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United States District Court
For the Northern District of California

E-FILED on 10/9/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICHARD B. FOX, M.D.,

Plaintiff,

v.

GOOD SAMARITAN HOSPITAL and GOOD
SAMARITAN HOSPITAL MEDICAL
STAFF,

Defendants.

No. C-04-00874 RMW

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

[Re Docket Nos. 87 and 129]

Defendants Good Samaritan Hospital and Good Samaritan Hospital Medical Staff move for summary judgment on all of the remaining claims for relief in the complaint of plaintiff Richard B. Fox, M.D., which alleges antitrust and related state claims. The court previously granted judgment on the pleadings as to Count III seeking relief for alleged unreasonable restraint of trade based on an exclusive contract. The court has read the moving and responding papers, considered defendants' accompanying objections to plaintiff's evidence¹ and heard the arguments of counsel. For the

¹ Evidence has been cited only if the court considered it admissible. However, statements or evidentiary rulings made in this order do not constitute issues deemed established for purposes of trial, except those in the section headed "III. ORDER." See Civil L.R. 56-3.

1 reasons set forth below, the court grants defendants' motion as to Counts I and II and denies it as to
2 Counts IV, VI and VII.

3 **I. BACKGROUND**

4 Plaintiff is a physician in private practice in San Jose, California, certified in pediatric
5 pulmonology and pediatric critical care medicine. He has been a member of the Medical Staff of
6 Good Samaritan Hospital ("Good Samaritan" or "Hospital") since 1989, assigned to the Department
7 of Pediatrics. Plaintiff's appointment at Good Samaritan is subject to a two-year review cycle. The
8 Good Samaritan Hospital is a private, for-profit hospital, located in San Jose.

9 Plaintiff's medical practice emphasized critical care for pediatric patients and treatment of
10 pediatric patients with pulmonary disorders or diseases. Possessing hospital privileges to admit
11 pediatric patients to an intensive care unit ("ICU") is critical to this practice. Initially, Good
12 Samaritan granted plaintiff the "Pediatric Critical Care Without Consultation in the ICU" ("PICU")
13 privilege and the "Pediatric Ventilator Management" ("PVM") privilege. These privileges allowed
14 plaintiff to admit critical care patients into the ICU and to treat pediatric patients with respiratory
15 disorders by using a ventilator, a mechanical device available only in an ICU.

16 In 1997 Good Samaritan instituted a more stringent policy regarding pediatric ICU
17 privileges. This policy required physicians to arrange alternate care coverage in order to obtain or
18 renew their PICU privileges. When a member of Good Samaritan's Medical Staff is unavailable, the
19 member must assure that the treatment of his or her patients in the Hospital is supervised by a
20 qualified physician. Plaintiff had previously designated Dr. Marjorie McCracken and Dr. Anders
21 Dahlstrom as his alternate call coverage. Their privileges, however, were insufficient to satisfy this
22 new coverage policy because they were not the same privileges as held by plaintiff. Plaintiff alleges
23 that his biennial reappointment was withheld in March 1998 for failure to designate appropriate
24 alternate care coverage, but that his privileges were temporarily continued while the Medical Staff
25 considered the matter.

26 In April 1999, Good Samaritan's Medical Staff Executive Committee, on recommendation of
27 the Credentials Committee and the Department of Pediatrics, amended the alternative call coverage
28 requirements for the Pediatrics Department and required any physician designated to provide

1 alternate call coverage for pediatric ICU care without consultation and ventilator care was required
2 to have PICU and PVM privileges. Any member holding the PICU or PVM privileges had to
3 designate this alternate call coverage. This requirement is referred to as the “identical privileges
4 rule.” Upon receiving notice of the new identical privileges rule, plaintiff requested and was
5 supplied a list of all members of the Good Samaritan Department of Pediatrics who possessed
6 identical privileges, namely both the PICU and PVM privileges.

7 On April 28, 1999, the Hospital’s Board of Trustees approved the recommendation of the
8 Medical Staff requiring that alternative call coverage physicians have identical privileges as the
9 primary care physician. Affected physicians were notified on April 29, 1999 that if a physician did
10 not provide alternate call coverage with identical privileges within thirty days, the Hospital would
11 administratively suspend his or her affected privileges. At the end of the thirty day period, plaintiff
12 declined to designate alternate call providers with identical privileges, continuing instead to insist on
13 Drs. McCracken and Dahlstrom as his alternate call providers. Consequently, on June 2, 1999,
14 Good Samaritan notified plaintiff that his PICU and PVM privileges were administratively
15 suspended “until such time as documentation of call coverage by providers with identical privileges
16 has been provided or a written request for waiver by the Staff Executive Committee has been
17 approved.” Compl., Ex. 27. Dr. Fox remained on the Good Samaritan Medical Staff but without
18 PICU and PVM privileges; no action was taken against any other privileges he then held. No one
19 questioned Dr. Fox’s personal competence or qualifications.

20 Dr. Fox responded to the suspension of his privileges by pursuing challenges to the identical
21 privileges rule. On June 22, 1999, he wrote a letter to the Chief of the Medical Staff questioning the
22 wisdom and fairness of the new rule and requesting an adjudicatory hearing. His request for an
23 adjudicatory hearing was declined. However, the Hospital permitted plaintiff to appear before the
24 Medical Staff Executive Committee, which he did on November 12, 1999, to challenge the alleged
25 discriminatory nature of the rule, since it applied only to members of the Department of Pediatrics.
26 His challenge was unsuccessful.

1 In September 1999, Dr. Fox notified Good Samaritan's Department of Pediatrics that he was
2 discontinuing his pediatric critical care and pediatric pulmonary service at the Hospital and that he
3 had relocated his practice to Los Gatos Community Hospital.

4 In October 1999 Good Samaritan contracted with Northern California PICU Associates to
5 provide on-call 24 hours per day pediatric critical care services at Good Samaritan. The contract
6 was non-exclusive and the Chief of Staff at Good Samaritan had advised Dr. McConnell, the group's
7 principal, that he expected the group to provide alternate call coverage for Dr. Fox if he requested it.
8 Dr. McConnell agreed but Dr. Fox never asked.

9 After addressing the Medical Staff Executive Committee, plaintiff was subsequently allowed
10 to challenge the rule before Good Samaritan's Board of Trustees and did so on April 26, 2000. The
11 Board of Trustees unanimously agreed with the Medical Staff Executive Committee, and found that
12 "the rules regarding coverage further the interests of patient care and have been appropriately
13 applied in [plaintiff's] case." Compl., Ex. 65.

14 In October 2001, Dr. Fox petitioned the state superior court for a writ of mandate. In his
15 amended petition, he asked that the court direct the Hospital to set aside the suspension of his PICU
16 and PVM privileges and reconsider its determination in light of a fair procedure. In his petition he
17 asserted that he was entitled under the Hospital's by-laws to an adjudicatory hearing. He also
18 complained that "the validity of the suspension of [his] pediatric critical care privileges was
19 prejudiced by [the Hospital's] simultaneous negotiations for an exclusive coverage contract for
20 pediatric critical care services with another group of physicians at an affiliated hospital." Def.'s
21 RFJN , Ex. A. The superior court held that plaintiff was not entitled to a judicial review hearing and
22 that "the alternate call coverage rule is rationally related to improving patient care, and is not
23 arbitrary and capricious." *Fox v. Good Samaritan Hosp.*, No. CV802341 (Cal. Superior Court
24 February 28, 2002). The decision was affirmed on appeal, and the court of appeal stated, among
25 other things, that the "Hospital's alternate call coverage rule was based upon 'professional criteria'
26 and was 'uniformly applied to all medical staff applicants and members.'" *Fox v. Good Samaritan*
27 *Hosp.*, 2003 WL 21675515 * 5 (Cal. Ct. App. July 18, 2003).

1 In March 2002 plaintiff re-applied for PVM and PICU privileges. Good Samaritan continued
2 to deny his applications for failure to comply with the identical privileges coverage rule. In his
3 March 1, 2002 application for the privileges, he designated for alternate coverage (1) Dr.
4 McCracken, who had finally been granted PVM and PICU privileges, (2) Dr. Dahlstrom, who did
5 not have PVM privileges but later applied for them on May 10, 2002, and (3) Dr. Singleton, who
6 had PVM privileges in the Anesthesiology Department and applied for the same privileges in the
7 Pediatrics Department in August 2002. Dr. Fox contends that his designation of these physicians in
8 his March 2002 application more than satisfied the identical privileges coverage rule. On March 20,
9 2003, because no action had been taken on his March 2002 application, Dr. Fox filed another
10 petition for a writ of mandate seeking PICU Admitting privileges. That petition was withdrawn on
11 November 4, 2003 as Good Samaritan restored Dr. Fox's PICU privilege in September 2003.

12 In January 2004, Dr. Fox submitted his biennial reappointment application to Good
13 Samaritan seeking both PICU and PVM privileges. He designated two pediatric anaesthesiologists
14 on the Hospital's medical staff, Dr. Singleton and Dr. Mendoza, as alternate call coverage for the
15 PVM privilege. Dr. Singleton had been granted such privilege; Dr. Mendoza had not been but Dr.
16 Fox believed him highly experienced in pediatric ventilator management. On April 27, 2004,² Dr.
17 Fox filed another petition for a writ of mandate in the state superior court. On May 17, 2004 the
18 Hospital's CEO, William Piche', advised Dr. Fox that his privileges were approved except that "his
19 request for Ventilator care was deferred pending your provision of appropriate alternate call
20 coverage." Def.'s RFJN., Ex. C-4. An amended writ petition was filed on October 20, 2004 seeking
21 an order that the Hospital grant Dr. Fox the PVM privilege on the basis that alternate call coverage
22 had been provided. On January 27, 2005 the superior court denied the petition holding that the
23 alternate coverage rule had previously been held to not be arbitrary, capricious or discriminatory and
24 that petitioner had failed to demonstrate "the physicians he designated satisfy the rule." *Fox v. Good*
25 *Samaritan Hosp.*, No. 1-04-CV-026778 (Cal. Superior Court. Jan. 27, 2005). Judgment was entered
26

27 _____
28 ² The record is not clear as to the actual date of filing of the petition.

1 on February 18, 2005. Dr. Fox appealed but he dismissed the appeal on August 16, 2005 “due to
2 mootness.” Def.’s RFJN F.

3 On March 4, 2004 Dr. Fox, proceeding *pro se*, filed his complaint in this court against
4 defendants alleging antitrust violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 &
5 2, violations under the Health Care Quality Improvement Act, 42 U.S.C. § 11101, and state causes
6 of action for withholding hospital privileges in violation of public policy, Cal. Bus. & Prof. Code
7 §§ 510-512, 2056, and breach of the implied covenant of good faith and fair dealing. The court
8 granted Good Samaritan’s motion for judgment on the pleadings as to plaintiff’s claim for relief for
9 unreasonable restraint of trade in violation of an exclusive contract, but denied the motion as to
10 plaintiff’s other causes of action.

11 Plaintiff retained counsel in April 2005. The court by recent order has allowed plaintiff to
12 substitute Good Samaritan Hospital LP and Good Samaritan Hospital LLC for Good Samaritan
13 Hospital and to add HCA Inc. as a defendant, and add a state cause of action for interference with
14 prospective economic relations. The court otherwise denied plaintiff’s motion to amend his
15 complaint which sought to add claims under the Racketeer Influenced and Corrupt Organizations
16 Act, 18 U.S.C. §§ 1961-1968 and a state law defamation claim.

17 Good Samaritan moved for summary judgment on plaintiff’s remaining claims for relief in
18 his original complaint. A jury trial was originally set for May 2007 but has been continued to allow
19 the court more time to address the summary judgment motion.

20 II. ANALYSIS

21 A. Summary Judgment Standard

22 The essential question in this case is whether the denial of Dr. Fox’s PICU and PVM
23 privileges resulted from a stubborn and unreasonable refusal by Dr. Fox to obtain appropriate
24 alternate call coverage pursuant to Good Samaritan’s requirement of identical privileges coverage, a
25 requirement that has been determined to be rationally related to improving patient care, or whether
26 the denial resulted from anticompetitive actions taken by defendants to exclude Dr. Fox from
27 providing competitive pediatric intensive and ventilator care. The question on this motion, however,
28 is only whether Dr. Fox has raised a triable issue of material fact on any of his claims.

1 Summary judgment is proper when the pleadings, discovery, and affidavits show that there is
2 “no genuine issue as to any material fact and that the moving party is entitled to judgment as a
3 matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the
4 case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is
5 genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving
6 party. *Id.* A party moving for summary judgment who does not have the ultimate burden of
7 persuasion at trial has the initial burden of producing evidence negating an essential element of the
8 non-moving party’s claims or showing that the non-moving party does not have enough evidence of
9 an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins.*
10 *Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). In overturning a summary judgment in an
11 antitrust case, the Supreme Court noted “[s]ummary procedures should be used sparingly in complex
12 antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the
13 alleged conspirators, and hostile witnesses thicken the plot.” *Fortner Enterprises, Inc. v. U.S. Steel*
14 *Corp.*, 394 U.S. 495, 500 (1969); see *In re Citric Acid Litigation*, 191 F.3d 1090, 1106 n.10 (9th Cir.
15 1999) (“[R]are is the antitrust case in which there is absolutely no evidence which could support
16 some inference of an antitrust violation.”).

17 **B. Standing Under the Sherman Act**

18 Defendants contend that plaintiff lacks standing to bring his claims. Private suits to enforce
19 the Sherman Act are authorized by Section 4 of the Clayton Act, 15 U.S.C. § 15(a). *Knevelbaard*
20 *Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000). The Clayton Act provides that “any
21 person . . . injured in his business or property by reason of anything forbidden in the antitrust laws
22 may sue therefore . . .” 15 U.S.C. § 15(a). Despite the broad wording of the section, “[o]nly those
23 who meet the requirements for ‘antitrust standing’ may pursue a claim under the Clayton Act; and to
24 acquire ‘antitrust standing,’ a plaintiff must adequately allege and eventually prove ‘antitrust
25 injury.’” *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 371 (9th Cir. 2003).
26 Antitrust injury is defined as “injury of the type the antitrust laws were intended to prevent and that
27 flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat,*
28 *Inc.*, 429 U.S. 477, 489 (1977). Antitrust injury is necessary to sustain such a cause of action

1 because the “antitrust laws . . . were enacted for ‘the protection of competition not competitors.’”
2 *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Antitrust injury requires:
3 (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the
4 conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent and (5) that
5 the injured party is a participant in the same market as the alleged malefactors. *Id.* at 372.

6 Here, defendants argue that the unlawful conduct of which plaintiff complains is not of the
7 type the antitrust laws were intended to protect. They contend that plaintiff’s complaint “contains
8 no allegation of increased price or decreased quality in the relevant market.” Mem. Supp. Mot. J. on
9 Pleadings at 7.

10 Antitrust laws are only concerned with acts that harm “allocative efficiency and raise[] the
11 price of goods above their competitive level or diminish[] their quality.” *Pool Water Products v.*
12 *Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) (citing *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433
13 (9th Cir. 1995)). Thus, injury that flows from aspects of a defendant’s conduct that are beneficial or
14 neutral to competition is not “antitrust injury.” *Id.*

15 Specifically, defendants argue that plaintiff has only claimed injury to himself and that such
16 injury is insufficient to demonstrate the requisite effect on competition because it does not implicate
17 harm to consumer welfare. The Ninth Circuit has repeatedly affirmed that “the elimination of a
18 single competitor, standing alone, does not prove anticompetitive effect.” *Kaplan v. Burroughs*
19 *Corp.*, 611 F.2d 286, 291 (9th Cir. 1979); *see Rebel Oil*, 51 F.3d at 1433 (“Of course, conduct that
20 eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman
21 Act until it harms consumer welfare.”); *Austin v. McNamara*, 979 F.2d 729 & n. 11 (9th Cir. 1992)
22 (“Nowhere in *Pinhas* did we suggest that injury to Pinhas alone would constitute sufficient evidence
23 of injury to competition.”).

24 However, plaintiff has raised a triable issue of fact concerning whether defendants’ conduct
25 has adversely impacted the quality of pediatric critical care services at Good Samaritan, thus
26 resulting in injury to consumer welfare. Although the court recognizes that the conclusory
27 allegations of public harm set forth under each of plaintiff’s claim headings are insufficient to
28 establish an injury to consumer welfare, *see Feldman v. Palmetto Gen. Hosp.*, 980 F. Supp. 467, 469,

1 n.6 (S.D. Fla. 1997), plaintiff does offer evidence that suggests a reduction in the quality of services
2 to patients as a result of the suspension of plaintiff's pediatric critical care privileges. *See, e.g.*,
3 Decl. of Marjorie McCracken, M.D. (discussing an incident that took place after the suspension of
4 plaintiff's privileges wherein an infant developed respiratory distress requiring treatment in the ICU
5 but was unable to obtain it immediately from any physician with PICU privileges at Good
6 Samaritan); Decl. of R. Lawrence Berkowitz, M.D. ("Dr. Fox's absence may have affected my
7 ability to offer my services (cleft lip and plate work involving children and there are only a limited
8 number of providers of this service in this area."); October 22, 1999 memo from Good Samaritan
9 chief of staff announcing the complete suspension of PICU services at Good Samaritan.
10 Additionally, although injury to plaintiff standing alone does not demonstrate antitrust injury, it may
11 be probative of harm to competition. *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir.
12 1987). Thus, defendants are not entitled to summary adjudication that plaintiff lacks antitrust
13 standing to assert his Sherman Act claims.

14 **C. Conspiracy to Violate Sherman Act § 1**

15 Defendants assert that Dr. Fox cannot maintain any conspiracy claims against them under
16 Sherman Act § 1. Dr. Fox appears to base Counts I, II, and IV on violations of Sherman Act § 1.
17 Count V of the operative complaint does allege an anticompetitive "combination or conspiracy," but
18 this claim is based on Sherman Act § 2.

19 "To establish a claim under Section 1 of the Sherman Act, Plaintiffs must show 1) that there
20 was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade
21 under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected
22 interstate commerce." *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1155 (9th
23 Cir. 2001). "The phrase 'contract, combination, or conspiracy' limits application of the Sherman
24 Act [§ 1] to concerted conduct by more than one person or single entity." *Oltz v. St. Peter's*
25 *Community Hosp.*, 861 F.2d 1440, 1449 (9th Cir. 1988). "Unilateral conduct by a single entity does
26 not implicate Sherman Act § 1 regardless of the magnitude of the restraint on competition; only
27 section two covers unilateral conduct." *Id.* at 1449-50. "[O]fficers or employees of the same firm
28

1 do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp. v.*
2 *Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

3 Good Samaritan, relying on out-of-circuit authority, argues by analogy to *Copperweld*, that
4 the Hospital and the Medical Staff were legally incapable of forming a § 1 conspiracy. This
5 conclusion seems inconsistent with *Oltz* in which the Ninth Circuit affirmed a finding that
6 anesthesiologists with medical degrees conspired with a hospital to eliminate competition from
7 nurse anesthesiologists, because the relationship between the hospital and the anesthesiologists was
8 on a competitive, independent-contracting basis. Thus, by eliminating competition from the nurses,
9 the anesthesiologists and the hospital "coalesced economic power previously directed at disparate
10 goals." *Oltz*, 861 F.2d at 1450. Therefore, defendants' motion is denied as to the argument that the
11 Hospital and the Medical Staff are incapable of forming a § 1 conspiracy.

12 Alternatively, Good Samaritan argues that Dr. Fox lacks any evidence of a conspiracy
13 between the Hospital and the Medical Staff. In response, Dr. Fox presents circumstantial evidence
14 from which he infers a conspiracy or unlawful concerted action. Although the court finds Dr. Fox's
15 inferences problematic, it finds them sufficient to raise a triable issue of fact on whether the Hospital
16 and the Medical Staff unlawfully conspired to exclude Dr. Fox from offering his PICU and PVM
17 care at Good Samaritan. As noted in *In re Citric Acid Litigation*, 191 F.3d at 1106 n.10, "rare is the
18 antitrust case in which there is absolutely no evidence which could support some inference of an
19 antitrust violation." Although plaintiff cannot claim that the identical privileges call coverage rule
20 was not based upon professional criteria or that he was entitled to an adjudicatory hearing on his
21 suspension because both those claims were decided against him in state court, he is not precluded
22 from arguing that the rule was nevertheless implemented not for the protection of patient care but to
23 exclude him from his practice. The facts from which Dr. Fox can argue an unlawful conspiracy can
24 be inferred include that: (1) he has unquestioned credentials and experience in pediatric critical care
25 and pulmonology and worked for years without complaint with Dr. McCracken and Dr. Dahlstrom
26 providing alternate care coverage; (2) his suspension occurred shortly after he had been warned by
27 the Chief of the Medical Staff to "watch his back" after he had complained about his wife's
28 treatment at the Hospital and after an unfounded complaint about his placement of a feeding tube in

1 one of his pediatric patients; (3) his suspension occurred relatively shortly after he reported to the
2 state incidents of the violations of patients' rights at the Hospital; (4) his suspension occurred after
3 his outspoken objection to transferring pediatric intensive care patients to the San Jose Medical
4 Center; (5) around the time of his suspension the Hospital was negotiating with Dr. McConnell to
5 have his group, a group that Dr. Fox felt could not provide adequate alternate call coverage, provide
6 PICU services at the Hospital; and (6) the Hospital failed to approve or timely approve privileges
7 applications by physicians Dr. Fox designated for alternate care coverage. Although persuasive
8 alternative inferences can be drawn from the evidence, Dr. Fox has raised a triable issue of fact on
9 the existence of a conspiracy.

10 **D. *Per Se* Antitrust Liability**

11 Dr. Fox's first and second claims allege that defendants denied him procedural safeguards
12 and fair procedure and that a group boycott of him was implemented by the "[a]ction of (Good
13 Samaritan) and NorCal PICU in forcing him to cooperate or be totally excluded from such
14 horizontal competition." He asserts that these actions had the effect of totally excluding him from
15 practice at Good Samaritan and competing, thus constituting a *per se* antitrust violation.

16 Good Samaritan moves for summary adjudication that it cannot be liable on Dr. Fox's § 1
17 claims under the *per se* rule. As the Ninth Circuit has explained, "Some practices . . . are so likely to
18 interfere with competition that they violate the Sherman Act *per se*. In these cases, we do not
19 require evidence of any actual effects on competition because we consider the potential for harm to
20 be so clear and so great." *Bhan v. NME Hosps.*, 929 F.2d 1404, 1410 (9th Cir. 1991). "Examples of
21 practices which are illegal *per se* include horizontal price-fixing, division of markets, and certain
22 tying arrangements." *Id.* Dr. Fox claims a "group boycott" by his "horizontal competitors" should
23 be analyzed under the *per se* rule.

24 "[O]nly certain boycotts are unlawful *per se*. Nonetheless, the distinction between boycotts
25 that are and those that must be tested under the rule of reason is less than crystal clear." *Id.* at 1412.
26 "[T]he *per se* rule should be invoked for a group boycott when the challenged activity would almost
27 always tend to be predominantly anti-competitive." *Id.* In *Bahn*, the Ninth Circuit found in another
28 hospital-privileges dispute that the *per se* rule should not be applied because "hospitals must make

1 choices about the types of qualifications a practitioner must have to apply for staff privileges in
 2 various fields of practice.” *Id.* Although in *Bahn* nurse practitioners rather than physicians had been
 3 excluded, Dr. Fox’s attempt to distinguish the case on that ground is unavailing. Because a decision
 4 about privileges involves much more than a simple economic calculation, the *per se* rule of analysis
 5 is not applicable to Dr. Fox’s § 1 claims.³ Therefore, summary adjudication is granted for
 6 defendants on Counts I and II.

7 **E. Rule of Reason**

8 Good Samaritan also argues that Dr. Fox cannot prevail under the alternate framework of
 9 analysis for Sherman Act § 1 claims, the rule of reason. Under the rule of reason test,
 10 the fact finder must analyze the anti-competitive effects along with any
 11 pro-competitive effects to determine whether the practice is unreasonable on balance.

12 To meet his initial burden in establishing that the practice is an unreasonable
 13 restraint of trade, plaintiff must show that the activity is the type that restrains trade
 14 and that the restraint is likely to be of significant magnitude. Ordinarily, a plaintiff to
 do this must delineate a relevant market and show that the defendant plays enough of
 a role in that market to impair competition significantly.

15 A full-blown market analysis is not necessary. A lesser analysis may show
 16 that the restraint has actually produced significant anti-competitive effects, such as a
 reduction in output. If the plaintiff can make a showing of anti-competitive effects, a
 formal market analysis becomes unnecessary.

17 Should the plaintiff satisfy his initial burden, the defendant must offer
 18 evidence of pro-competitive effects. The plaintiff, driven to this point, must then try
 19 to show that any legitimate objectives can be achieved in a substantially less
 restrictive manner. Finally, the court must weigh the harms and benefits to determine
 if the behavior is reasonable on balance.

20 *Id.* at 1413 (citations omitted).

21 Dr. Fox, based on his own declaration, seeks to define the relevant geographic market as
 22 Good Samaritan Hospital. Good Samaritan counters that the relevant geographic market is at least

23
 24 ³ The Seventh Circuit has noted that:

25 The cases involving staffing at a single hospital are legion. Hundreds, perhaps
 26 thousands of pages in West publications are devoted to the issues those circumstances
 27 present. . . . Those hundreds or thousands of pages almost always come to the same
 conclusion: the staffing decision at a single hospital was not a violation of section 1
 of the Sherman Act.

28 *BCB Anesthesia Care, Ltd. v. Passavant Mem. Area Hosp. Ass’n*, 36 F.3d 664, 667 (7th Cir. 1994).

1 Santa Clara County and presents expert testimony to back this up.⁴ In *Morgan, Strand, Wheeler &*
2 *Biggs v. Radiology, Ltd.*, the Ninth Circuit refused to accept the “conclusory” definition of the
3 relevant geographic market by a pair of physicians.⁵ 924 F.2d 1484, 1490 (9th Cir. 1991).
4 However, the court finds Dr. Fox’s explanation regarding how patients obtain pediatric intensive
5 care services at least plausible, and his criticism of the opinion of Good Samaritan’s expert appears
6 to have some merit. In addition, “[o]rordinarily, the relevant market is a question of fact for the jury.”
7 *Id.* at 1489. Therefore, the court accepts, for the purposes of this current motion, Dr. Fox’s
8 geographic market for the “rule of reason” analysis. The court will also accept Dr. Fox’s argument
9 that Good Samaritan possesses market power in this one-hospital geographic market.

10 As discussed above in the section analyzing antitrust injury, some evidence marginally
11 supports the conclusion that competition was harmed by Dr. Fox’s withdrawal from the Hospital.
12 The quality of PICU services, according to Dr. Fox, diminished after he was allegedly pressured to
13 leave by the implementation of the identical coverage requirement, thus harming consumer welfare.

14 The ultimate question under a “rule of reason” analysis is whether the anticompetitive
15 aspects of the challenged practice outweigh its pro-competitive effects.

16 The rule of reason weighs legitimate justifications for a restraint against any
17 anticompetitive effects. We review all the facts, including the precise harms alleged
18 to the competitive markets, and the legitimate justifications provided for the
19 challenged practice, and we determine whether the anticompetitive aspects of the
20 challenged practice outweigh its procompetitive effects.

21 *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003) (affirming
22 summary judgment for defendant where court gave plaintiff the benefit of all reasonable inferences
23 from the evidence and concluded that the procompetitive justifications still plainly outweighed the

24 ⁴ The parties appear to agree on the relevant product market or markets.

25 ⁵ Specifically, the Ninth Circuit stated:

26 Drs. Strand and Taylor conclusorily state that the relevant geographic market is
27 Tucson. We give little weight to such a conclusory assertion. We find no evidence
28 that those two principals were experts qualified to opine on a highly technical
economic question. Equally important, we find no record evidence that could support
their conclusion. MSW & B cite only two evidentiary items to support their
geographic market definition.

Morgan, Strand, 924 F.2d at 1490.

1 alleged anticompetitive effects.). Although in *Paladin* the court found as a matter of law that the
2 procompetitive justifications outweighed the anticompetitive effects, the balancing test generally
3 involves a question of fact. *See, e.g., Miller v. Indiana Hosp.*, 843 F.2d 139, 144 (3rd Cir. 1988)
4 (whether hospital revoked surgeon's staff privileges due to incompetence or for purpose of
5 destroying surgeon's competition was question of fact in surgeon's antitrust action alleging violation
6 of the rule of reason and, therefore, precluded summary judgment).

7 In the present case, there is persuasive evidence that the identical privileges rule was
8 implemented for the improvement of patient care and did not have significant anticompetitive
9 effects. The state court found that the enactment and enforcement of the identical privileges rule
10 was "rationally related to improving patient care." RFJA, Ex. A at 5. The Hospital provided PICU
11 services through a non-exclusive arrangement with NorCal PICU, and the opportunity was always
12 available to Dr. Fox to practice PICU services at Good Samaritan if he merely complied with the
13 identical coverage requirement. However, there is evidence, discussed above, from which one could
14 infer that implementation of the identical privileges rule was targeted to preclude competition from
15 Dr. Fox, that patient welfare suffered and that the reason given for the implementation of the rule
16 was pretextual. Therefore, summary judgment is denied on Count IV.

17 **F. Conspiracy to Violate Sherman Act § 2**

18 Count V of Dr. Fox's complaint alleges that the Hospital and Medical Staff entered into a
19 conspiracy to obtain and did obtain monopoly power over market prices in and did exclude
20 competition from providing of pediatric intensive care services. "Every person who shall
21 monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to
22 monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty
23 of a felony . . ." 15 U.S.C. § 2. To demonstrate attempted monopolization a plaintiff must prove
24 (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent
25 to monopolize and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc.*
26 *v. McQuillan*, 506 U.S. 447, 456 (1993). As discussed above, there is some evidence from which an
27 inference of a conspiracy can be drawn and some evidence from which one could conclude that
28 defendants acquired monopoly power over pediatric intensive care services and did so by

1 implementing the identical privileges rule and utilizing Nor Cal PICU to render those services in a
2 manner that effectively lessened competition and the quality of those services. Defendants' motion
3 for summary judgment as to Count V is denied.

4 **G. Statutes of Limitation**

5 **1. Federal Antitrust Claims**

6 Good Samaritan asserts Dr. Fox's claims are barred as untimely. "Any action to enforce any
7 cause of action under [15 U.S.C. §§] 15, 15a, or 15c [] shall be forever barred unless commenced
8 within four years after the cause of action accrued." 15 U.S.C. § 15b. Good Samaritan suspended
9 plaintiff's privileges in June 1999 and plaintiff left Good Samaritan in September 1999; he filed this
10 action over four years later in March 2004. Plaintiff's antitrust claims plaintiff have statutes of
11 limitation of four years. Therefore, Dr. Fox's claims are barred, unless, as Dr. Fox claims,
12 subsequent acts by Good Samaritan constitute new injuries, restarting the statute of limitations, or
13 his state-court litigation tolled the statutes of limitation.

14 Certain "overt act[s] . . . will restart the statute of limitations." *Pace Indus. v. Three Phoenix*
15 *Co.*, 813 F.2d 234, 237 (9th Cir. 1987). As the Ninth Circuit has explained:

16 A cause of action in antitrust accrues each time a plaintiff is injured by an act of
17 the defendant and the statute of limitations runs from the commission of the act. A
18 continuing violation is one in which the plaintiff's interests are repeatedly invaded
19 and a cause of action arises each time the plaintiff is injured. However, even when a
20 plaintiff alleges a continuing violation, an overt act by the defendant is required to
21 restart the statute of limitations and the statute runs from the last overt act.

22 *Id.* Not all acts are sufficient to restart the statute of limitations. "[T]wo elements characterize an
23 overt act which will restart the statute of limitations: 1) It must be a new and independent act that is
24 not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on
25 the plaintiff." *Id.* at 238.

26 The Ninth Circuit has held that the statute of limitation runs from the first of multiple
27 refusals to sell, *David Orgell, Inc. v. Geary's Stores*, 640 F.2d 936 (9th Cir. 1981), as well as from
28 the first of multiple refusals to buy, *AMF, Inc. v. General Motors Corp. (In re Multidistrict Vehicle*
Air Pollution), 591 F.2d 68, 72 (9th Cir. 1979). Merely receiving payments under an
anticompetitive contract does not restart the statute of limitations. *Aurora Enters. v. Nat'l Broad.*

1 Co., 688 F.2d 689, 694 (9th Cir. 1982). On the other hand, filing suit to enforce an anticompetitive
2 contract will restart the statute of limitations, *Twin City Sportservice v. Charles O. Finley & Co.*,
3 512 F.2d 1264, 1270 (9th Cir.1975), although taking an appeal in such a suit does not, *Pace*, 813
4 F.2d at 239. Paying a third party to “shepherd” potential customers away from a competitor is also
5 an overt act sufficient to restart the statute of limitations each time it occurs. *Hennegan v. Pacifico*
6 *Creative Serv.*, 787 F.2d 1299, 1300-01 (9th Cir. 1986).

7 Here, Good Samaritan adopted the identical privileges rule in April 1999. Good Samaritan
8 denied plaintiff’s application for privileges in April 1999 and suspended his PICU privileges in June
9 1999 (a decision upheld by its trustees in November 1999). Plaintiff removed his practice from
10 Good Samaritan in September 1999. Plaintiff again applied for privileges in March 2002. Good
11 Samaritan did not act upon that application until after plaintiff filed a petition for a writ of mandate
12 with the state superior court in April 2003; Good Samaritan granted plaintiff PICU privileges in
13 September 2003.

14 Plaintiff’s primary grievance is his exclusion from practice at Good Samaritan’s pediatric
15 intensive care unit. Good Samaritan’s identical privileges rule went into effect in April 1999 and
16 Good Samaritan first denied plaintiff privileges under that rule the following June. Plaintiff took his
17 practice away from Good Samaritan in September 1999. Therefore, plaintiff suffered injury in 1999
18 and the statute of limitations accrued. Therefore, his antitrust claims are barred, unless there was a
19 new and independent injury inflicted by defendants thereafter. If Good Samaritan’s subsequent acts
20 were only the affirming of the denial of privileges or defending against plaintiff’s state-court suits,
21 the statute would not accrue again based on these acts as they were not “new and independent
22 acts”—all such actions were “merely a reaffirmation of” the initial denial under the identical
23 privileges rule. *See Pace*, 813 F.2d at 238. However, Dr. Fox asserts that defendants, as part of
24 their anticompetitive conduct, delayed or failed to act on applications for identical privileges
25 submitted by his alternate care designees. Sufficient facts exist from which reasonable inferences
26 can be drawn supporting Dr. Fox’s assertion. *See, e.g., McCracken Decl.* ¶ 7, *Fox Decl.* ¶¶ 37-38.
27 If Dr. Fox can prove that the Hospital delayed or failed to approve privileges applications to
28

1 frustrate his renewed applications in 2002 and 2003, such conduct would constitute new and
2 independent acts, thus restarting the running of the statute of limitations.

3 Dr. Fox also argues that his pursuit of administrative remedies within Good Samaritan
4 Hospital and his petitions for writs of mandamus in the California state court system tolled the
5 running of the statute of limitation on his antitrust claims. In support of this argument, plaintiff cites
6 *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) (*en banc*), *Mt. Hood*
7 *Stages v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980), and *Nichols v. Hughes*, 721 F.2d 657 (9th
8 Cir. 1983).

9 *Daviton* involved claims for disability discrimination. 241 F.3d at 1133. Even though the
10 claims for relief were federal, as Congress has not provided “a federal statute of limitations for
11 claims arising under the Civil Rights Acts of 1866 and 1871, the controlling statute of limitations is
12 the most appropriate one provided by state law.” *Id.* at 1135. The Ninth Circuit was therefore using
13 California, not federal, law to determine whether the plaintiff’s claims had been tolled. *See id.* at
14 1135-42. Antitrust claims, on the other hand, have their own federal statute of limitation, 15 U.S.C.
15 § 15b, so *Daviton* is inapplicable.

16 Plaintiff’s resort to *Nichols* is likewise unavailing. There, the court stated that “the general
17 rule is that if prior resort to an administrative body is a prerequisite to review in court, the running of
18 the limitation period will be tolled during the administrative proceeding.” 721 F.2d at 659.
19 However, the court in *Nichols* was merely stating a general rule; the case involved a claim for
20 wrongful discharge from the U.S. Navy and the court did not reach the tolling question because even
21 with exhaustion for administrative proceedings, the claim was not timely. *Id.* at 658-59. In other
22 cases, discussed below, the Ninth Circuit has analyzed more particularly tolling in the antitrust
23 context.

24 In *Grimmett v. Brown*, 75 F.3d 506, 515-16 (9th Cir. 1996), in the course of finding that the
25 RICO claims of plaintiff Joanne Siragusa were not tolled by her bankruptcy action, the court
26 explained its precedents on tolling of antitrust claims, particularly *Mt. Hood*:

27 In *Mt. Hood*, the Interstate Commerce Commission (ICC) permitted Greyhound to
28 acquire a number of bus companies whose routes circled Mt. Hood on the condition
that Greyhound not interfere with bus routes going through the mountain. Greyhound

1 started to violate the condition, and one of its competitors, Mt. Hood Stages, filed a
 2 complaint with the ICC in 1964. When Mt. Hood Stages sued for antitrust violations
 3 in 1968, Greyhound moved to dismiss because the four-year limitations period had
 4 started to run in 1960. Mt. Hood Stages contended that the ICC proceeding tolled the
 5 limitations period, and we agreed. We reasoned that Greyhound would be immune
 6 from antitrust liability if its challenged transportation practices were necessary to
 7 effectuate the acquisitions approved by the ICC. The necessity of the practices could
 8 only be decided by the ICC as an expert body. Thus it was appropriate to toll the
 9 running of limitations on the antitrust claim until the ICC had made “a preliminary
 10 determination of issues within its primary jurisdiction.” *Id.* at 405.

11 Subsequent cases have read *Mt. Hood* narrowly and limited its application to
 12 cases involving “considerations of federal policy and primary jurisdiction.” *Pace*,
 13 813 F.2d at 241; *Community Elec. Serv. v. National Elec. Contractors Ass’n, Inc.*,
 14 869 F.2d 1235, 1241 (9th Cir.), *cert. denied*, 493 U.S. 891, 110 S. Ct. 236, 107 L. Ed.
 15 2d 187 (1989). In *Conley v. International Brotherhood of Elec. Workers*, 810 F.2d
 16 913 (9th Cir. 1987), the plaintiff filed a petition with the National Labor Relations
 17 Board and then brought a court action stating similar claims of unfair labor practices,
 18 violations of the Labor-Management Relations Act, and violations of state law. We
 19 read *Mt. Hood* to say that “[e]quitably tolling is most appropriate when the plaintiff is
 20 required to avail himself of an alternative course of action as a precondition to filing
 21 suit.” *Id.* at 915. In that case, the NLRB suit was merely a “parallel avenue[] of
 22 relief” to the court action. *Id.* at 916. Thus, we refused to toll the period while the
 23 NLRB had considered the plaintiff’s petition. *See also Community Electric*, 869 F.2d
 24 at 1241 (refusing to toll statute of limitations for period in which plaintiff sought
 25 relief from NLRB because prior resort to the NLRB “was not a prerequisite to review
 26 in federal court”); *Pace*, 813 F.2d at 240 (“Prior judicial actions, however, ‘do not toll
 27 the statute of limitations, no matter how close their relationship to the one at bar.’”) (citation omitted).

28 Given this interpretation of *Mt. Hood*, Siragusa’s claim fails. Unlike the ICC’s
 jurisdiction over immunity claims, the primary jurisdiction of the bankruptcy court is
 not RICO claims. With respect to RICO claims, the bankruptcy court and federal
 court are more properly considered “parallel avenues of relief.” Even if Siragusa
 could have raised her RICO claim in some form in the bankruptcy proceeding, *see In*
re The Monetary Group, 2 F.3d 1098, 1099 (11th Cir. 1993), she could have
 simultaneously pressed her claim in federal court since the automatic stay did not
 apply to her claim against Brown, who was not the debtor, *see* 11 U.S.C. § 362(a); *In*
re Kalispell Feed & Grain Supply, 55 B.R. 627, 629 (Bankr. D. Mont. 1985). Thus,
 the bankruptcy proceeding did not toll her RICO claim.

Grimmett v. Brown, 75 F.3d 506, 515-16 (9th Cir. 1996).

Federal courts have exclusive jurisdiction over antitrust claims. *Kern-Tulare Water Dist. v.*
City of Bakersfield, 828 F.2d 514, 518 (9th Cir. 1987). Neither plaintiff’s administrative remedies
 nor his mandamus petitions were preconditions to his filing antitrust claims in federal court.⁶ Any

⁶ Dr. Fox’s argument that the Medical Staff bylaws cut off his access to federal court and therefore tolled the statute of limitations is unavailing. The provision Fox refers to provides:

7.5-8 Challenges to Rules. The hearing provided for in this Article shall not

1 remedies plaintiff could obtain from Good Samaritan or the California state-court system were
 2 unrelated to his antitrust claims before this court, as noted in this court's order on Good Samaritan's
 3 motion for judgment on the pleadings: "The state court determined that the suspension was lawful
 4 within the context of state law. It did not examine whether such acts would have been lawful in the
 5 context of an antitrust claim of monopolization." Order (docket no. 57) at 15. This is unlike the
 6 situation in *Mt. Hood*, where prior resort to the Interstate Commerce Commission was necessary for
 7 the plaintiff to pursue its antitrust claims in court. Instead, the present situation is governed by
 8 *Grimmett*. Plaintiff's antitrust claims are "parallel avenues of relief" to the other remedies he has
 9 previously pursued; nothing indicates that plaintiff could not have simultaneously advanced his
 10 antitrust claims here and his other claims elsewhere. Tolling, therefore, is not available to Dr. Fox.
 11 However, since there is a material issue of fact as to whether defendants committed "new and
 12 independent" acts within the four years before he filed, summary judgment that the statute of
 13 limitations bars his antitrust claims is denied.

14 2. State Claims

15 Defendants assert that plaintiff's two state law claims are barred by the two-year statute of
 16 limitation set forth in Cal. Code of Civ. Proc. § 339(1) (action on obligation or liability not founded
 17 upon written instrument). The parties do not dispute the application of § 339(1) but plaintiff argues
 18 that the statute was tolled by Dr. Fox's exhaustion of administrative remedies. Plaintiff's first state
 19 law claim, Count VI, alleges that his PICU and adult pulmonary privileges were withheld in
 20 retaliation for advocating for appropriate medical care for patients and that such retaliation was in
 21 violation of California Business and Professions Code §§ 510-12 and 2056. Those sections provide
 22 protection against retaliation for health care practitioners who advocate for appropriate health care

23
 24 be utilized to make determinations as to the substantive validity of a Bylaw, rule,
 25 regulation, or policy. Where the substantive validity of such Bylaw, rule, regulation,
 26 or policy is the only issue, the petitioner shall have a direct appeal and hearing, in the
 first instance to the Staff Executive Committee with an appeal to the Board of
 Trustees. Such hearing and appeal must be utilized prior to resorting to legal action.

27 Dr. Fox, however, asserts that he is not challenging the "substantive validity" of the identical
 28 privileges rule, which the parties do not dispute is not uncommon in modern hospitals. He, instead,
 claims the stated reasons for adoption and implementation of the rule were pretextual to cover-up the
 Hospital's retaliation and anti-competitive conduct.

1 for their patients. Specifically, Dr. Fox asserts that the Hospital retaliated against him because he
2 complained about the treatment provided to his wife following some diagnostic testing she
3 underwent at Good Samaritan in 1992 and because in 1999 he filed a complaint with the California
4 Department of Health Services against Good Samaritan for interference with his treatment of a
5 critically-ill child. The retaliation, according to Dr. Fox, consisted of arbitrarily adopting the
6 identical coverage requirements, the refusal to provide him an appropriate hearing before suspending
7 his PICU and pulmonary privileges, and the referral of patients to his Hospital-employed
8 competitors.

9 The conduct that Dr. Fox claims led to the retaliation occurred in or before 1999. On June 2,
10 1999 the Chief of Staff of Good Samaritan advised Dr. Fox that his clinical privileges for PICU care
11 without consultation and ventilator care were administratively suspended with approval of the Board
12 of Trustees. On June 23, 1999 and February 1, 2000, Dr. Fox requested a “judicial hearing”
13 pursuant to the Hospital by-laws. Dr. Fox thereafter discussed his case with the Medical Staff
14 Committee on November 12, 1999 and with the Board of Trustees on April 26, 2000. On April 27,
15 2000 Dr. Fox received the Hospital’s decision affirming the determination to suspend his privileges
16 in ventilator management and care of pediatric patients in the Intensive Care Unit. In the meantime,
17 in September 1999, Dr. Fox notified the Hospital’s Pediatric Department that he had relocated his
18 office to Los Gatos Community Hospital. Dr. Fox filed his original Petition for a Writ of Mandate
19 with the state superior court on October 17, 2001 and his Amended Petition on January 8, 2002 by
20 which he sought to have the suspension of his privileges set aside and the determination to suspend
21 them reconsidered in a “fair procedure.” The writ petition was denied February 28, 2002 by the
22 superior court, and the denial was affirmed on appeal on July 18, 2003 by the court of appeals. Dr.
23 Fox’s complaint was filed in this court on March 4, 2004.

24 Even assuming that Dr. Fox was required to exhaust his administrative remedies pursuant to
25 section 7.1-7 of the Hospital’s by-laws, he completed exhaustion by no later than April 27, 2000, the
26 date on which he was advised that the determination to suspend his privileges in ventilator
27 management and care of pediatric patients in ICU had been affirmed by the Board of Trustees. He
28 did not file his retaliation claim until March 4, 2004, substantially over two years later.

1 However, Dr. Fox also claims that the Hospital's failure to grant privileges to some
2 physicians who could have provided identical coverage for him was additional retaliatory conduct
3 and that it occurred within the two years before he filed his federal action. As discussed in
4 connection with Dr. Fox's antitrust claims, there is sufficient evidence to raise a triable issue of fact
5 on this question. The court does not resolve in this ruling, and the parties did not brief, the question
6 of whether plaintiff is limited to recovery on his state claims for only those acts occurring in the two
7 years before he filed suit or whether he can reach back and recover for alleged acts occurring in
8 1999 as being the beginning acts in a continuous tort that lasted into the two year period prior to his
9 filing.

10 Dr. Fox's second state claim, Count VII, alleges breach of the implied covenant of good faith
11 and fair dealing. Dr. Fox asserts that the Hospital Medical Staff bylaws contained an implied
12 covenant to perform the bylaws' terms and conditions fairly and in good faith. Although Claim VII
13 is general in its allegations, the gist appears to be that the Hospital created and applied the alternate
14 coverage rule unfairly and in bad faith. Dr. Fox claims that since a conspiracy has been alleged, the
15 statute did not begin to run until the last overt act. Although the continued withholding of some of
16 Dr. Fox's privileges was merely a continuation and adherence to the Hospital's initial decision, that
17 continued withholding was not an overt act sufficient to restart the running of the statute of
18 limitation. However, Dr. Fox again claims that the Hospital's failure to grant privileges to some
19 physicians who could have provided identical coverage for him was additional bad faith conduct and
20 that it occurred within the two years before he filed his federal action. As discussed in connection
21 with Dr. Fox's antitrust claims and state retaliation claim, there is sufficient evidence to raise a
22 triable issue of fact on this question.

23 The California superior court, in denying a third writ application by Dr. Fox, did find that
24 "the deferral of Petitioner Richard Fox's Ventilation Management privilege in his 2004 application
25 for Medical Staff membership for failure to comply with the alternate call coverage rule by Good
26 Samaritan Hospital was not arbitrary, capricious and discriminatory, as Petitioner fails to
27 demonstrate the physicians he designated satisfy the rule." Order to Amended Verified Petition for
28 Writ of Mandate and Motion for Hearing on Writ of Mandate, Case no. 1-04-CV-026778, Santa

1 Clara County Superior Court. The superior court, however, did not examine or rule on any claim by
2 Dr. Fox that the delay or failure to grant privileges to his designees was in bad faith. Therefore,
3 since that alleged failure or delay took place within the two years before he filed, summary judgment
4 on the statute of limitations is denied as to Count VII.

5 **H. Continuance under Rule 56(f)**


6 Dr. Fox asks for more time to conduct discovery under Rule 56(f). However, this case has
7 been pending for a long time, discovery has not been diligently pursued and there is no showing that
8 discovery would be likely to uncover any additional basis of liability.

9 **III. ORDER**

10 For the foregoing reasons, the court grants Good Samaritan's motion for summary judgment
11 on Counts I and II and denies it as to Counts IV, VI and VII.

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DATED: 10/9/07



RONALD M. WHYTE
United States District Judge

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10 **Dated:** 10/9/07 /s/ MAG
11 **Chambers of Judge Whyte**

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