

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 ALI J. NAINI,

CASE NO. C19-0886-JCC

10 Plaintiff,

ORDER

11 v.

12 KING COUNTY PUBLIC HOSPITAL  
13 DISTRICT NO. 2 d/b/a EVERGREEN  
HOSPITAL MEDICAL CENTER *et al.*,

14 Defendants.  
15

16 This matter comes before the Court on Plaintiff's motion for a temporary restraining  
17 order (Dkt. No. 111). Having considered the parties' briefing and the relevant record, the Court  
18 hereby DENIES the motion for the reasons explained herein.

19 **I. BACKGROUND**

20 On October 25, 2017, Plaintiff filed the original complaint in this case in King County  
21 Superior Court. (Dkt. No. 11-1.) The complaint alleged that Defendants were threatening to  
22 revoke Plaintiff's hospital privileges if he did not complete a competency assessment at the  
23 University of California in San Diego. (*Id.* at 3.) The complaint further alleged that Defendants  
24 imposed the competency assessment requirement "in retaliation for ethical concerns that  
25 [Plaintiff] ha[d] expressed regarding the care of his elderly ICU patients by some hospital-  
26 employed physicians, who regularly transfer those patients . . . to hospice care, where they die

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1 prematurely, when they could have survived to live meaningful lives.” (*Id.* at 5–6.) Although  
2 Defendants denied this allegation, they withdrew “without prejudice” the competency  
3 assessment requirement, thereby preserving Plaintiff’s privileges. (*See* Dkt. No. 12-8 at 8.)

4 Plaintiff’s privileges did not remain secure for long. On January 15, 2019, Plaintiff was  
5 informed that his privileges at Evergreen had been suspended based largely on Plaintiff’s  
6 purportedly substandard treatment of patients in 2018. (*See* Dkt. No. 28 at 28–36.) The Superior  
7 Court quickly undid the suspension, concluding that Defendants had likely denied Plaintiff due  
8 process and violated Evergreen’s bylaws. (Dkt. No. 16-13 at 4.) The Superior Court also  
9 enjoined Defendants from “[t]aking any action that prevents, prohibits, or interferes with  
10 plaintiff’s exercise of privileges and prerogatives as an active staff member of the  
11 EvergreenHealth Medical Center.” (*Id.*) The Superior Court did, however, allow Evergreen to  
12 “initiate a new process, with notice and opportunity to be heard, with respect to [Plaintiff’s]  
13 application to renew his privileges.” (*Id.* at 6.)

14 Following the Superior Court’s ruling, Defendants continued to engage in peer review of  
15 Plaintiff’s treatment of patients in 2018. (*See* Dkt. No. 115-5 at 2–3.) As part of that peer review  
16 process, Plaintiff met with Evergreen’s Quality Peer Review Committee (QPRC) on October 30,  
17 2019, and defended his actions in seven of the cases at issue. (Dkt. No. 111 at 6.) After Plaintiff  
18 left the meeting, the QPRC voted unanimously to recommend that Evergreen suspend Plaintiff’s  
19 privileges. (*Id.*)

20 One day later—but unrelated to the QPRC meeting—Plaintiff received a patient with a  
21 traumatic brain injury. (*Id.*) Plaintiff treated the patient for the first 28 hours that the patient was  
22 at Evergreen. (*Id.*) At that point, the patient was transferred to the care of Dr. Jeyamohan. (*Id.*)  
23 36 hours later, the patient died. (*Id.*) The patient’s death prompted Evergreen to investigate  
24 Plaintiff’s care of the patient. (*See* Dkt. No. 86 at 3.) As part of that investigation, physicians and  
25 doctors met with Plaintiff on November 5, 2019. (*Id.*) Present at the meeting was Dr. Melissa  
26 Lee, a prominent defendant in this case. (Dkt. No. 111 at 7.) According to Evergreen, this

1 meeting raised “serious, grave concerns about [Plaintiff’s] ability to provide safe patient care at  
2 Evergreen.” (Dkt. No. 86 at 3.) Due to those concerns, Evergreen asked the Court to vacate the  
3 Superior Court’s preliminary injunction so that Evergreen could invoke Article 16 of its bylaws  
4 and suspend Plaintiff’s privileges pending an investigation. (*Id.* at 4–5, 10.) The Court granted  
5 Evergreen’s request while noting that Plaintiff would be “free to challenge . . . any ultimate  
6 decision that Evergreen makes regarding Plaintiff’s privileges.” (Dkt. No. 94 at 5.)

7         On November 14, 2019, Dr. Jeffrey Tomlin, Evergreen’s CEO, notified Plaintiff that  
8 Evergreen was summarily suspending his privileges based on his care of the patient who had  
9 recently died. (Dkt. No. 111 at 8.) Then, on December 11, 2019, Evergreen notified Plaintiff by  
10 letter that the Medical Executive Committee (“MEC”) had voted to approve the QPRC’s  
11 recommendation to terminate his privileges. (Dkt. No. 114-4 at 2–4.) Although the QPRC  
12 purportedly based its recommendation on the 2018 cases, the letter stated that the MEC based its  
13 decision on both the 2018 cases and Plaintiff’s treatment of the recently deceased patient. (*Id.*)  
14 The letter also stated that the summary suspension had been stayed because Plaintiff had  
15 “voluntarily decided” not to exercise his privileges while Evergreen investigated the patient’s  
16 death.<sup>1</sup> (*Id.* at 3.) Finally, the letter notified Plaintiff that Evergreen planned to report Plaintiff’s  
17 decision to the National Practitioner Data Bank (“NPDB”) on December 22, 2019. (*Id.* at 4.)  
18 Plaintiff now seeks to prevent Evergreen from making a report to the NPDB. (Dkt. No. 111 at 9.)

## 19 **II. DISCUSSION**

20         Congress enacted the Health Care Quality Improvement Act (“HCQIA”), 42 U.S.C.  
21 §§ 11101–11152, to “restrict the ability of incompetent physicians to move from State to State  
22 without disclosure or discovery of the physician’s previous damaging or incompetent

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24 <sup>1</sup> The parties dispute whether Plaintiff surrendered his privileges. (*See* Dkt. Nos. 111 at 11–12,  
25 111 at 16–17.) That dispute is not relevant to the Court’s decision. Regardless of whether  
26 Plaintiff surrendered his privileges or was suspended, Evergreen would still be required to file a  
report to the NPDB. *See* 42 U.S.C. § 11133(a)(1)(A)–(B). And Plaintiff argues that in either  
case, Evergreen’s bad-faith actions set the reporting process in motion. (*See* Dkt. No. 111 at 20.)

1 performance.” 42 U.S.C. § 11101(2). To accomplish that goal, Congress required that health care  
2 entities file reports to the NPDB whenever they suspend a physician’s privileges for longer than  
3 30 days or whenever they accept the surrender of a physician’s privileges while the physician is  
4 under investigation. 42 U.S.C. § 11133(a)(1)(A). At the same time, Congress set up a process by  
5 which physicians could challenge reports that health care entities file to the NPDB. *See* 45  
6 C.F.R. § 60.21. Here, Plaintiff asks the Court to interfere with this congressional scheme by  
7 prohibiting Evergreen from reporting the suspension of his privileges because a jury might  
8 ultimately conclude that there is no basis for the suspension. While such an intervention might be  
9 justified in extreme circumstances, Plaintiff has not shown that those circumstances are present  
10 here.

11 **A. Legal Standard**

12 Preliminary injunctive relief is “an extraordinary remedy never awarded as of right.”  
13 *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). To obtain such relief, a party must  
14 “make a showing” on each of the following elements: (1) that the party will suffer irreparable  
15 harm in the absence of preliminary relief; (2) that the balance of equities tips in favor of granting  
16 an injunction; (3) that granting an injunction is in the public interest; and (4) that the party is  
17 likely to succeed on the merits. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th  
18 Cir. 2011). What is required to “make a showing” on the fourth element depends on the strength  
19 of the party’s showing on the first three elements. *Id.* Thus, if a party shows that it will suffer  
20 irreparable harm, that the balance of equities tips in its favor, and that granting an injunction is in  
21 the public interest, then the party need only show that there are “serious questions on the merits.”  
22 *Id.*

23 **B. Irreparable Harm**

24 Plaintiff would suffer irreparable harm if Evergreen reports him to the NPDB.  
25 Evergreen’s report would declare that Plaintiff “is under investigation by [Evergreen] relating to  
26 possible incompetence or improper professional conduct.” 42 U.S.C. § 11133(a)(1)(B)(i). That

1 report would be shared far and wide: every hospital at which Plaintiff holds privileges or might  
2 seek future privileges would be required to review the report whenever he applies for privileges  
3 and every two years thereafter. 42 U.S.C. § 11135(a); 45 C.F.R. § 60.17. Thus, to obtain  
4 privileges at another hospital, Plaintiff would have to overcome the stigma created by an  
5 investigation into his competence and professional conduct. That stigma is serious, and multiple  
6 courts have recognized that it constitutes irreparable harm. *Rosario v. Weirton Med. Ctr.*, 2018  
7 WL 1960952, slip op. at 2 (W.D. Pa. 2018); *Walker v. Mem'l Health Sys. of East Texas*, 231 F.  
8 Supp. 3d 210, 216 (E.D. Tex. 2017) (“[A]n adverse report almost certainly proves detrimental to  
9 a practitioner’s livelihood.”); *Russo v. Jones*, 2010 WL 2612628, slip op. at 4 (D. Haw. 2010);  
10 *Doe v. Cmty. Med. Ctr., Inc.*, 221 P.3d 651, 661 (Mont. 2009).

11       The potential for irreparable harm is also likely. Defendants have informed Plaintiff that  
12 they consider him to have surrendered his clinical privileges while he is under investigation.  
13 (Dkt. No. 114-4 at 3.) Because Defendants accepted Plaintiff’s purported surrender of his  
14 privileges, Defendants are required by law to file a report to the NPDB. 42 U.S.C.  
15 § 11133(a)(1)(B)(i). Defendants have indicated that they will file such a report by December 22,  
16 2019. (Dkt. No. 114-4 at 4.) Thus, an adverse report—and the harm it will cause Plaintiff—is  
17 imminent.

18       Although Plaintiff is likely to suffer irreparable harm, there exists a comprehensive  
19 administrative scheme that could mitigate that harm. Under that scheme, Plaintiff can challenge  
20 Evergreen’s report using the Department of Health and Human Services’ (HHS) dispute process.  
21 *See* 45 C.F.R. § 60.21(c). That process might result in HHS requiring Evergreen to revise the  
22 report or instructing the NPDB to void the report. *See id.* The NPDB would then notify all  
23 queriers who received the previous version of the report within the past three years that the report  
24 has been changed or voided. *See id.*; U.S. Dep’t of Health and Human Servs., NPDB Guidebook  
25 E-8 (2018). In addition, Evergreen would be required to void the report if the Court later  
26 overturns the suspension of Plaintiff’s privileges, and all queriers would be notified that the

1 report was void. *See* NPDB Guidebook, *supra*, at E-8.

2 This administrative scheme lessens the harm that Plaintiff faces. However, the scheme  
3 could not undue completely the stigma that a report would cause. Nor would the scheme offer  
4 Plaintiff much help if he sought employment prior to Evergreen’s report being changed or  
5 voided. Consequently, Plaintiff still faces irreparable harm.

6 **C. Balance of Equities**

7 The balance of equities is mixed. To determine which way the balance of equities tips, a  
8 court must “identify the harms which a preliminary injunction might cause to defendants  
9 and . . . weigh these against plaintiff’s threatened injury.” *L.A. Mem’l Coliseum Comm’n v. Nat’l*  
10 *Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). Here, Plaintiff will suffer reputational  
11 harm if Evergreen files a report to the NPDB. Evergreen, on the other hand, could also suffer  
12 harm if it does not comply with its legal obligation to file a report. *See* 42 U.S.C. §§ 11111(b),  
13 11133(a); *Doe*, 221 P.3d at 398 (Rice, J., dissenting). HHS might investigate Evergreen for  
14 failing to file a report. *See* 42 U.S.C. § 11111(b). The agency might then publish notice of  
15 Evergreen’s noncompliance in the federal register. *See id.* And Evergreen could ultimately be  
16 stripped of its legal protections under 42 U.S.C. § 11111(a) for three years. *See id.* These are  
17 serious consequences.<sup>2</sup>

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19 <sup>2</sup> Plaintiff cites *Walker v. Memorial Health System of East Texas*, 231 F. Supp. 3d 210, 217 (E.D.  
20 Tex. 2017), for the proposition that an injunction would excuse Evergreen from any legal  
21 obligation to file a report to the NPDB. (*See* Dkt. No. 111 at 16.) At issue in *Walker*, however,  
22 was whether a hospital had taken an action that was reportable. 231 F. Supp. 3d at 215–16. The  
23 hospital argued that if the court enjoined it from filing a report to the NPDB, then the hospital  
24 would have to violate federal law. *Id.* at 217. The court rightfully rejected this argument,  
25 concluding that “[i]t is the province of the federal courts—not the Hospital—to determine the  
26 requirements of . . . a federal statute.” *Id.* Here, by contrast, there is no doubt that Evergreen  
must report a suspension (or surrender) of Plaintiff’s privileges to the NPDB. *See* 42 U.S.C.  
§ 11133(a)(1)(A)–(B). The question, then, is whether the Court can somehow excuse  
Evergreen’s legal obligation to report if the Court concludes that the suspension is likely invalid.  
The Court is unaware of any basis on which it could do so. 42 U.S.C. § 11133(a) uses mandatory  
language, and it contains no exceptions.

1           **D.     Public interest**

2           Like the balance of equities element, the public interest element is also mixed.

3           The Court begins with the strong presumption that the public interest weighs against  
4 granting an injunction. The Court does so because an injunction prohibiting a health care entity  
5 from complying with its congressionally-mandated reporting obligations threatens the balance  
6 that the HCQIA struck between the competing interests of the public and medical practitioners.  
7 *See* 42 U.S.C. § 11101(2). In weighing those interests, Congress concluded that the public would  
8 significantly benefit from a reporting requirement. Such a requirement, Congress stated in its  
9 legislative findings, would “restrict the ability of incompetent physicians to move from State to  
10 State without disclosure or discovery of the physician’s previous damaging or incompetent  
11 performance.” *See id.* But Congress recognized that a reporting requirement could harm  
12 physicians’ reputations. To mitigate that harm, Congress authorized HHS to “promulgate by  
13 regulation . . . procedures in the case of disputed accuracy of information.” 42 U.S.C. § 11136.  
14 HHS, in turn, “set out a comprehensive administrative scheme for challenging the accuracy of a  
15 report made to the NPDB.” *Brown v. Med. Coll. of Ohio*, 79 F. Supp. 2d 840, 845 (N.D. Ohio  
16 1999); *see* 45 C.F.R. § 60.21. This scheme, and the implicit judgments underlying it, show that it  
17 is ordinarily in the public interest for a court to allow a health care entity to file a report to the  
18 NPDB when the entity is statutorily obligated to do so. *See id.* (quoting *McGee v. United States*,  
19 402 U.S. 479, 484 (1971)) (“Allowing a physician to bypass the administrative procedure simply  
20 by choosing to sue the reporting entity could ‘induce frequent and deliberate flouting of the  
21 administrative processes, thereby undermining the scheme of decisionmaking that Congress has  
22 created’ under the HCQIA.”).

23           Plaintiff makes what appear to be two arguments for why the public interest weighs in  
24 favor of prohibiting Evergreen from filing a report to the NPDB. First, Plaintiff argues that the  
25 public is not served if Plaintiff’s career is harmed while Evergreen’s investigation is still  
26 ongoing. (*See* Dkt. No. 111 at 17–18.) Yet, Congress has concluded that the opposite is true: the

1 public benefits from hospitals reporting the suspension or surrender of a physician’s privileges  
2 while the hospital investigates the physician. *See* 42 U.S.C. 11133(1)(A)–(B). The Court will not  
3 second-guess that legislative judgment. Second, Plaintiff argues that the public is not served by  
4 Evergreen filing a report “when . . . significant evidence demonstrates the hospital’s pattern of  
5 acting in bad faith against [Plaintiff].” (*See* Dkt. No. 111 at 17–18.) This argument could have  
6 merit. For if it is true that Evergreen is planning to file a sham report, then the public would be  
7 harmed rather than helped by that report. However, Plaintiff bears the burden of showing that the  
8 report will likely be a sham. It is to that issue that the Court now turns.

9 **E. Success on the Merits**

10 Plaintiff has not demonstrated that he is sufficiently likely to succeed on the merits so as  
11 to warrant an injunction that would interfere with the HCQIA’s ordinary reporting process.

12 As an initial matter, Plaintiff does not clearly state which of his legal or equitable rights  
13 may have been violated by Evergreen’s latest actions. (*See* Dkt. No. 111 at 18–21.) For example,  
14 Plaintiff argues that he has “at a minimum raised serious questions on the merits of his  
15 constitutional claims,” (*id.* at 18), but he does not specify whether he believes that Evergreen’s  
16 latest actions violated his First Amendment rights, due process rights, or both, (*see id.* at 18–21).  
17 Similarly, Plaintiff cites *Doe v. Community Medical Center, Inc.*, 221 P.3d 651, 661 (Mont.  
18 2009), but he does not clarify if he is claiming, like the physician in *Doe*, that Evergreen  
19 breached its contract with him when it suspended his privileges following the recent death of his  
20 patient. (*See id.* at 19.) Plaintiff’s lack of clarity places the Court in the uncomfortable position of  
21 having to make arguments on his behalf. It also weighs against granting an injunction because  
22 Plaintiff bears the burden of demonstrating a likelihood of success on the merits. *See L.A. Mem’l*  
23 *Coliseum Comm’n*, 634 F.2d at 1203.

24 Because of Plaintiff’s lack of clarity, the Court will limit its analysis to what appears to  
25 be Plaintiff’s central claim: “that Defendants have engaged in a years-long campaign of  
26 retaliation against [Plaintiff], and this act is a continuation of this campaign.” (*See* Dkt. No. 111



1 at 20.) In analyzing that claim, the Court will consider separately Evergreen’s actions regarding  
2 the death of Plaintiff’s patient and Evergreen’s actions regarding his 2018 cases.

3 1. Evergreen’s Actions Regarding the Death of Plaintiff’s Patient

4 At this juncture, there is strong evidence that Evergreen acted in good faith when it  
5 responded to the recent death of Plaintiff’s patient. As detailed in Dr. Ettore Palazzo’s  
6 declaration, several doctors and medical staff had genuine concerns over Plaintiff’s  
7 decisionmaking during the patient’s treatment. (*See* Dkt. No. 87 at 4–8.) Those concerns were  
8 shared by the numerous other physicians and surgeons who attended the *ad hoc* quality peer  
9 review meeting with Plaintiff on November 5, 2019. (*Id.* at 9.) And those concerns were  
10 reflected in the MEC’s letter explaining the MEC’s decision to suspend Plaintiff’s privileges.  
11 (*See* Dkt. No. 114-4 at 3.) That letter states, “In short, you selected a less than optimal procedure,  
12 opted for observational post-surgical monitoring, and did not appropriately react to the  
13 information gathered throughout that monitoring.” (*Id.*)

14 Plaintiff has offered little evidence to show that the letter’s words, which mirrored the  
15 judgments of many qualified doctors at Evergreen, were mere pretext. To establish pretext,  
16 Plaintiff primarily relies on the declarations of Dr. Charles Cobbs and Dr. Richard Wohns, (*see*  
17 Dkt. No. 111 at 19), who both reviewed medical records relating to the patient’s death, (Dkt.  
18 Nos. 112 at 2, 113 at 2).<sup>3</sup> These declarations, which describe the doctors’ conclusions only in  
19 general terms, raise questions about whether Plaintiff provided adequate care to the patient and  
20 whether Evergreen made the correct decision when it suspended Plaintiff’s privileges. (*See* Dkt.  
21 Nos. 112 at 3–4, 113 at 3.) But the issue here is not whether Evergreen made the correct  
22 decision. The issue is whether Evergreen made the decision in bad faith. The fact that the

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24 <sup>3</sup> Plaintiff also argues that Evergreen’s bad faith is evidenced by Dr. Lee’s presence at the *ad hoc*  
25 meeting. (Dkt. No. 111 at 19.) Yet, the meeting was also attended by numerous other doctors and  
26 physicians who were concerned enough with Plaintiff’s behavior that they recommended an  
investigation. (*See* Dkt. No. 87 at 9.) Consequently, Dr. Lee’s presence is, at most, weak  
evidence of bad faith.

1 decision might have been wrong is evidence of bad faith, but it is not strong enough evidence to  
2 warrant a preliminary injunction.

3           2.       Evergreen’s Actions Regarding the 2018 Cases

4           Plaintiff also offers the Court little concrete evidence to show that Evergreen acted in bad  
5 faith when it relied on the 2018 cases to suspend his privileges. When one reads the QPRC’s  
6 unanimous recommendation to not renew Plaintiff’s privileges, one is struck by the seriousness  
7 of the allegations contained therein. (*See* Dkt. No. 115-4 at 2–4.) Among other things, the QPRC  
8 alleges that Plaintiff engaged in practices that are unsupported by the literature; that he is  
9 “unwilling[] to adapt his practice to modern, accepted techniques”; that several of his cases in  
10 2018 deviated from the standard of care; and that he has serious issues collaborating with other  
11 Evergreen employees, including “ignoring, cancelling or superseding the judgments and orders  
12 of hospitalists and intensivists, even when the decision is clearly within their professional  
13 expertise (and not his).” (*Id.* at 4.) To rebut these allegations, Plaintiff offers conclusory  
14 statements with no supporting citations. The following excerpt from Plaintiff’s motion is  
15 illustrative:

16           The January 2019 termination was not reported to the NPDB only because the state  
17 court quickly enjoined it before it could reach 30 days. Dkt. No. 20-12. That  
18 termination—the first of any credentialed provider at Evergreen in at least a dozen  
19 years—was based explicitly on absurd pretextual concerns such as [Plaintiff’s]  
20 “optimistic” prognoses (which, as Dr. O’Callaghan has since acknowledged, have  
21 often been correct), his willingness to “contradict” other clinicians, and cases with  
22 excellent clinical outcomes and highly satisfied patients. Then, in October 2019,  
23 the QPRC again recommended termination of [Plaintiff’s] privileges based on the  
24 CAP cases—which, again, involved only positive clinical outcomes. Naini Decl.,  
25 Ex. 3.

26 (Dkt. No. 111 at 20.) This type of argument does not show that a jury will likely conclude that  
the QPRC’s and MEC’s decisions were nothing more than a sham. The Court therefore declines  
to grant Plaintiff the “extraordinary remedy” that is a temporary restraining order.

**III. CONCLUSION**

For the foregoing reasons, the Court DENIES Plaintiff’s motion for a temporary

1 restraining order (Dkt. No. 111).

2 DATED this 20th day of December 2019.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE