonable jury could conclude that Defendants' actions fail to meet §§ 11112(a)(1), (2), (3), and (4) of the HCQIA. The court will now consider Plaintiffs' arguments seriatim.

a. Reasonable Belief that the Action was in the Furtherance of Quality Health Care

Plaintiffs make four arguments to show that Plaintiffs have presented evidence that would

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hearing procedures, and holding that the action of a hearing committee or an appellate panel must meet § 11112(a)'s requirements would be illogical. Cf. Mathews v. Lancaster Gen. Hosp., 883 F. Supp. 1016, 1028 (E.D. Pa. 1995) (holding that investigative measures were not professional review actions because professional review actions can only be taken after a reasonable effort to obtain the facts), aff'd, 87 F.3d 624 (3d Cir. 1996).

[11]The court also concluded, in dicta, that the term "person," as used in § 11111(a)(1), includes corporations. Mathews, 883 F. Supp. at 1025.

allow a reasonable jury to conclude that PMMC did not suspend Perez's privileges with a reasonable belief that the action was in the furtherance of quality health care. The thrust of each argument is that "the purpose of the Perez peer review was to eliminate Perez from the medical staff for business reasons." (Pls.' Br. at 28.) As the court explains below, the arguments lack merit.

First, Plaintiffs contend that because Moran, Goyal, and DelGrosso retained counsel in connection with their business disputes with X-Ray as early as December 1995, a jury could reasonably infer that Moran, Goyal, and DelGrosso "had been counseled . . . to initiate the removal of Perez from the medical staff via a peer review in order to take advantage of HCQIA immunity." (Id. at 29.) This inference is patently unreasonable and fails to create a jury issue. See Anderson, 477 U.S. at 255 (requiring the court to grant the nonmovant only justifiable inferences).

Second, Plaintiffs point to Moran's testimony that although Moran believed that Perez was making life-threatening mistakes as early as May-June 1995, Moran did not report this belief to any member of an appropriate medical committee until over a year later. According to Plaintiffs, this testimony allows the inference that Moran, DelGrosso, and Goyal raised questions about Perez's competence only after "it was obvious that the business dispute between themselves and Perez would not be resolved amicably." (Id. at 31.) Evidence about Moran's, DelGrosso's, and Goyal's motivation for questioning Perez's competence is irrelevant. Although Moran, Goyal, and DelGrosso engaged in professional review activities, they did not take any professional review action subject to the standards set forth in § 11112(a). Even if they had, a defendant's subjective bad faith is irrelevant to the § 11112(a) inquiry. See Sklaroff, 1996 WL 383137, at *7 ("Plaintiff alleges that the decision to suspend his privileges was taken, not to further quality health care, but to prevent him from criticizing Hospital policies and to destroy his medical practice. . . . [A]llegations of bad faith

are immaterial in determining whether a defendant acted reasonably, and are insufficient to rebut the presumption of reasonableness."); see also Mathews, 87 F.3d at 635.

Third, Plaintiffs argue that the MEC failed to vote on the status of Perez's noninterventional privileges until after Perez rejected PMMC's "business deal," evidencing that the MEC did not suspend Perez's noninterventional privileges in the reasonable belief that its action would further quality healthcare. On January 13, 1997, Buckley offered to reinstate Perez provided that Perez agreed to take a voluntary leave of absence to complete retraining in exchange for releasing Moran, DelGrosso, and Goyal from their X-Ray restrictive covenants and releasing PMMC, Buckley, and all physicians involved in the peer review from any claims. On January 15 or 16, 1997, Perez, through his lawyer, rejected the offer.

Although there may be an issue as to whether Fed. R. Evid. 408 prohibits Plaintiffs' use of this evidence, the court need not decide the issue because the proffered evidence is insufficient to rebut the statutory presumption of immunity. The mere presence of a "business" element in PMMC's negotiations with Perez prior to the MEC's decision to suspend Perez's noninterventional privileges does not make it reasonable to infer that the MEC's subsequent decision to summarily suspend Perez's noninterventional privileges was not made to further quality health care. Plaintiffs might have had a stronger argument had PMMC offered to reinstate Perez in exchange for the releases without requiring Perez to undergo retraining.

Fourth, Plaintiffs suggest that testimony that Buckley hired QualVal to conduct the random review because the hospital was renegotiating its contract with X-Ray permitsan inference that Buckley hired QualVal "to remove Perez from the medical staff at PMMC in order to renegotiate a new, more favorable contract with Tri-County." (Pls.' Br. at 34.) This argument misses the mark.

Buckley's decision to hire QualVal to conduct an external review is not a professional review action and, therefore, need not meet the standards set forth in § 11112(a). See Mathews, 87 F.3d at 634 (rejecting the plaintiff's argument that a letter from the head of an ad hoc committee recommending a focused review of the plaintiff's cases was a professional review action, and reasoning that the letter did not restrict or recommend the immediate restriction of the plaintiff's privileges).

b. Reasonable Effort to Obtain the Facts

The court is mindful that "[p]laintiff is entitled to a reasonable investigation under the [HCQIA], not a perfect investigation." Sklaroff, 1996 WL 383137, at * 8. In its analysis, the court must focus on the totality of the circumstances leading to the professional review action. See Mathews, 87 F.3d at 637.

Plaintiffs' first §11112(a)(2) argument is that:

> [b]ecause the cases reviewed during the first review and those reviewed during the second review have never been positively identified, there is no way to determine whether the 56 cases presented to the ad hoc committee in support of the suspension of Perez's privileges were the product of a random peer review or the product of the "behind-the-scenes" compilation of cases by Moran, Goyal, and DelGrosso.
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> * * *
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> If all or most of the 56 cases considered by the Ad Hoc Committee had their origins in the clandestine compilation of Moran, Goyal, and DelGrosso, then there was no random study as the committee was lead [sic] to believe, but only a witch hunt.

(Pls.' Br. at 35-36.)

Plaintiffs err as a matter of fact when they suggest that the Committee did not know the origins of the fifty-six cases that PMMC presented to the Committee. PMMC provided the Committee with summary sheets that revealed the names of the physicians who reviewed each of

the fifty-six cases. All five independent reviewing physicians testified, and, by looking at the name of the physician(s) on the summary sheet, it is obvious which cases were from the random review, and which cases were from the focused review.[12] In addition, the Committee knew how QualVal selected cases for the random review, and how PMMC selected cases for the focused review. PMMC counsel explained the origins of the cases in the focused review in his opening statement at the Hearing, and Perez cross-examined Feazell and King about the origins of the cases in the random and focused reviews.

To the extent Plaintiffs argue that the Board's final decision to suspend Perez's privileges could not have been taken after a reasonable effort to obtain the facts unless the majority of the fifty-six cases presented to the Committee came from the random review, the court rejects the argument. Three independent, well-qualified physicians reviewed and reached their own conclusions about the cases that were part of the focused review. Plaintiffs ignore the significance of this layer of review.[13]

Next, Plaintiffs argue that because Waltman testified that, in the PIOPED study, experts disagreed approximately ten percent of the time about the interpretation of the findings on pulmonary arteriograms, PMMC's failure to present the Committee with the total number of procedures performed by Perez and reviewed by the independent experts evidences a lack of a reasonable effort to obtain the facts. Although in a perfect world, PMMC would have provided

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[12]By this court's count, nineteen of the fifty-six cases were from the random review.

[13]In addition, whether Perez handled cases not presented to the Committee competently does not change the fact that independent experts found that Perez mishandled a significant number of cases. See Mathews, 883 F. Supp. at 1033 ("That Dr. Mathews may have been up to par in other aspects of his practice does not change the fact that 27 of his cases fell below the standard of care.").

the Committee with the total number of procedures reviewed, PMMC's failure to provide this information is not fatal. The Committee heard Waltman's testimony and was free to give it whatever weight it chose in the context of all of the evidence. Waltman's testimony could not cause a reasonable jury to conclude that Defendants failed to comply with § 11112(a)(2).

Perez's final argument in support of his position that Defendants failed to make a reasonable effort to obtain the facts of the matter is that "the jury could . . . conclude that the cases which the Ad Hoc Committee felt justified the suspension of Perez's interventional and non-interventional privileges were gathered only after the summary suspension of said privileges, and in an ex post facto effort to justify the summary suspension." (Pls.' Br. at 38.) The evidence, however, shows that Buckley summarily suspended Perez's interventional privileges after a reasonable effort to obtain the facts of the matter. Before suspending Perez's interventional privileges, Buckley engaged QualVal to conduct a random review. On January 5, 1997, Cobb and Dalal communicated to Buckley and Saylor their concerns about Perez's interventional skills, and, on January 8, 1997, Cobb told Buckley that it was highly probable that Perez would unnecessarily place a vena cava filter in a patient who presented for a pulmonary arteriogram.

In addition, the MEC had multiple sources of information about problems with Perez's noninterventional skills when it suspended Perez's noninterventional privileges. Referring physicians at PMMC had expressed concerns about Perez's skills generally; Moran, DelGrosso, and Goyal had complained about Perez's skills; and, less than two weeks after Buckley ordered the overreading of Perez's noninterventional cases by the physicians in the radiology department (Rubin, Lewis, Moran, DelGrosso, and Goyal), Buckley learned the results "were poor and

suggested that Dr. Perez might have misdiagnosed a significant number of cases."[14] (PMMC Mot., App., Tab 1, ¶ 29.) Although the issue is a close one, the court finds that a jury could not conclude that Plaintiffs have rebutted the statutory presumption that the MEC summarily suspended Perez's noninterventional privileges after a reasonable effort to obtain the facts of the matter. Most significant to the court are the results of the overreads of Perez's noninterventional cases. In addition, the court recognizes the difficulty of the decisions that hospitals must make about whether a physician presents a threat to patients.

Even assuming that the MEC prematurely suspended Perez's noninterventional privileges, Perez could, at most, seek damages from the time of the summary suspension to the time that the Board suspended Perez following the focused review and Hearing; moreover, such a claim would evaporate upon consideration of the totality of the circumstances. The Board suspended Perez's privileges only after QualVal provided the results of the random review of the radiology department, and after Osterman, Wheeler, and Moskowitz testified at the Hearing about the disturbing results of the focused review. The results of the two reviews confirmed the earlier findings of problems with Perez's interventional and noninterventional work. The peer review process resulted in a fair, final decision reached only after a reasonable investigation of the fact.

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[14]It is not clear whether the MEC had the QualVal report, which identifies potential problematic patterns in Perez's noninterventional work and recommends internal proctoring, by January 17, 1997. Although King testified that she gave the report to PMMC by January 10, 1997, the report is dated February 6, 1997. In addition, in a letter to Perez's counsel dated February 13, 1997, counsel for PMMC states that the QualVal report, and copies of the x-rays and diagnoses for patients identified in the reports, are "now available." Because the date that PMMC received the report is material, and the court must grant Plaintiffs all reasonable inferences, the court will not conclude that the MEC had the report on or before January 17, 1997.

c. Adequate Notice and Hearing Procedures

Plaintiffs make three arguments about why a reasonable jury could conclude that PMMC did not provide Perez with adequate notice and hearing procedures. First, Plaintiffs argue that, despite Perez's request on January 13, 1997 for an immediate hearing, PMMC failed to notify Perez of the scheduled hearing dates until April 10, 1997 and failed to hold a hearing within a reasonable period of time. Next, Plaintiffs attack PMMC's failure to postpone the hearing to accommodate Waltman. Lastly, Plaintiffs contend that Buckley initiated the random review in violation of the PMMC Bylaws.

Plaintiffs' argument that PMMC failed to comply with § 11112(a)(3) by unreasonably delaying notice of the Hearing is not persuasive. Section 11112(b)(2) of the HCQIA provides as follows:

> **(2) Notice of Hearing**
>
> If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—
>
> **(A)** the place, time, and date, of the hearing, which date shall be not be less than 30 days after the date of the notice, and
>
> **(B)** a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

This section does not require that a physician receive notice of the date of the hearing within a certain amount of time after the physician requests a hearing. Similarly, § 11112(b)(3) of the HCQIA does not require that a hearing take place within a specific time frame.[15]

A reasonable jury could not conclude that PMMC's conduct falls outside of these safe-

[15]Even if § 11112(b)(3) did require that a hearing take place within a specific time frame, failure to meet the provisions of § 11112(b) does not, in itself, constitute failure to meet the standards of § 11111(a)(3).

harbor provisions. PMMC scheduled the Hearing for May 13-15, 1997, more than thirty days after the April, 10, 1997 notice. PMMC's April 10, 1997 letter lists the witnesses that PMMC intended to call to testify at the Hearing. Thus, PMMC acted consistent with § 11112(b)(2). In addition, Plaintiffs do not contend that the Hearing failed to comply with § 11112(b)(3).

Plaintiffs' argument that a reasonable jury could conclude that PMMC did not meet the HCQIA's adequate notice and hearing procedures requirement because PMMC refused to delay the Hearing to accommodate Waltman also fails. The HCQIA in no way required PMMC to postpone the hearing. In any event, the court notes that PMMC: 1) added a date in June so that Waltman could testify; 2) offered to provide Waltman with transcripts of the days of the hearing that he could not attend; and 3) offered to allow Perez to videotape portions of the proceedings to review with Waltman.

Perez's final § 11112(a)(3) argument, that Buckley violated the PMMC Bylaws when he engaged QualVal, does not address the issue of HCQIA immunity. Whether PMMC breached the PMMC Bylaws is a claim for breach of contract and does not rebut the presumption that the HCQIA immunizes Defendants from Plaintiffs' claims for damages.

d. Reasonable Belief that the Action was Warranted by the Facts Known

Building on their previous arguments, Plaintiffs contend that a jury could reasonably conclude that PMMC did not suspend Perez's privileges in the reasonable belief that the action was warranted by the facts known. In assessing Plaintiffs' evidence, the court must be mindful to avoid "reweigh[ing] the evidence or substitut[ing] its own judgment for that of the decisionmaker." Sklaroff, 1996 WL 383137, at *9.

Plaintiffs' first argument is that a jury could infer that no patient presented for a pulmonary arteriogram on January 8, 1997 from the fact that Buckley and Saylor failed to verify the existence of the patient. Plaintiffs present no testimony or documentary evidence to support the claim that the patient did not exist. Plaintiffs' argument does no more than raise a metaphysical doubt about the existence of the patient and does not create a genuine issue of material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (explaining that to survive a motion for summary judgment, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts").

The court also rejects Plaintiffs' argument that because Cobb was a general radiologist, he was not qualified to decide that Perez's deficiencies in the area of interventional radiology posed a danger to patients. Nothing in the HCQIA requires that a physician involved in professional review activities practice in the same subspecialty as the physician whose work is under review. See Rogers v. Columbia/HCA of Central Lousiana, 971 F. Supp. 229, 234 (W.D. La. 1997) ("We do not interpret § 11151(9) to require that a 'professional review action' necessarily involve consultation with a sub-specialist in the same field as the physician being reviewed.") Cobb was the Chief of Radiology at Bassett, performed special procedures every ninth night and ninth weekend, and had experience in reading x-rays that were the result of invasive procedures. The court will not hold that a jury could conclude that this evidence rebuts the statutory presumption of immunity.

Finally, the court rejects Plaintiffs' argument that PMMC acted too harshly in suspending Perez's privileges because the evidence presented to the Committee did not support the need for the total restriction of his privileges. Viewing the evidence in the light most favorable to Perez

and granting Perez reasonable inferences, Dalal may not have been convinced that Perez was deficient in the area of noninterventional radiology. The unequivocal testimony of Cobb, Osterman, Wheeler, and Moskowitz, however, supported the conclusion that a serious problem existed with respect to Perez's noninterventional skills. In addition, all five PMMC experts testified about serious problems with Perez's interventional skills. Perez's evidence that he has not harmed any patients in his new position is irrelevant.[16]

e. Summary

Plaintiffs have not produced evidence sufficient to rebut the statutory presumption that the professional review actions in this case met the HCQIA's standards. Thus, the HCQIA immunizes all Defendants from Plaintiffs' federal and state law damages claims.[17]

C. Effect of the Court's HCQIA Analysis on Plaintiffs' Claims

In Count II of the Second Amended Complaint, Plaintiffs seek a declaration that Defendants violated the HCQIA. Although the HCQIA does not immunize Defendants from claims for equitable relief, Count II is moot in light of the court's ruling on HCQIA immunity.[18] Therefore, the court will dismiss Count II.

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[16]Tri-County Defendants correctly note that Moskowitz did not testify that one week of retraining would resolve Perez's problems. In addition, Waltman's testimony does not create a jury issue. See Mathews, 87 F.3d at 638 ("While the conflicting expert reports raise an issue of fact as to the adequacy of care provided by Dr. Mathews, they do not rebut the presumption that the Board made its decision in the reasonable belief that it was warranted by the facts known.")

[17]The court need not resolve Plaintiffs' argument that the PRPA does not immunize Defendants from Plaintiffs' damages claims.

[18]In any event, the HCQIA does not provide a private right of action. See Doe v. United States Dep't of Health & Human Servs., 871 F. Supp. 808, 812 (E.D. Pa. 1994), aff'd, 66 F.3d 310 (3d Cir. 1995).

Next, the HCQIA immunizes Defendants from all of Plaintiffs' damages claims that arise out of the peer review process. See 42 U.S.C.A. § 11111(a) (West 1995) (providing that defendants entitled to HCQIA immunity shall not be liable for federal or state damage claims with respect to the professional review action). Plaintiffs' claims pursuant to the Sherman Act, (see Second Am. Compl. ¶ 111-14), arise out of the peer review process with one exception. Pursuant to § 2 of the Sherman Act, 15 U.S.C. § 2, Plaintiffs allege that "[s]ince becoming CEO, Buckley has tried to create a monopoly for PMMC within its geographical service area." (See Second Am. Compl. ¶ 76.) The court therefore will enter judgment in Defendants' favor on Plaintiffs' Sherman Act claims with the exception of the above-mentioned § 2 claim.

Some, but not all, of Plaintiffs' state law claims for damages arise out of the peer review process. Plaintiffs' claims for fraud, civil conspiracy, intentional interference with existing contractual relationship, defamation per se, intentional interference with existing and prospective contractual relations, breach of contract, and breach of implied covenant of good faith and fair dealing arise out of the peer review process. (See Second Am. Compl. ¶¶ 115-49.) Therefore, the court will enter judgment in Defendants' favor on these damages claims,[19] over which the court clearly may exercise supplemental jurisdiction.

The remaining state law claim is Count I, the shareholder derivative count. Count I does not arise out of the peer review process. Therefore, no basis would exist for granting Defendants summary judgment on this claim, even if the court could exercise supplemental jurisdiction over

[19]The court cannot enter judgment, however, on Plaintiffs' equitable claim for a declaration that PMMC breached the Medical Staff Bylaws because the HCQIA immunizes Defendants only from damages claims. See 42 U.S.C.A. § 11111(a); Mathews, 883 F. Supp. at 1035 (holding that scope of HCQIA immunity does not extend to non-damage remedies).

the claim.

D. Remaining Claims

After finding Defendants immune and entering judgment in their favor on all damages claims that arise out of the peer review process, the following claims remain: 1) Plaintiffs' monopolization claim pursuant to § 2 of the Sherman Act; 2) Plaintiffs' claim for a declaration that PMMC breached the Medical Staff Bylaws; and 3) Plaintiffs' shareholder derivative claim. For the reasons discussed below, the court will dismiss the two latter claims for lack of jurisdiction.

Section 1367(a) of Title 28 of the U.S. Code provides, in relevant part, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." This section codified the standards set forth in United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Under Gibbs, a district court may exercise supplemental jurisdiction over a state law claim if: 1) the federal claims have substance sufficient to confer subject matter jurisdiction on the court; 2) the state and federal claims derive from a common nucleus of operative fact; and 3) the claims are such that they would ordinarily be expected to be tried in one judicial proceeding. See In re Prudential Ins. Co., Nos. 97-5155, 97-5156, 97-5127, 97-5312, --F.3d--, 1998 WL 409156, at *12 (3d Cir. July 23, 1998) (citing Gibbs). Whether claims arise from a common nucleus of operative fact is a fact-specific inquiry, see Tolan v. United States, 176 F.R.D. 507, 512 (E.D. Pa. 1998), and a court should dismiss state claims totally unrelated to the federal claims. See Prudential, --F.3d--, 1998 WL 409156, at *12.

The court lacks supplemental jurisdiction over Count I, the shareholder derivative claim, and Plaintiffs' claim for a declaration that PMMC breached the Medical Staff Bylaws, because those claims and the remaining federal claim do not derive from a common nucleus of operative fact. Plaintiffs' monopolization claim pursuant to § 2 of the Sherman Act arises out of Buckley's alleged efforts to create a monopoly for PMMC, whereas the shareholder derivative claim arises from the conduct of Moran, DelGrosso, Goyal, and Lewis regarding X-Ray's exclusive radiology agreement with PMMC. Similarly, the breach of contract claim arises from the peer review process, not Buckley's alleged efforts to create a monopoly for PMMC. Therefore, the court will dismiss these state law claims without prejudice.

III. Conclusion

In sum, Plaintiffs have presented no evidence that would allow a reasonable jury to conclude that the peer review disciplinary process failed to meet HCQIA standards. Accordingly, Defendants are immune from Plaintiffs' federal and state claims for damages that arise out of the peer review process. After entering judgment on those claims and dismissing the state claims over which the court lacks supplemental jurisdiction, only Plaintiffs' monopolization claim pursuant to § 2 of the Sherman Act remains.

An appropriate order follows.

BY THE COURT:

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Edward N. Cahn, C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. PEREZ, D.O. and POTTSTOWN X-RAY SPECIALISTS, P.C., Plaintiffs,	:	
v.	:	**Civil No. 97-3334**
POTTSTOWN MEMORIAL MEDICAL CENTER, et al., Defendants.	:	

ORDER

And NOW, this ___ day of July, 1998, upon consideration of: 1) the Motion of Defendants, Pottstown Memorial Medical Center and John J. Buckley for Summary Judgment; 2) Defendants John K. Moran, M.D., Edward DelGrosso, M.D., Mayheep Goyal, M.D. and Tri-County Imaging Group, P.C.'s Motion for Summary Judgment; 3) the Motion of Defendant Joffre P. Lewis, M.D. for Summary Judgment; 4) Plaintiffs' response to the Motions; 5) PMMC's and Buckley's reply; 6) Tri-County Defendants' reply; 7) Plaintiffs' surreply to Tri-County Defendants' reply; and 8) Tri-County Defendants' letter to this court dated July 15, 1998, it is hereby ORDERED as follows:

1. Defendants' summary judgment motions are GRANTED. Defendants are IMMUNE from Plaintiffs' federal and state damage claims that arise out of the peer review process.

2. Plaintiffs' claim in Count III of the Second Amended Complaint that Buckley has tried to create a monopoly for PMMC within its geographic service area in violation of § 2 of the Sherman Act MAY PROCEED.

3. Count II of the Second Amended Complaint, Violation of the Health Care Quality

Improvement Act, is DISMISSED as MOOT.

4. Count I of the Second Amended Complaint, Plaintiffs' shareholder derivative claim, is DISMISSED WITHOUT PREJUDICE.

5. Plaintiffs' claim in Count VI of the Second Amended Complaint that Plaintiffs are entitled to a declaration that PMMC breached the Medical Staff Bylaws is DISMISSED WITHOUT PREJUDICE.

6. Plaintiffs are directed to initiate, on August 14, 1998, at 8:45 a.m., a telephone conference with Defendants and the court to set a trial date for Plaintiffs' claim pursuant to § 2 of the Sherman Act.

BY THE COURT:

_____

Edward N. Cahn, C.J.