

APPENDICES

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Order of the United States Court of
Appeals for the 7th Circuit affirming the
decision of the District Court.

United States Court of Appeals for the
Seventh Circuit

Chicago, Illinois 60604

Final judgement.

Submitted January 5, 2022

Decided January 5, 2022

Before

FRANK H. EASTERBROOK, Circuit

Judge

MICHAEL Y. SCUDDER, Circuit Judge

AMY J. STEVE, Circuit Judge

No. 21-2159

NAZIR KHAN

Plaintiff-Appellant

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V.

PRESENCE CHICAGO HOSPITALS

NETWORK et AL

Defendants-

Appellees

Appeal from the United States District
court

For the Northern District of Illinois,
Eastern Division

No 20 C3819

Judge Virginia M. Kendall

ORDER

Nazir Khan, a surgeon formerly
employed by Presence Chicago
Hospitals Network, appeals the

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dismissal of his complaint for failure to state a claim. He alleged that the hospital administrators violated state and federal law by terminating his admitting privileges for not cooperating with an employee review. Because these allegations do not state a federal claim, we affirm.

We have agreed to decide the case without oral argument because the briefs and record adequately state the facts and legal arguments, and oral argument would not significantly aid the court FED.R.App.P.34(a)(2)(c).

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We treat all factual allegations in Khan's operative complaint (his first amended complaint) as true, while taking all reasonable inferences in his favor. *Caldcrone v. City of Chi.*, 979 F.3d 1156, 1161 (7th Cir. 2020).

Khan worked as a cardiothoracic surgeon for nearly twenty years for St. Elizabeth's Hospital (which merged with another hospital and became Presence Chicago Hospitals Network) before the hospital terminated his privileges. He alleges that the hospital administrators removed him from the staff so that other employees could perform his procedures.

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In 2017, the hospital's CEO and Chief Medical Officer asked Khan to resign. They referred to an unspecified "pattern" involving his cases. Khan then signed a leave-of absence agreement, allegedly under duress. A review committee identified four of Khan's cases involving high infection rates and issues with call responsiveness and asked Khan to undergo a physical and psychological examination to address these concerns. Khan refused and Gked that a log of his cases be sent to an outside reviewer. The hospital ignored Khan's request and in mid-2018 terminated his admitting privileges.

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Two years after his discharge, Khan filed this suit. He amended his complaint several times, primarily alleging claims under federal antitrust law, Title VII of the Civil Rights Act of 1964, the Health Care Quality Improvement Act, 42 U.S.C. SS 11101, 11137, and various state-law claims.

The court granted the defendants' motion to dismiss. The court dismissed Khan's antitrust claims because Khan did not allege a cognizable antitrust injury; he did not plead sufficient facts of any relevant market or the hospital's control of any market. The court also dismissed Khan's claim under the Health Care Quality Improvement Act

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because the Act does not provide a private right of action. As for his Title VII discrimination claim, the court found that Khan had not obtained a right-to-sue letter from the Equal Employment Opportunity Commission showing that he had exhausted his administrative remedies. If he could show that he exhausted those administrative remedies, the court added, he then could refile that claim. The court then declined to exercise supplemental jurisdiction over the remaining state-law claims.

Khan amended his complaint again, attaching an EEOC right-to-sue letter indicating that he had exhausted

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his administrative remedies under Title VII. (He also repleaded a host of other claims that the court properly dismissed because he had not sought leave to bring them, and we do not discuss them further.) The EEOC letter confirmed that the charge Khan filed with the agency was untimely, and so the court dismissed Khan's remaining claims with prejudice.

On appeal, Khan generally challenges the court's dismissal of each of his claims. Regarding his discrimination claim, Khan argues the district court erred in directing him to allege that he filed a charge with the EEOC, only to reverse course after he

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refiled his claim and dismiss it as time-barred. But the court correctly determined that Khan filed his charge with the EEOC more than two years after the termination of his admitting privileges, well outside Title VII's 300-day window. 42 U.S.C. S 2000e-5(e)(1). As the court explained, dismissal is appropriate when, as here, a plaintiff's complaint sets out all the elements of an affirmative defense. *NewSpin Sports, LLC v. Arrow Elecs., Inc.*, 910 F.3d 293, 299-300 (7th Cir. 2018).

Khan now argues for the first time that the district court should have tolled the statute-of-limitations period because he did not learn of this

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requirement until the court dismissed his operative complaint. Waiver aside, see *Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1018 (7th Cir. 2020), Khan has not alleged anything to suggest that tolling here would serve the filing requirement's purpose of giving prompt notice to the employer. see *Nat'l R.R. Passenger corp. v. Morgan*, 536 U.S. 101, 113-14, 121 (2002).

Regarding his antitrust claim, Khan argues that the court wrongly required him to allege that the hospital had established market control. But to state a claim under the Sherman Act, Khan had to allege not only an injury to himself, but also "an injury to the

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market." *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012). Moreover, staffing decisions at one hospital do not violate federal antitrust law. *Kochert v. Greater Lafayette Health servs.*, 463 F.3d 710, 717 (7th Cir. 2006).

As for his claim under the Health Care Quality Improvement Act, Khan maintains that the review committee relied on false statements and denied him appropriate notice and a hearing. But the district court correctly explained that this statute does not provide a private right of action, see, e.g., *Patel v. Hamilton Medical Center, Inc.*, 967 F.3d 1190, 1194 (11th Cir.

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2020), and indeed, it immunizes those engaged in good-faith peer review.

Austin v. Am. Ass'n of Neurological Surgs., 253 F.3d 967, 974 (7th Cir. 2001).

Finally, Khan continues to press his various state-law claims. But because his federal claims were all properly dismissed, the district court was well within its discretion to decline to exercise supplemental jurisdiction over his state-law claims. 28 U.S.C. § 1367(c)(We have considered Khan's other arguments and motions; none has merit

AFFIRMED

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**Order of the United States Court of
appeals for the 7th circuit denying the
panel rehearing and rehearing Enbanc**

United States court of appeals for the
7th Circuit

Chicago Illinois 60604

February 3, 2022

Before

Frank.H. Easterbrook Circuit Judge

MichAELY.SCUDDER Circuit judge

AMY.J. STEVE,Circuit Judge

No.21-2159

NAZIR KHAN,

Plaintiff-Appellant

V

Presence Chicago Hospitals Network, et
al

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Defendants-Appellees

Appeal from United States District

Court for

The Northern District of Illinois

Eastern Division

No20C3819

Virginia M. Kendall, Judge

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing Enbanc on January 19, 2022. No judge in active regular service has requested a vote on the petition for rehearing Enbanc, and all the judges on the panel have voted to deny rehearing. It is ordered the petition for rehearing Enbanc is denied.

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**Order of the United States Court of
appeals for the 7th circuit Appellee's
jurisdictional statement is incomplete
and incorrect. Appellee's to file amended
jurisdictional statement.**

United States Court of Appeals

Chicago Illinois 60604

September 30, 2021

BY THE COURT

No.21-2159

NAZIR KHAN,

Plaintiff-Appellant

V

Presence Chicago Hospitals Network, et

al

Defendants-Appellees

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Appeal from United States District
Court for
The Northern District of Illinois
Eastern Division

No20C3819

Virginia M. Kendall, Judge

ORDER

A review of the section of the
brief captioned "Jurisdictional
Statement" filed by appellees reveals
that appellees have not complied with
the requirements of Circuit Rule 28(b).
That rule requires an appellee1 to
state whether or not the jurisdictional
summary in an appellant's brief is
"complete and correct." If it is not, the

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appellee must provide a "complete jurisdictional summary."

Appellees state that appellant's statement is "incomplete and partially incorrect."

And, although appellees provide a jurisdictional statement, they fail to provide one that is both complete and correct. Specifically, appellees' statement fails to provide the basis of the district court's jurisdiction, identifying the "provision of the constitution" or "federal statute" involved in the case. See Cir. R. 28(a)(1). This information must be provided. It is insufficient to cite 28 U.S.C. S 1331.

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Further, appellees must provide
the date of the notice of appeal was
filed. See Cir. Rule 28(a)(2)(iv).

Accordingly,

IT IS ORDERED that appellees
file a paper captioned "Amended
Jurisdictional Statement" on or before
October 7, 2021, that provides the
omitted information noted above and
otherwise complies with all the
requirements of Circuit Rule 28(b), and
if appellant's brief is not complete and
correct, Circuit Court Rule 28(a) also.
IT IS FURTHER ORDERED that the
Clerk DISTRIBUTE, along with the
briefs in this appeal, copies of this order
and appellees' "Amended Jurisdictional

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Statement" to the assigned merits
panel.

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**Order of the United States Court of
Appeals for the 7th circuit for Appellees
Amended Jurisdictional Statement**

United States Court of Appeals for
Seventh Circuit

Chicago, Illinois, 60604

APPELLEES AMENDED

**JURISDICTIONAL STATEMENT for
Merit Panel review by the order of the
court**

Date Filed: 10/06/2021

No. 21-2159

Before

**FRANK H.EASTERBROOK CIRCUIT
JUDGE**

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MICHAEL Y.SCUDDER ,CIRCUIT

JUDGE

AMY J. STEVE CIRCUIT JUDGE

NAZIR KHAN

PLAINTIFF-APPELLANT

V

PRESENCE CHICAGO HOSPITALS

NETWORK et AL

DEFENDANTS-APPELLEES

APPEAL from the United States

District Court For the NORTHERN

DISTRICT Of Illinois

EASTERN Division

NO20C3819

Judge Virginia M Kendall

APPENDIX A**APPELLEES AMENDED****JURISDICTIONAL STATEMENT**

Appellee's Presence Chicago hospital
Network d/b/a Presence Saint Mary and
Elizabeth Medical center (Hospital)
Laura Concannon MD, Nora Byrne JD,
Norma Thornton, Thomas Malvar MD,
David Hines M.D, Ada Arias M.D,
Raghu Ramadurai M.D, Ernesto
Cabrera M.D, Olga Saavedra M.D,
Michael Maghrabi DPM, and the Board
of Directors for Prescence Saint Mary
And Elizabeth Medical Center (herein
after collectively Referred to as
Appellees) by and through their
Attorneys, Chuhak & Tecson P .C
(David Tecson, Mark Altschul and

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Daniel Fumagalli) file their Amended
jurisdictional statement as this Court
ordered in its September 30, 2021 order
(Document 18)

**AMENDED JURISDICTIONAL
STATEMENTS**

Appellants Jurisdictional Statement is
incomplete and partially incorrect.

Appellant's initial complaints before
District court purported to invoke
Federal question Jurisdiction, 28 U.S.C
Sec 1331, based on alleged violations of
Section 1 and 2 of the Sherman
Act, 15 U.S.C Sec 1 and 2, the Healthcare
Quality improvement Act of
1986 (HCQIA) 42 U.S.C Sec 1110 and
Title VII of the Civil Rights Act of

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1964, 42 U.S.C. sec 2000e et seq (R.Doc 35 and 37 the "Amended Complaint") The District court dismissed with Prejudice the Antitrust Act and HCQIA Claims on November 17, 2020 and Title VII Claim without Prejudice (R.Doc 68) The District Court also declined to exercise Supplemental Jurisdiction over remaining State law claims pursuant to 28 U.S.C. Sec 1367(c) (3).

Appellant's second Amended complaint filed on March 17, 2021 (R.Doc 80) repleaded his claim under Title VII of civil rights act of 1964, 42 U.S.C. sec 2000e along with federal claims already dismissed with prejudice and included additional federal claims filed without

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leave of the Court alleging
discrimination in violation of 42 U.S.C
sec 1983 and discrimination in violation
of the Americans With Disabilities Act
of 1990 42 U.S.C Sec12101,et seq

Appellees Filed combined motions to
dismiss the Amended Complaint and
second amended complaint that
challenged both the failure to allege
Plausible federal and State claims
under Federal Rule Civ.p12(B)(6) and
lack of Federal subject matter
Jurisdiction Due to the failure to allege
plausible federal claim (Fed .R.Civ.P.
12(b)(1) (R.DOC83) . On june16 ,2021
District court granted Appellees motion
to dismiss the second Amended

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complaint with prejudice(R.Doc91)

Generally an order Constitutes a final decision if it ends the litigation and leaves nothing to be decided in the District Court “ United states V. Ettrick wood prods.Inc 916 F.2d 1211,1211.1216 (7th cir1990) This court has Jurisdiction over June 16 2021 order because it is a final order pursuant to 28U.S.C.sec 1291 the order dismissed all federal claims with prejudice and the District court declined to exercise Supplemental Jurisdiction over remaining State law claims.

Appellant incorrectly relies on 28 U.S.C sec 1295 (a)(1) in his jurisdictional Statement sec 1295 relates to the

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exclusive Jurisdiction of the court of Appeals for the Federal Circuit which does not apply to this Circuit court. In addition the Cited sub section relates to appeals of final decision of district courts relating to "patents or plant variety protection" which are not the Subjects of Appellants underlying complaints. Appellant filed a notice of appeal on June 22 2019 (R.Doc .95)

Dated oct 6 2021 .Prescence Chicago
Hospitals Net work d/b/a presence saint
Mary and Elizabeth Medical center,
Laura Concanon M.D NORA Byrne JD,
Norma Thor Thomas Malvar MD David
Hines M.D David Hines M.D Ada Arias
M.D Raghu Ramaduri MD Ernesto

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Cabrera M.D, Olga Saavedra MD

Michael Maghrabi DPM and Board of

Directors for presence Saint Mary

And Elizabeth Medical center

Defendants

BY /s/ David J.Tecson

One of their attorneys.

David J. Tecson(ARDC# 6198108)

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**Order of the United States Court of
Appeals for the 7th circuit for Void
Judgment in first and Second Amended
complaint to be decided by the merit
panel.**

United States Court of Appeals for
Seventh Circuit

Chicago, Illinois, 60604

Before

FRANK H. EASTERBROOK, Circuit

Judge

No. 21-2159

Ordered on October 7th 2021

NAZIR KHAN

Plaintiff-Appellant

V.

PRESSENCE CHICAGO HOSPITALS

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NETWORK et AL

Defendants-Appellees

Appeal from the United States District
court

For the Northern District of Illinois,
Eastern Division

No 20 C3819

Judge Virginia M. Kendall

ORDER

Upon consideration of the Motion for
void judgment of district court's
dismissal of amended complaint and
second amended complaint with
prejudice for lack of subject matter
jurisdiction and inadequate appellant's
jurisdictional statement, filed on

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October 6, 2021 by pro se appellant

Nazir Khan

IT IS ORDERED that the appellant's
motion and any response shall be
TAKEN WITH THE CASE for
resolution by assigned merits panel.

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**Order of the United States Court of
Appeals for the 7th circuit Denying
Motion for Reconsideration**

United States Court of Appeals for
Seventh Circuit

Chicago, Illinois, 60604

Motion for reconsideration of the final
order, filed on February 10, 2022 by the
appellant.

Decision February 11, 2022.

Before

FRANK H. EASTERBROOK

Circuit Judge

MICHAEL Y. SCUDDER, Circuit Judge

ANY J. STEVE, Circuit Judge

No. 21-2159

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Nazir Khan,

Plaintiff-Appellant

V.

Presence Chicago Hospitals network et

al

Defendants-

appellees

Appeal from the United States District

Court of Illinois, Eastern Division

No 20 C3819

Judge Virginia M. Kendall

ORDER

Plaintiff filed the motion for the
reconsideration of the final order on
February 10, 2022. The motion was filed
without action by the court on Feb 11,
2022.

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**Order of the United States Court of
Appeals for the 7th circuit denying
Appellant's motion that the clerk of the
court notify Illinois Attorney General
and Cook County State's Attorney for
violations of constitutional rights of the
Appellant.**

United States Court of Appeals for
Seventh Circuit

Chicago, Illinois, 60604

Filed on January 26, 2022

Decided January 27, 2022

1. Appellant's motion to notify
attorney general and state
attorney for the misconduct of
defendants, filed on January 26
2022, by pro se appellant.

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2. Objection to bill of cost under
F.R.A.P. 39(d)(2), filed on
January 26, 2022, by pro se
appellant

ORDER

It is ordered that the motions are denied.

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**Order denying document production of
peer review committee's non privileged
recommendation.**

**United States Court of Appeals for
Seventh Circuit**

Chicago, Illinois, 60604

Filed on September 27, 2021

Decided October 1, 2021

Order

Upon consideration of the motion for
production of peer review committee's
non-privileged final recommendation
electronically stored information with
Presence Chicago Hospital, It is
Ordered that the motion is denied.

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**Order of the United States District
Court**

**Northern District of Illinois Eastern
Division**

Dismissing First Amended Complaint

United States District Court
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Nov 17th, 2020

NAZIR Khan

Plaintiff

V.

PRESENCE ST MARY AND ST
ELIZABETH HOSPITAL, et al.

Defendants

NO 20C 3819

Judge Virginia M. Kendall

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**MEMORANDUM OPINION AND
ORDER**

**Judge Virginia M. Kendall Nov
17th, 2020**

Defendants Presence

Chicago Hospitals Network d/b/a

Presence Saints Mary and Elizabeth

Medical Center

("Presence" or the "Hospital"), Laura

Concannon, MD, Nora Byrne, JD,

Norma

Thornton, Thomas Malvar, MD, David

Hines, MD, Ada Arias, MD, Raghu

Ramadurai, MD, Ernesto Cabrera, MD,

Olga Saavedra, MD, Michael Maghrabi,

DPM, Alejandra Ditryk,

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RN, and the Board of Directors for Presence Saints Mary and Elizabeth Medical Center have filed a Motion to Dismiss Plaintiffs Amended Complaint. [Dkt. 50]. Defendants argue that this Court does not have subject matter jurisdiction and Plaintiff has failed to state a claim. Certain Defendants also argue that proper service has not been effected. For the reasons discussed below, the Court grants Defendants' Motion to Dismiss.

BACKGROUND

On a motion to dismiss under Rule 12(b)(6), the Court accepts the Complaint's well pleaded factual allegations and draws all reasonable

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inferences in the non-moving party's favor, but not its legal conclusions. *See Smoke Shop, LLC v. United States*, 761 F.3d 779, 785 (7th Cir. 2014). The facts below come from Plaintiff's Amended Complaint (Dkt. 35) and the Court accepts them as true for purposes of reviewing this Motion. *See Vinson v. Vermillion Cty., Ill.*, 776 F.3d 924, 925 (7th Cir. 2015).

Plaintiff has practiced cardiovascular and thoracic surgery since 1983. (Doc. 35 at 2). Plaintiff is a highly skilled and competent surgeon who can perform complicated cardiovascular and thoracic surgeries. (*Id.* at 2–3). In 1998, Plaintiff became a

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member of the medical staff at Saint Elizabeth's Hospital which later joined St. Mary Hospital as Presence Saints Mary and Elizabeth's Hospital in 2005 ("the Hospital"). (*Id.* at 3). In November of 2017, Dr. Khan alleges that Martin Judd, the CEO of the Hospital and Laura Concannon, M.D., Chief Medical Officer of the Hospital, formed a conspiracy to coerce him into taking a leave of absence from the Hospital. (*Id.* at 4, 8–9). Defendants Judd and Dr. Concannon acted in concert with two presidents of the medical staff, Dr. Ada Arias and Dr. Raghu Ramadurai, and the hospital attorney to remove Plaintiff. (*Id.* at 4).

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The intent of the conspiracy was to remove the Plaintiff from the medical staff so that the hospital could use its own radiologists to perform and charge for these endovascular procedures that Plaintiff was performing, therein removing competition from the other cardiovascular and thoracic surgeons on staff. (*Id.*).

On November 3, 2017, Judd and Dr. Concannon called Plaintiff into a meeting where Judd explicitly asked Plaintiff to resign from the medical staff. (*Id.* at 7). Plaintiff asked why he was being asked to resign and was told there was a "pattern," but without any specific details as to what the pattern

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was. (*Id.*). Judd and Dr. Concannon told Plaintiff to immediately sign a Leave of Absence letter, which Plaintiff did under duress. (*Id.*). The Leave of Absence was effective November 4, 2017. (*Id.*). Plaintiff alleges the Leave of Absence letter violated hospital bylaws because it did not state the approximate duration of the leave of absence. (*Id.* at 8). Additionally, pursuant to the alleged conspiracy, on November 17, 2017, the Medical Executive Committee (MEC) appointed an Investigative Committee pursuant to the hospital bylaws to address the quality concerns related to Dr. Khan's practice at the Hospital. (*Id.* at 7–8, 12). The Presence

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Quality Assurance Committee identified four surgical cases performed by Dr. Khan that raised clinical concerns, and identified clinical concerns related to a high infection rate, responsiveness to calls and pages, and case management trends. (*Id.* at 10–11). The MEC notified Plaintiff that he was required to get a neuro-psychological and a physical exam to address the clinical concerns from the Investigative Committee, which Dr. Khan refused to undergo, arguing there was no justifiable reason for him to proceed with the testing (*Id.* at 12, 23). On December 7th, 2017, Plaintiff sent a letter asking that his six-month log of surgical cases be sent

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to an outside reviewer with respect to the evaluation of outcomes of surgery and infection rate. (*Id.* at 11). Dr. Khan's request for outside review was ignored. (*Id.*). Dr. Khan's privileges were voluntarily terminated on June 18, 2018. (*Id.* at 24).

Dr. Khan brings claims of Violation of Hospital Bylaws, Fraudulent Actions and Wrongful Termination of Plaintiff's Hospital Privileges, Violation of the Health Care Quality Improvement Act, Breach of Contract, Violation of the Federal Antitrust Laws, Violation of the Civil Rights Act of 1991, Defamation, and Mental Distress.

APPENDIX B**LEGAL STANDARD**

A motion to dismiss for failure to state a claim challenges the sufficiency of the complaint. *Berger v. National Collegiate Athletic Association*, 843 F.3d 285, 289–90 (7th Cir. 2016). When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must construe the complaint in the light most favorable to the non-moving party, accept well-pleaded facts as true, and draw all inferences in the non-moving party's favor. *Bell v. City of Chicago*, 835 F.3d 736, 1146 (7th Cir. 2016). The complaint must contain a “short and plain statement of the claim showing

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that the pleader is entitled to relief.”

Fed. R. Civ. P. 8(a)(2). A party need not plead “detailed factual allegations,” but “labels and conclusions” or a “formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must contain sufficient factual matter that when “accepted as true . . . ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. 570). In assessing the sufficiency of the complaint, the “reviewing court [must] draw on its judicial experience and

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common sense." *Iqbal*, 556 U.S. at 679.

When there are well pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

Rule 12(b)(5) provides that a defendant may seek dismissal for "insufficient service of process." Fed.R.Civ.P. 12(b)(5). When a defendant challenges the sufficiency of service, the plaintiff bears the burden of demonstrating that proper service occurred. *See Cardenas v. City of Chicago*, 646 F.3d 1001, 1005 (7th Cir. 2011); *Homer v. Jones-Bey*, 415 F.3d 748, 754 (7th Cir. 2005).

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The Court may consider affidavits, other documentary evidence, depositions, and oral testimony when considering whether summons was properly served. *Dumas v. Decker*, 10 C 7684, 2012 WL 1755674, *2 (N.D. Ill. May 16, 2012) (citing *Falconer v. Gibsons Rest. Grp., LLC*, 2011 WL 43023, at *1 (N.D. Ill. Jan. 6, 2011 WL 43023); 5B Wright & Miller, Federal Practice and Procedure § 1353, at 344–45 (3d ed. 2004)). Neither party requested an evidentiary hearing, so the motion will be resolved based on the parties' briefs and attached evidentiary materials.

APPENDIX B**DISCUSSION****I. Rule 12(b)(6) Motion to Dismiss for Failure
to State a Claim**

Plaintiff has filed four complaints – his original complaint and three amended complaints. The Court granted his first amendment and the Complaint at issue was filed on August 24, 2020.

In spite of warning that Court would not accept other amendments without leave of Court, Plaintiff filed two more amended complaints. Defendants argue that the only claims that may trigger the Court's Federal Question jurisdiction are the alleged

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violations of the federal antitrust laws, violations of HCQIA and the citation to the Civil Rights Act of 1981, but that Plaintiff has failed to state a claim under each statute. Defendants assert that since Plaintiff has not brought a federal claim, the remaining state law claims should be dismissed. The Court views Plaintiff's *pro se* pleadings liberally. *See Taylor v. JPMorgan Chase Bank, N.A.*, 958 F.3d 556, 562 (7th Cir. 2020); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (a "document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings

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drafted by lawyers.”) The Court has had experience with Kahn in a previous matter where he was sanctioned for his litigation conduct. *See Khan et al. v. Hemosphere Inc., et al.*, No. 18-5368. Even viewing Plaintiff’s claims liberally, his antitrust, HCQIA, and Civil Rights claims must be dismissed. The Court declines to exercise supplemental jurisdiction over Plaintiff’s remaining state law claims.

A. Antitrust Claims

Plaintiff brings claims under Section 1 and Section 2 of the Sherman Antitrust Act for the loss of his clinical privileges

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at the Hospital.¹ There are three elements to a § 1 claim: “(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.” *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335 (7th Cir. 2012) (quoting *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993)). To satisfy the injury requirement, Plaintiff

¹ Plaintiff also brings a claim under the Federal Trade Commission Act of 1914, which created the FTC. Plaintiff does not explain under which provision of the Act he seeks to bring his claim. The Court assumes Plaintiff intends to bring antitrust claims generally, for which the Sherman Act provides the remedy he seeks.

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must allege that his “claimed injuries are ‘of the type the antitrust laws were intended to prevent’ and ‘reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.’” *Tri-Gen Inc. v. Int’l Union of Operating Eng’rs, Local 150*, 433 F.3d 1024, 1031 (7th Cir. 2006) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

Plaintiff alleges that the loss of his clinical privileges are cognizable injuries under the Sherman Antitrust act, yet this conclusory assertion is insufficient to state an antitrust injury. Of the many deficiencies in Plaintiff’s

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Complaint, the most salient is that Plaintiff has only pled that his injury is the loss of his clinical privileges and does not plead any effect on any market. The Seventh Circuit has stated explicitly that “the staffing decision at a single hospital [is] not a violation of Section 1 of the Sherman Act.” *Kochert v. Greater Lafayette Health Services*, 463 F.3d 710, 718 (7th Cir. 2006) (citing *BCB Anesthesia Care Ltd. v. Passavant Memorial Area Hospital*, 36 F.3d 664, 668 (7th Cir. 1994)). Additionally, Plaintiff has not pled the relevant market nor facts to establish the market control of the Hospital, both of which are required under Sections 1 and 2 of

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the Sherman Act. *See Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 886 (N.D. Ill. 2015) (citing *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 738 (7th Cir. 2004)).

The failure to allege the existence of a relevant commercial market is fatal to a Sherman Act claim, regardless of whether the Court applies a *per se* analysis, quick-look review, or rule-of-reason analysis. *Reapers Hockey Ass'n, Inc. v. Amateur Hockey Ass'n Ill., Inc.*, 412 F. Supp. 3d 941, 952 (N.D. Ill. 2019) (citing *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 337 (7th Cir. 2012) ("It is the existence of a

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commercial market that implicates the Sherman Act in the first instance.”)).

Because Plaintiff does not plead a cognizable antitrust injury and has failed to plead a commercial market, Plaintiff cannot make out an antitrust claim.

B. Health Care Quality**Improvement Act Claims**

Plaintiff pleads an injury under the Health Care Quality Improvement Act of 1986 (“HCQIA”), 42 U.S.C. § 1110. It is well-settled that the HCQIA does not provide a private cause of action to aggrieved physicians. *See e.g.*

Rosenberg v. Advocate Health & Hospitals Corp., No. 11 C 2493, 2011

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WL 1548391, *3 (N.D. Ill. Apr. 22, 2011). In fact, “it appears that every court to address the question of whether the HCQIA provides a private cause of action has come to the same conclusion: it does not.” *Id.* (citing *Westmoreland v. Pleasant Valley Hosp., Inc.*, No. 3:08–1444, 2009 WL 1659835, at *3 (S.D. W.Va. Jun.12, 2009) and collecting cases). Because the HCQIA does not provide a private cause of action such that Plaintiff may avail himself of the statute, the Court need not linger on this claim. Plaintiff’s HCQIA claim is dismissed with prejudice. *See Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th

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Cir. 2015) (“District courts ... have broad discretion to deny leave to amend ... where the amendment would be futile.”).

C. Civil Rights claims

Plaintiff brings a claim under the “Civil Rights Act of 1991,” which does not exist. The Court will construe this as intending to refer to 42 U.S.C. § 1981. In order to bring a Title VII claim in federal court, a plaintiff must present the claim in an EEOC charge and have obtained a right-to-sue letter. *Conner v. Illinois Dept. of Natural Resources*, 413 F.3d 675, 680 (7th Cir. 2005) (stating that “[a] plaintiff must file a charge with the EEOC detailing the alleged discriminatory

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conduct within the time allowed by statute, and the EEOC must issue a right-to-sue letter"); *Ballard v. Sercon Corp.*, 846 F.2d 463, 468 (7th Cir. 1988) ("Title VII's requirement that the plaintiff exhaust the administrative remedies provided by the statute is jurisdictional; that is, a court is obligated to enforce the requirement even if the defendant has overlooked it.") In Illinois, a plaintiff has a 300-day window to file an EEOC charge concerning an alleged unlawful employment practice for a Title VII claim based on those practices to be actionable. *Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 839 (7th Cir.

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2014) (“If a plaintiff does not file a charge concerning a discrete act within the 300-day window, [his] claim is time-barred and [he] may not recover.”); *Roney v. Ill. Dep’t of Transp.*, 474 F.3d 455, 460 (7th Cir. 2007) (“A charge of employment discrimination must be filed with EEOC within 300 days of the alleged unlawful employment practice.”). Here, Plaintiff does not allege that he filed a discrimination charge with the EEOC within the 300-day window nor does he allege anything that could lead the Court to believe that he has exhausted his administrative remedies. Because Plaintiff does not allege he has filed a charge with the

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EEOC or exhausted his administrative remedies, Plaintiff's Title VII claim is dismissed.

II. Rule 12(b)(5) Motion to Dismiss for

Insufficient Service of Process

The docket indicates that Thomas Mulvar (Dkt. 13-1), David Hines (Dkt. 13-1), Ernesto Cabrera (Dkt. 14), Nora Byrne (Dkt. 16), Raghu Ramadurai (Dkt. 17), Ada Arias (Dkt. 17-1) and Michael Maghrabi (Dkt. 17-2) were all served by certified mail. The Defendants move to dismiss pursuant to Rule 12(b)(5). Rule 4(e) provides that an individual defendant may be served by following state law, in this case Illinois law, or by delivering a copy of

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the summons and the complaint to the individual personally, leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or by delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e).

Illinois law provides that an individual defendant may be served by leaving a copy of the summons with the defendant personally, or:

(2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or

APPENDIX B

upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode. 735 ILCS 5/2-203(a). In Illinois, service on individual defendants through the United States Postal Service by certified mail is not permitted under the statute. *Thompson v. Brown*, No. 20 C 133, 2020 WL 6149580, *1 (N.D. Ill. Oct. 20, 2020) (finding service improper where individual defendants served through certified mail); *Lee v. Howse*, No. 19-cv-30, 2020 WL 2468133, *4 (N.D.

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Ill. May 13, 2020) (citing *Walton v. Lyons*, 962 F. Supp. 126, 128 (C.D.

Ill. 1997) (“The Federal Rules of Civil Procedure do not permit service of the summons and complaint by first class, or even certified, mail.”)). Plaintiff does not provide any good cause that would allow the Court to extend the time for service. The Court “must dismiss” the complaint if plaintiff fails to properly serve the Defendants within 90 days after filing the Complaint. Fed. R. Civ. P. 4(m). Such a dismissal may be with prejudice “if the plaintiff’s delay in obtaining service is so long that it signifies failure to prosecute.” *Williams*

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v. Illinois, 737 F.3d 473, 476 (7th Cir. 2013).

This is not Plaintiff's first case before the Court. In 2018, Kahn sued over 300 defendants for patent infringement and sent them all waivers of service. Repeatedly, at numerous status hearings, the Court warned Kahn that this type of service was an alternative form of service and that defendants were not required to waive service. In spite of these repeated warnings, Kahn refused to alter his service. With very limited exceptions, Kahn failed to serve the defendants in that matter and insisted on serving defendants by mailing the

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summons and complaint to them. He further refused to obtain an attorney and refused to listen to the Court's recitation of binding law – all offered to help him with his case. Rather than accept any of these warnings, Kahn plunged ahead with his suit, requiring dozens of lawyers to appear and challenge venue and service. In the end, the case was dismissed and the Court sanctioned Kahn for his abuse of the judicial process and he was required to pay for the attorney fees of opposing counsel. In this Court's previous memorandum opinion and order the Court stated:

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Plaintiffs also failed to comply with the timeliness requirements of Rule 4(m). Still, more than 250 days after Plaintiffs filed their Complaint, nearly all of the Defendants have still not been properly served. The Plaintiffs provide no justification for this extreme delay besides their tired refrain that service was completed by U.S. Mail. By maintaining this contention, in the face of directly contrary instruction from the Court, Plaintiffs have failed to comply with the necessary procedural rules for litigating their case. Therefore, due to insufficient and untimely service, Plaintiffs' Complaint is dismissed for want of prosecution.

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Khan et al. v. Hemosphere Inc., et al.,
No. 18-5368, Dkt. 135 at 6. Under these
circumstances, the Court will not give
Kahn another opportunity than the two
he has already had. He cannot claim
that he was unaware of how to serve his
Complaint nor can he claim he is
unaware of the serious consequences of
failure to serve properly. Defendants
Mulbar, Cabrera, Ramadurai, Byrne
and Maghrabi are dismissed for
Plaintiff's failure to prosecute.

III. Remaining State Law Claims

This leaves only state law claims for
Violation of Hospital Bylaws,
Fraudulent Actions and Wrongful
Termination of Plaintiff's Hospital

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Privileges, Breach of Contract,
Defamation, and Mental Distress.
Having dismissed the only federal
claims in this action, the Court declines
to exercise supplemental jurisdiction
over the remaining state law claims. 28
U.S.C. § 1367(c)(3); *see also*
Dietchweiler by Dietchweiler v. Lucas,
827 F.3d 622, 631 (7th Cir. 2016)
(explaining the Court may decline to
exercise jurisdiction over state law
claims when federal claims are
deficient).

CONCLUSION

For the foregoing reasons, Plaintiff's
discrimination claim is dismissed

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without prejudice; his antitrust claim is dismissed with prejudice; and because the HCQIA does not provide for a private right of action, this claim is dismissed with prejudice.

Plaintiff's claims as to certain

Defendants are dismissed for failure to properly effect service and for failure to prosecute. The case is therefore dismissed. If Kahn exhausts his administrative remedies with the EEOC, he may refile his discrimination claim.

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**Order of the United States District
Court
Northern District of Illinois Eastern
Division
Dismissing Second Amended Complaint
United States District Court
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

June 16, 2021

NAZIR KHAN

Pliantiff

V.

PRESENCE ST AND ST
ELIZABETH HOSPITAL, et al

Defendants

NO 20C3819

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Judge Virginia M. Kendall

ORDER

Judge Virginia M. Kendall June
16th, 2021

Defendants, Presence Chicago Hospitals
Network d/b/a Presence Saints Mary
and Elizabeth Medical Center
("Presence" or the "Hospital"), Laura
Concannon, MD, Nora Byrne, JD,
Norma Thornton, Thomas Malvar, MD,
David Hines, MD, Ada Arias, MD,
Raghu Ramadurai,
MD, Ernesto Cabrera, MD, Olga
Saavedra, MD, Michael Maghrabi,
DPM, John Connolly, MD, Alejandra

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Ditryk, RN, and the Board of Directors for Presence Saints Mary and Elizabeth Medical Center have filed a Motion to Dismiss Plaintiff Nazir Khan's Second Amended Complaint. (Dkt. 83). This Court previously dismissed Plaintiff's antitrust and the Health Care Quality Improvement Act of 1986 ("HCQIA") claims with prejudice and his Title VII discrimination claim without prejudice, provided Dr. Khan exhaust his administrative remedies with the EEOC. (Dkt. 68). The Court also dismissed Plaintiff's claims as to certain Defendants for failure to properly effect service and for failure to prosecute and declined to exercise supplemental

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jurisdiction over Plaintiff's remaining state law claims. (*Id.*).

Plaintiff has now filed a Second Amended Complaint, attaching an EEOC notice indicating he has exhausted his administrative remedies pursuant to 42 U.S.C. § 2000e-5(e)(1). Plaintiff has also filed additional claims pursuant to 42 U.S.C. 1983, discrimination and wrongful termination pursuant to the Americans with Disabilities Act (ADA), breach of contract, and a claim for "mental distress." (Dkt. 80 at 16). The Court was extremely clear in its earlier order that Plaintiff was given leave to re-plead only his Title VII discrimination

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claim. (Dkt. 79 at 2). Plaintiff's additional claims for violations of 42 U.S.C. 1983, discrimination and wrongful termination pursuant to the ADA, breach of contract, and mental distress are dismissed because Plaintiff's did not seek leave to bring these claims. Even if the Court were not entitled to dismiss because Plaintiff did not seek leave to file these additional claims, the Court would dismiss on the merits. Dr. Khan's attempt to invoke 42 U.S.C. 1983 is dismissed with prejudice because he has not alleged a deprivation of constitutional rights, and Defendants are not government officials who acted under color of law. To state a § 1983

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claim, a plaintiff must allege that he was deprived of a federal right, privilege, or immunity by a person acting under color of state law. *See Brown v. Budz*, 398 F.3d 904, 908 (7th Cir. 2005). Dr. Khan's employment claims against private actors plainly does not fall within the ambit of § 1983.

Second, Plaintiff's discrimination claims under Title VII and the ADA are dismissed with prejudice because he filed his charge of discrimination with the EEOC on January 15, 2021, approximately 2.5 years after his medical staff privileges at Presence Saints Mary and Elizabeth Medical Center were terminated. (Dkt. 80, Ex.

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A). A plaintiff must satisfy two different deadlines to bring a timely claim for employment discrimination under Title VII or the ADA. First, the employee must file “a charge of discrimination with the EEOC within 300 days of the alleged ‘unlawful employment practice.’” *Laslie v. Cicero*, 2021 WL 1853250, 2021 WL 1853250, *7 (N.D. Ill. May 10, 2021) (citing *Flannery v. Recording Indus. Ass’n of Am.*, 354 F.3d 632, 637 (7th Cir. 2004) (citation omitted); 42 U.S.C. § 2000e-5(e)(1). Failure to file a timely charge with the EEOC precludes a subsequent lawsuit under Title VII.” *Beamon v. Marshall & Ilsley Tr. Co.*,

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411 F.3d 854, 860 (7th Cir. 2005) (citing *Martinez v. United Auto., Aerospace & Agric. Implement Workers of Am.*, 772 F.2d 348, 350 (7th Cir. 1985)). “For purposes of this statute of limitations, discrete discriminatory employment actions such as termination, failure to promote, denial of a transfer, or refusal to hire are deemed to have been taken on the date they occurred, even if they form part of an ongoing practice or are connected with other acts.” *Id.* (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109–11 (2002)) (emphasis added). Each discrete discriminatory act “starts a new clock for filing charges alleging that act,” and charges not filed

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within 300 days of the act in question are not actionable. *Id.* (quoting *Morgan*, 536 U.S. at 113). Second, if the EEOC decides not to pursue the case and issues a “Notice of Right to Sue,” the plaintiff must bring a case within 90 days of receiving that notice. *See* 42 U.S.C. § 2000e-5(f)(1); *see also DeTata v. Rollprint Packaging Prod. Inc.*, 632 F.3d 962, 967 (7th Cir. 2011) (explaining that the Seventh Circuit “ha[s] consistently held (as have our sister circuits) that the 90-day period does not start running until the claimant (or her agent) actually receives the right-to-sue letter from the EEOC).

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At issue here is the first deadline as Dr. Khan filed his charge of discrimination with the EEOC more than two years after his privileges were revoked. An untimely charge gives the defendant employer an affirmative defense to the plaintiff's claims. "Filing a timely charge with the EEOC is not a jurisdictional prerequisite to suit in federal court; rather, it is an affirmative defense akin to administrative exhaustion." *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 921 (7th Cir. 2007) (citation omitted). As with any affirmative defense, "complaints need not anticipate and attempt to plead around defenses." *Chicago Bldg.*

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Design, P.C. v. Mongolian House, Inc.,

770 F.3d 610, 613 (7th Cir. 2014)

(quoting *United States v. N. Trust Co.*,

372 F.3d 886, 888 (7th Cir. 2004)).

While Dr. Khan is not required to anticipate and defeat affirmative defenses such as a statute of limitations in his Complaint, if the “complaint nonetheless sets out all of the elements of an affirmative defense, dismissal under Rule 12(b)(6) is appropriate.”

Indep. Tr. Corp. v. Stewart Info. Servs.

Corp., 665 F.3d 930, 935 (7th Cir. 2012).

Exhibit A of Plaintiff’s Second Amended Complaint makes clear that he has failed to comply with the 300-day filing date. (Dkt. 80 at 20). Dr. Khan’s EEOC

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Charge indicates that he was discharged by his employer, the last day on which a negative employment action could have occurred, on or about June 18, 2018.

(*Id.*). Dr. Khan's EEOC Charge also indicates that he did not file this Charge until January 15, 2021. (*Id.*). It is clear that Plaintiff has failed to comply with the 300-day deadline. Therefore, Plaintiff's claims under Title VII and the ADA are dismissed with prejudice.

This Court previously advised Plaintiff that if he continued to flood the Court with frivolous filings, the Court would consider imposing sanctions. (Dkt. 79 at 2).

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Defendants have now requested that the Court impose monetary sanctions on Plaintiff, in part because he attempted to serve his Second Amended Complaint on individuals that were dismissed for failure to properly serve and for his relentless prosecution of meritless claims against individual defendants.² (Dkt. 83 at 11). Under Rule 11(c), sanctions may be imposed on a party for “making arguments or filing claims that are frivolous, legally unreasonable,

² The Court notes that Dr. Khan continues to pursue this action against Thomas Malvar, Ernesto Cabrera, Nora Byrne, Raghu Ramadurai and Michael Maghrabi, even though the Order dismissed those Defendants from the case. The Court reiterates that these claims are dismissed with prejudice.

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without foundation, or asserted for an improper purpose.” *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998) (defining “frivolous argument or claim” as “one that is baseless and made without a reasonable and competent inquiry.”). The rule “is principally designed to prevent baseless filings.” *Royce v. Michael R. Needle, P.C.*, 950 F.3d 939, 957 (7th Cir. 2020) (citing *Brunt v. Serv. Emps. Int’l Union*, 284 F.3d 715, 721 (7th Cir. 2002)). While Plaintiff is *pro se*, these litigants are not excused from the monetary sanctions available under Federal Rule of Civil Procedure 11. *See Dix v. Edelman Financial Services, LLC*, 978 F.3d 507,

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521 (7th Cir. 2020); *Vukadinovich v. McCarthy*, 901 F.2d 1439, 1445 (7th Cir. 1990). Plaintiff's Complaint is now dismissed with prejudice. This is a sufficient sanction at this juncture. However, if Plaintiff attempts to file any further Complaints or filings, the Court will sanction Plaintiff accordingly.

Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint [Dkt. 83] is granted with prejudice. Plaintiff's Motion to Compel [Dkt. 88] is denied because the case has not, and now will not, reach the discovery phase.

Should Plaintiff continue to baselessly file on the docket, the Court will impose sanctions on him.

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Decided January 5, 2022

Before

FRANK H. EASTERBROOK, Circuit

Judge

MICHAEL Y. SCUDDER, Circuit

Judge

AMY J. STEVE, Circuit Judge

No. 21-2159

NAZIR KHAN

Plaintiff-Appellant

V.

PRESENCE CHICAGO HOSPITALS

NETWORK et AL

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Defendants-Appellees

Appeal from the United States District
court

For the Northern District of Illinois,
Eastern Division

No 20 C3819

Judge Virginia M. Kendall

HOSPITAL CASE LOG presented
before peer review committee on
February 7th 2018 shows plaintiff
performed more surgical cases than the
other seven peers and plaintiffs'
patients' infection rate was within the
normal limits. Plaintiff filed the case log
in district court and seventh circuit

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court to aid the court in making its
decision making.

Year 2017 HOSPITAL CASE LOG

Surgeons # of Operations, Infection

Rate %

Abdelhady Khalid M.D 38

5.28%

Baranewski Henry M.D 41

2.44%

Doshi Ashokh Kumar M.D 1`

0%

Khan Nazir Ahmad M.D 80*

3.75%

Letsbarapa Yukhol M.D 106

0%

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Massad Malek G M.D	2
--------------------	---

0%

Reshus Scott A D.O	1
--------------------	---

0%

Schubert Charles B M.D	40
------------------------	----

0%

* Actual # of Surgeries performed by Dr Nazir
Khan MD was 110 and only two patients were
infected. This infection rate was 1.8% not 3.75%

Year 2016 HOSPITAL CASE LOG

Surgeon	# of Operations	Infection Rate %
---------	-----------------	---------------------

Abdelhady Khalid M.D	62
----------------------	----

1.61%

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Baranewski Henry M.D 87

1.15%

Doshi Ashokh Kumar M.D 4`

0%

Khan Nazir Ahmad M.D 243

1.55%

Letsbarapa Yukhol M.D 171

0%

Schubert Charles B M.D 40

0%

Year 2015 HOSPITAL CASE LOG

Surgeon # of Operations Infection

Rate %

Khan Nazir Ahmad M.D 258

2.33%

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Abdelhady Khalid M.D	65
----------------------	----

1.54%

Baranewski Henry M.D	102
----------------------	-----

0.58%

Letsbarapa Yukhol M.D	186
-----------------------	-----

0.54%

Doshi Ashokh Kumar M.D	14
------------------------	----

0%

Reshus Scott A D.O	2
--------------------	---

0%

Schubert Charles B M.D	11
------------------------	----

0%

Year 2014 HOSPITAL CASE LOG

Surgeon	# of Operations	Infection
Rate %		

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Abdelhady Khalid M.D 59

0%

Baranewski Henry M.D 146

0%

Doshi Ashokh Kumar M.D 22

0%

Khan Nazir Ahmad M.D 357

1.12%

Letsbarapa Yukhol M.D 243

0.41%

Massad Malek G M.D 1

0%

Reshus Scott A D.O 10

0%

Schubert Charles B M.D 10

0%

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**DEFENDANTS' MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT
(DOC 35)**

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 5, 2022

Before

FRANK H. EASTERBROOK, Circuit

Judge

MICHAEL Y.SCUDDER,

Circuit Judge

AMY. J, STEVE

Circuit Judge

No.21-2159

NAZIR KHAN

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Plaintiff-Appellant

V.

Presence Chicago Hospitals Network et
Al

Defendant-Appellees

Appeal from the United States District
Court

For the Northern the Northern District
of Illinois,

Eastern Division

No.20c3819

Virginia M. Kendall Judge

PRESENCE ST. MARY AND ST.

ELIZABETH HOSPITALS

MARTIN JUDD

LAURA CONCANON

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NORA BYRNE

NORA THORNTON

THOMAS MULVAR

MEDICAL QUALITY COUNCIL OF

PRESENCE ST. MARY AND SAINT

ELIZABETH HOSPITAL

DAVID HINES

ADA ARIES

RAGHU RAMADURAI

ERNESTO CABRER

SAVEDRA OLGA

DONNA VICE

ALEX DICTRYK

MICHAEL MAGHRABI

BOARD OF DIRECTORS PRESENCE

ST. MARY'S AND ELIZABETH

MEDICAL CENTER

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Defendants

**In the United States District Court for
the Northern District of Illinois Eastern
Division**

CERTAIN DEFENDENTS MOTION

TO DISMISS

THE AMENDED COMPLAINT (DOC.

35)

Certain Defendants, Presence Chicago
Hospitals Network d/b/a Presence
Saints Mary and Elizabeth Medical
Center ("Presence" or the "Hospital"),
Laura Concannon, MD, Nora Byrne, JD,
Norma Thornton, Thomas Malvar, MD,
David Hines, MD, Ada Arias, MD,
Raghu Ramadurai, MD, Ernesto
Cabrera, MD, Olga Saavedra, MD,

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Michael Maghrabi, DPM, Alejandra
Ditryk, RN, and the Board of Directors
for Presence Saints Mary and Elizabeth
Medical Center (hereinafter collectively
referred to as "Defendants"), by and
through their attorneys, Chuhak &
Tecson, P.C. (David Tecson and Mark
Altschul), file this Motion to Dismiss the
Amended Complaint pursuant to Rules
12(b)(1), 12(b)(5) and 12(b)(6) of the
Federal Rules of Civil Procedure, and in
support hereof, state as follows:

Summary of Procedural History

1. Nazir Khan, MD ("Dr.
Khan" or "Plaintiff") filed this action on
June 29, 2020.

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Dr. Khan has elected to prosecute his claims pro se.

2. Dr. Khan's multiple filings of Amended Complaints, and documents titled "Amended Complaint," have created some confusion with the docket. As noted by the Court in the Order dated September 8, 2020: "Plaintiff has also filed two separate Amended Complaints that have added a defendant and added allegations [35] [37]." In the same Order, the Court noted that the operative complaint is now Doc. 37.

3. Doc. 37 contains the title "Amended Complaint", but it is actually a motion to file the Amended Complaint, wherein Dr. Khan states "[t]he Plaintiff

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requests that the amended complaint filed on 08/11/2020 be granted."

4. Based on the foregoing procedural history, the Defendants have filed the instant Motion to Dismiss the Amended Complaint filed on August 11, 2020 (Doc. 35). It is the most recent version of the Amended Complaint filed by Plaintiff.

Motion to Dismiss for Lack of Federal Jurisdiction

5. The Defendants will file a memorandum of law in support of this Motion after the Court rules on the Defendants Motion to File under Seal. The Defendants' Memorandum of Law in support of the Motion to Dismiss the

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Amended Complaint is incorporated by reference herein.

6. Dr. Khan reorganized the Amended Complaint into eight counts, as follows:

Claim I — Violation of Hospital

Bylaws

Claim II — Fraudulent Actions and
Wrongful Termination of Plaintiffs
Hospital Privileges

Claim III — Violation of the Health
Care Quality Improvement Act

Claim IV — Breach of Contract

Claim V — Violation of the Federal
Antitrust Laws

Claim VI — Violation of the Civil
Rights Act of 1991

Claim VII — Defamation

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Claim VIII — Mental Distress

7. The only claims, or counts, that might trigger federal subject matter jurisdiction are the claims for violation of the federal antitrust laws, violation of the Civil Rights Act, and the alleged violation of the Health Care Quality Improvement Act ("HCQIA"). As will be described more fully below, the facts alleged in the Amended Complaint do not support a federal cause of action.

8. Plaintiff has practiced cardiovascular and thoracic surgery for approximately 35 years. (Doc. 35, p. 2).

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The key allegations of the Amended
Complaint appear are as follows:

During the year 2017, the
Presence Quality Assurance
Committee identified four (4)
surgical cases performed by Dr.
Khan that raised clinical concerns,
and the Quality Assurance
Committee also identified clinical
concerns related to a high infection
rate, responsiveness to calls and
pages, and case management trends.
(Doc. 35, p. 10-11).

On or about November 17, 2017,
the Medical Executive Committee
(MEC) appointed an Investigative
Committee pursuant to the hospital

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bylaws to address the quality concerns related to Dr. Khan's practice at the Hospital. (Doc. 35, p. 12).

Also in November of 2017, Dr. Khan alleges that the CEO of the hospital (Martin Judd) and the Chief Medical Officer (Laura Concannon, MD) coerced him into taking a leave of absence from the Hospital. (Doc. 35, pp. 8-9)

In advance of meeting(s) with the Investigative Committee in February of 2018, the MEC notified Dr. Khan that he was required to get a neuro-psychological and physical exam to address the clinical concerns reviewed by the Investigative Committee. Dr.

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Khan refused to undergo a neuro-
psychological or physical exam, and his
privileges were voluntarily terminated
on June 18, 2018 (Doc. 35, p. 23, Ex. D).

9. Based on the peer review
process implemented by Presence to
protect patient safety, Dr. Khan has
attempted to aver federal claims for
violations of "the Sherman antitrust
laws, Acts 1 and 2," "section 4 of the
Clayton Act", violations of "the Civil
Rights Acts," and violations of the
Health Care Quality Improvement Act
of 1986. (Doc. 35).

10. This is not a federal case.
As described in the memorandum of law
filed in support of this Motion to

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Dismiss the Amended Complaint, the loss of privileges by a single physician, at a single hospital on the Northside of Chicago, cannot give rise to violations of the federal antitrust laws. To the extent that Dr. Khan is attempting to invoke Title VII of the 1964 Civil Rights Act, as amended in 1991, the Amended Complaint does not allege that he filed a charge of discrimination with the Equal Employment Opportunity Commission("EEOC") within 300 days of the actions described in the Complaint, and he has not cited a right to sue letter issued by the EEOC. In addition, Dr. Khan has not alleged that

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he was an employee of Presence,
because he was not.

11. Dr. Khan's attempt to
assert a federal claim for violation of
the Health Care Quality Improvement
Act ("HCQIA") also fails. This federal
statute was enacted to protect patients,
not physicians. Accordingly, multiple
courts have held that HCQIA does not
create a private right of action.

12. The Complaint should be
dismissed pursuant to Rule 12(b)(1) for
lack of subject matter jurisdiction.

Certain Defendants' Motion to Dismiss
for Insufficient Service of Process

13. Dr. Khan has attempted to
serve Thomas Malvar, MD, David Hines,

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MD, Ada Arias, MD, Raghu Ramadurai, MD, Ernesto Cabrera, MD, Nora Byrne, JD, Michael Maghrabi, DPM, Alejandra Ditryk, RN and the Board of Directors of Presence Saints Mary and Elizabeth Medical Center via certified mail. This is not an authorized method of service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure. Accordingly, the Amended Complaint as pled against these Defendants should be dismissed.

**Certain Defendants' Motion to Dismiss
Pursuant to Rule**

14. The state and federal claims alleged by Dr. Khan fail to satisfy the standard of alleging a claim that is

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plausible on its face. *Bell AtL Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

15. The defects in the federal claims have been summarized in an earlier section of this Motion, and those flaws are described in detail in the memorandum of law submitted by the Defendants.

16. The Amended Complaint also fails to alleges state law claims for a violation of hospital bylaws, breach of contract, wrongful termination of hospital privileges, defamation and intentional infliction of emotional distress. In addition, the Illinois Hospital Licensing Act bars Dr. Khan's claims for damages against the Defendants who participated

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in the peer review of the clinical concerns related to his practice. 210 ILCS 85/10.2; Valfer v. Evanston Northwestern Healthcare, 215 111.App. (1st 142284); 31 N.E. 3d 883 (1st Dist. 2015); Larsen v. Provena Hospitals, 2015 111.App. (4th) 140255, 27 N.E.3d 1033 (4th Dist. 2015).

WHEREFORE, Defendants,
Presence Chicago Hospitals Network
d/b/a Presence Saints Mary and
Elizabeth Medical Center, Laura
Concannon, MD, Nora Byrne, JD,
Norma Thornton, Thomas Malvar, MD,
David Hines, MD, Ada Arias, MD,
Raghu Ramadurai, MD, Ernesto
Cabrera, MD, Olga Saavedra, MD,
Michael Maghrabi, DPM, Alejandra

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Ditryk, RN, and the Board of Directors
for Presence Saints Mary and Elizabeth
Medical Center, respectfully request
that this Combined Motion be granted,
dismissing the Amended Complaint,
while granting all other relief which the
Court deems just and equitable.

Dated: September 15, 2020

Presence Chicago Hospitals Network
d/b/a Presence Saints Mary and
Elizabeth Medical Center, Laura
Concannon, MD, Nora Byrne, JD,
Norma Thornton, Thomas Malvar, MD,
David Hines, MD, Ada Arias, MD,
Raghu Ramadurai, MD, Ernesto
Cabrera, MD, Olga Saavedra, MD,
Michael Maghrabi, DPM, Alejandra

APPENDIX D

Ditryk, RN, and the Board of Directors
for Presence Saint Mary and Elizabeth
Medical Center

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APPENDIX E

**NOTARIZED AFFIDAVIT OF THE
PLAINTIFF DATED JANUARY 18TH
2022 SUBMITTED TO THE 7TH
CIRCUIT COURT OF APPEALS
PRIOR TO THE MOTION OF
RECONSIDERATION** decided

February 10th 2022.

**United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604**

Before

FRANK H. EASTERBROOK, Circuit

Judge

MICHAEL Y. SCUDDER, Circuit Judge

AMY J. ST EVE, Circuit Judge

No. 21-2159

Affidavit in support of the statements

APPENDIX E

Petitioner, Nazir Khan makes the following statements and swears under penalty of perjury that the following statements are true and correct to the best of his knowledge and belief:

1 That petitioner rendered 20 years of service from 1998 to Nov 3rd 2017 to St. Mary and St. Elizabeth hospitals as independent contractor and not as an employee of the hospitals

2 That I am a normal healthy person physically and having no mental illness

3 That Hospital administration, chief Medical officer and president of Medical staff Dr Ramaduri made the petitioners restoration of Hospital

APPENDIX E

privileges contingent upon physical, neurocognitive and psychiatric testing without any foundation. Such an action was illegal.

4 That petitioner was cleared by peer review committee (there was no adverse action). President of Medical staff and Hospital, had Legal Obligation pursuant to Illinois Medical studies act and Human quality improvement act of 1986 to restore petitioner privileges

SIGNED BY NAZIR KHAN ON

01/18/2022 BEFORE NOTARY PUBLIC

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APPENDIX F

**Voluntary Termination of Plaintiffs'
Medical Staff Membership and Clinical
Privileges based on peer review
communication to Medical Executive
committee dated January 13th, 2018
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604**

Decided January 5, 2022

Before

FRANK H. EASTERBROOK, Circuit
Judge

MICHAEL Y. SCUDDER, Circuit Judge

AMY J. STEVE, Circuit Judge

No. 21-2159

NAZIR KHAN

Plaintiff-Appellant

APPENDIX F

V.

PRESENCE CHICAGO HOSPITALS

NETWORK et AL

Defendants-Appellees

Appeal from the United States District

court

For the Northern District of Illinois,

Eastern Division

No 20 C3819

Judge Virginia M. Kendall

Presence Saints Mary and Elizabeth

Medical Center

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APPENDIX F

CONFIDENTIAL & PRIVILEGED
PEER REVIEW COMMUNICATION

June 13, 2018

Via Certified Mail

Nazir Khan, M.D.

330 W. Grand Avenue, Suite A

Chicago, Illinois 60654

Re: Voluntary Termination of
Medical Staff Membership and Clinical
Privileges

Dear Dr. Khan:

This letter is in follow-up to prior
correspondence from the Medical
Executive Committee ("MEC") to you
dated May 2, 2018. As a member of the
Medical Staff of Presence Saints Mary
and Elizabeth Medical Center

APPENDIX F

("Hospital"), you agree to be bound by the Medical Staff Bylaws and all applicable policies. These include various qualifications and ongoing conditions applicable to all members and which are intended to address the Medical Staffs obligation to assess and monitor the quality of care rendered to patients of the Hospital. Among these qualifications and conditions is the obligation to continuously demonstrate or provide evidence of your physical and mental ability and health status necessary to perform clinical privileges to the satisfaction of the Hospital and Medical Staff. Additionally, all members agree to an ongoing responsibility to

APPENDIX F

submit to and meaningfully participate in focused and ongoing or periodic peer review of professional competence and skill and related quality assurance and improvement activities and policies.

The MEC has communicated with you on multiple occasions its request that you obtain a physical exam and neurocognitive testing and the reasons for this request. After repeated requests and attempts to engage you on this issue, the MEC's most recent May 2 correspondence to you stated if you failed to complete the exam and testing by May 30, 2018 that it would interpret your decision as a desire to not return to active status from our leave of absence.

APPENDIX F

You refused or otherwise offered no indication that you would fulfill this request. Consistent with the Medical Staff Bylaws and applicable policy, a decision to not seek and satisfy conditions of reinstalment will result in a voluntary termination of Medical Staff membership. Accordingly, please accept this letter as notice of your voluntary termination of Medical Staff membership and clinical privileges at the Hospital. Please note that this result is administrative in nature and not considered to be adverse by the Hospital and Medical Staff.

Sincerely,

SIGNED BY Raghu Ramadurai, M.D.

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APPENDIX F

President of the Medical Staff

cc: Thomas Malvar, M.D., Department
Chairperson

2233 West Division Street

1431 North Claremont Avenue

Chicago, Illinois 60622

Chicago, Illinois 60622

312.770.2000

7732782000

Sponsored by the Franciscan Sisters of
the Sacred Heart, the Servants of the
Holy Heart of Mary, the Sisters of the
Holy Family of Nazareth, the Sisters of
Mercy of the Americas and the Sisters
of the Resurrection

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APPENDIX G

**Letter from Chief Medical Officer
Presence St Mary Hospital Dated Feb
1st 2018 stating that Medical Executive
committee will not reinstate petitioners'
privileges unless and until he undergoes
neuropsychiatric testing and physical
examination.**

**United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604**

Before

FRANK H. EASTERBROOK,

Circuit Judge

MICHAEL Y. SCUDDER, Circuit

Judge

AMY J. STEVE, Circuit Judge

No. 21-2159

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APPENDIX G

NAZIR KHAN

Plaintiff-Appellant

V.

PRESENCE CHICAGO HOSPITALS

NETWORK et AL

Defendants-Appellees

**Appeal from the United States District
court**

**For the Northern District of Illinois,
Eastern Division**

No 20 C3819

Judge Virginia M. Kendall

RECEIVED 2/7/18 01:26PM

CONFIDENTIAL & PRIVILEGED

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APPENDIX G

PEER REVIEW COMMUNICATION

February 1, 2018

Via Certified Mail

Nazir Khan, M.D.

330 W. Grand Avenue, Suite A

Chicago, Illinois 60654

Re: Follow-up Meeting

Dear Dr. Khan, Your presence is requested at a meeting of the medical staff investigative committee on Wednesday, February 7th at noon in the Administrative Board Room on the 3rd floor of Presence Saints Mary and Elizabeth Medical Center. Please be prepared to meaningfully respond to each of the concerns or observations

APPENDIX G

included in the four (4) peer reviewed cases that are enclosed with this letter.

You may also provide information in supplement to the discussion for subsequent review by the committee.

The investigative committee may have additional questions related to your previous focused professional performance evaluation. At your request, the members of the

investigative committee were changed and the current members are: Dr.

Malvar, Dr. Zambrano, Dr. Campo, Dr. Jaramillo, Dr. Hines, and Dr. Cabrera.

As conveyed in prior correspondence, please know that the Medical Executive Committee is expecting that you

APPENDIX G

complete the physical and cognitive exams prior to considering any request to return to practice from your current leave of absence. Please refer to the previous letter sent and information shared regarding the approved physicians/psychiatrists and the process to be followed.

Regards,

SIGNED BY

LAURA CONCANNON, MD. MBA

FACP

Chief Medical Officer

2233 W Division Street, Chicago, IL

60622