

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Irfan M Mirza, et al.,

10 Plaintiffs,

11 v.

12 Bullhead City Hospital Corporation, et al.,

13 Defendants.
14

No. CV-20-08148-PCT-DJH

ORDER

15 Pending before the Court are four Motions to Dismiss Plaintiffs' First Amended
16 Complaint ("FAC") (Docs. 47; 50; 51; 52). Plaintiffs have filed Responses to each Motion
17 (Docs. 60; 61; 62; 63), and the corresponding Defendants have filed their Replies (Docs.
18 64; 65; 66; 67). The Motions are fully briefed.¹ For the following reasons, the Court will
19 grant Defendants' Motions (Docs. 50; 51; 52), except for Defendant Bullhead City Hospital
20 Corporation dba Western Arizona Regional Medical Center's ("WARMC") Motion (Doc.
21 47), which the Court will grant in part and deny in part.

22 ///

23 _____
24 ¹ One of the Motions requested oral argument on this matter (Doc. 51). The request is
25 denied. The matter is fully briefed, and oral argument will not aid the Court's decision.
See Fed. R. Civ. P. 78(b) (stating that a court may decide motions without oral hearings);
LRCiv 7.2(f) (same).

26 Defendant Bullhead City Hospital Corporation dba Western Arizona Regional Medical
27 Center also filed a Motion to Seal Documents (Doc. 48) to support its Motion to Dismiss
28 (Doc. 47). Plaintiffs have not filed any response in opposition. However, the Motion to
Seal (Doc. 48) will be denied as moot because the documents are not necessary for the
Court to make its decision.

1 **I. Background**

2 The following background comes from the FAC’s factual allegations, which the
3 Court must assume are true at this motion to dismiss phase. *See Lee v. City of L.A.*, 250
4 F.3d 668, 679 (9th Cir. 2001).

5 The FAC alleges that over the years Plaintiffs Dr. Irfan Mirza and his business, Vista
6 Health, had “built a successful and thriving” cardiology practice in and around Bullhead
7 City, Arizona. (Doc. 41 at ¶¶ 2, 10–11). Part of Dr. Mirza’s practice entailed Privileges
8 to work as a medical staff member at WARMC (the FAC capitalizes “Privileges” when
9 referring to those that relate to WARMC). (*Id.* at ¶ 10). Dr. Mirza also heled privileges at
10 another nearby hospital, Valley View Medical Center (“VVMC”), which is not a party to
11 this action. (*Id.* at ¶ 61).

12 According to the FAC, Dr. Mirza’s practice was doing so well that WARMC’s Chief
13 Executive Officer, had offered to purchase the practice in May 2018. (*Id.* at ¶ 70). Around
14 the same time, Defendants, consisting of WARMC and several doctors who make up
15 members of WARMC committees and its Board of Trustees, allegedly experienced “a
16 sharp decline in the number of patients they were seeing,” so they “launched a relentless
17 campaign of manufacturing vague, unsupported anonymous complaints and accus[ed] Dr.
18 Mirza of being incompetent and of having bipolar disorder, to not only destroy his
19 reputation in the community, but to oust him from the [Bullhead City] area.” (*Id.* at ¶ 3).

20 In the midst of this “campaign” Dr. Mirza had several challenges with the hospitals
21 at which he worked. He “asserted that the care provided by certain medical staff members
22 at WARMC and VVMC posed a severe and unacceptable risk to patient safety.” (*Id.* at ¶
23 67). In addition to these whistleblower claims, Dr. Mirza shared call coverage at VVMC
24 with a former “resentful” colleague, Defendant Dr. Mohamed Ahmed, whom Dr. Mirza
25 had previously reported to state and federal authorities for inappropriately prescribing
26 medications. (*Id.* at ¶¶ 55, 63).

27 While the FAC makes clear that Dr. Mirza had issues with VVMC, it also alludes
28 to issues VVMC had with Dr. Mirza. For example, on November 14, 2018, Dr. Mirza and

1 VVMC “resolved their issues through a confidential settlement agreement.” (*Id.* at ¶ 76).
2 The FAC implies that Dr. Mirza’s privileges at VVMC were modified. (*See id.* at ¶¶ 77,
3 81–82) (“A limitation on or revocation of Privileges has been equated to a restriction on a
4 physician’s license to practice medicine, as his or her ability to practice medicine is
5 materially limited as a result.”). In addition, after his agreement with VVMC, in October
6 2018, Dr. Mirza voluntarily underwent a behavioral health assessment by a psychiatrist “to
7 refute certain behavioral allegations made by VVMC.” (*Id.* at ¶ 79). The resulting report
8 found “no DSM-5 psychiatrist diagnoses No evidence of substance abuse [and] No
9 concern for clinician impairment, disruptive behavior, or burnout.” (*Id.* at ¶ 80).

10 After learning of the issues at VVMC, WARMC’s Chief of Staff, Defendant Dr.
11 Waheed Zehri, requested that the hospital’s Medical Executive Committee (“MEC”)
12 conduct a peer review of Dr. Mirza. (*Id.* at ¶ 77). Dr. Zehri had “asserted that information
13 was received that Dr. Mirza had been summarily suspended at VVMC, and [he] falsely
14 claimed that Dr. Mirza had ‘engaged in inappropriate conduct that undermines a culture of
15 safety, and has issues identified regarding documentation, supervision of personnel, and
16 other clinical concerns.’” (*Id.* at ¶ 77).

17 On November 2, 2018, “the MEC summarily suspended Dr. Mirza’s interventional
18 cardiology privileges allegedly due to the care of a patient on September 8, 2018 plus ‘other
19 [unspecified] clinical, compliance, and behavioral related concerns.’” (*Id.* at ¶ 86) (this
20 quote’s edits are as written in the FAC). Four days later, the MEC suspended all of Dr.
21 Mirza’s Privileges “allegedly based upon his care of this aforementioned patient and the
22 revocation of his [p]rivileges at VVMC.” (*Id.* at ¶ 87). The FAC alleges that, to the
23 contrary, Dr. Mirza’s VVMC privileges were never fully revoked. (*Id.* at ¶ 88).
24 Furthermore, the FAC alleges “the MEC’s allegations were just a pretense in furtherance
25 of the plan to remove Dr. Mirza from the [Bullhead City] area.” (*Id.* at ¶ 89). Dr. Mirza
26 was also concerned that “WARMC’s peer review process was in retaliation for the patient
27 safety issues he had raised.” (*Id.* at ¶ 78).

28 Like VVMC, WARMC also presented Dr. Mirza with a confidential agreement

1 (“WARMC Agreement”), which Dr. Mirza signed on November 27, 2018, less than two
2 weeks after Dr. Mirza signed the other agreement with VVMC. (*Id.* at ¶¶ 76, 115). The
3 WARMC Agreement allowed Dr. Mirza to resume work at WARMC. (*Id.* at ¶ 95).

4 In June 2019, WARMC sent Dr. Mirza a Notice of Investigation, a process of peer
5 review, regarding three of his patients’ cases. (*Id.* at ¶ 135). One of the MEC members,
6 Defendant Dr. Ihtisham Choudhry, claimed that Dr. Mirza suffered from bipolar disorder,
7 which prompted a “Wellness Committee” to investigate the MEC’s “wellness related
8 concerns.” (*Id.* ¶¶ 140–41). After meeting with Dr. Mirza, the Wellness Committee
9 “identified concerns regarding [Dr. Mirza’s] mental health and wellbeing.” (*Id.* at ¶ 150).
10 The Wellness Committee claimed that Dr. Mirza potentially had bipolar disorder, even
11 though none of those on the Committee had degrees in psychology or psychiatry. (*Id.* at
12 ¶¶ 143, 152). The Committee recommend Dr. Mirza take a one-year leave of absence “to
13 undergo psychiatric care.” (*Id.* at ¶ 4). Dr. Mirza refused this recommendation. (*Id.* at ¶
14 173).

15 In July 2019, the MEC met and suspended Dr. Mirza’s medical staff membership
16 and clinical Privileges for the second time. (*Id.* at ¶ 165). In August 2019, the MEC fully
17 revoked Dr. Mirza’s Privileges “based upon alleged violations of the WARMC Agreement
18 and his care of what had suddenly become five patients, as well as his refusal to follow the
19 Wellness Committee’s [leave of absence] recommendation.” (*Id.* at ¶ 173). The FAC
20 alleges that the MEC took this action because of Dr. Mirza’s perceived mental illness. (*Id.*
21 at ¶ 169). The FAC also alleges the MEC’s actions were taken “with the goal of eliminating
22 a key competitor in order to monopolize the interventional cardiology market” (*Id.* at
23 ¶ 180).

24 After the MEC’s peer review, a “Fair Hearing Committee” recommended that
25 WARMC reinstate Dr. Mirza, but the MEC rejected this recommendation. (*Id.* at ¶ 192).
26 Dr. Mirza also appealed to the WARMC Board of Trustees, which affirmed the MEC’s
27 decision. (*Id.* at ¶¶ 193–94). The Board “formally unanimously revoked Dr. Mirza’s
28 Privileges on February 10, 2020.” (*Id.* at ¶ 197).

1 Plaintiffs bring fourteen claims against Defendants, WARMC, the MEC and its
2 members, as well as the members of WARMC's Board of Trustees. (*Id.* at ¶¶ 201–347).

3 They are as follows:

- 4 1. Violation of § 504 of the Rehabilitation Act of 1973 against WARMC. (*Id.* at
5 ¶¶ 201–17).
- 6 2. Fraudulent inducement to execute the WARMC Agreement against WARMC
7 and Dr. Richard Cardone. (*Id.* at ¶¶ 218–27).
- 8 3. Fraudulent inducement for Dr. Mirza to return to WARMC against WARMC,
9 Dr. Richard Cardone, Dr. Ihtisham Choudhry, and Dr. Malik Rahim. (*Id.* at ¶¶
10 228–37).
- 11 4. Tortious interference with prospective economic advantage against WARMC.
12 (*Id.* at ¶¶ 238–47).
- 13 5. Civil conspiracy to tortiously interfere with prospective economic advantage
14 against the MEC and each MEC member in their individual capacity. (*Id.* at ¶¶
15 248–59).
- 16 6. Civil conspiracy to tortiously interfere with prospective economic advantage
17 against each member of the WARMC Board of Trustees in their individual
18 capacity. (*Id.* at ¶¶ 260–71).
- 19 7. Civil conspiracy to tortiously interfere with prospective economic advantage
20 against Dr. Richard Cardone, Dr. Ihtisham Choudhry, and Dr. Howard Morris.
21 (*Id.* at ¶¶ 272–84).
- 22 8. Civil Conspiracy to tortiously interfere with prospective economic advantage
23 against Dr. Malik Rahim, Dr. Waheed Zehri, and Dr. Ihtisham Choudhry. (*Id.*
24 at ¶¶ 285–97).
- 25 9. Breach of contract regarding WARMC's Medical Staff Bylaws against
26 WARMC, each member of the WARMC Board of Trustees in their individual
27 capacity, the MEC, and each MEC member in their individual capacity. (*Id.* at
28 ¶¶ 298–306).

- 1 10. Breach of the implied covenant of good faith and fair dealing regarding
2 WARMC’s Medical Staff Bylaws against WARMC, each member of the
3 WARMC Board of Trustees in their individual capacity, the MEC, and each
4 MEC member in their individual capacity. (*Id.* at ¶¶ 307–14).
- 5 11. Breach of Contract Regarding the WARMC Agreement against WARMC, each
6 member of the Board of Trustees in their individual capacity, the MEC, and each
7 MEC member in their individual capacity. (*Id.* at ¶¶ 315–22).
- 8 12. Breach of the Implied Covenant of Good Faith and Fair Dealing Regarding the
9 WARMC Agreement against WARMC, each member of the Board of Trustees
10 in their individual capacity, the MEC, and each MEC member in their individual
11 capacity. (*Id.* at ¶¶ 323–30).
- 12 13. This claim requests injunctive relief in the form of reinstating Dr. Mirza’s
13 privileges and “requiring WARMC to withdraw and/or void the adverse action
14 report(s) regarding the suspension and revocation of Dr. Mirza Privileges
15 previously filed with National Practitioners Data Bank.” (*Id.* at ¶¶ 331–37).
- 16 14. Violation of the Arizona Civil Rights Act against WARMC. (*Id.* at ¶¶ 338–47).

17 In addition to the claim for injunctive relief, Dr. Mirza seeks an award of exemplary
18 and punitive damages. (*Id.* at 42).

19 **II. Legal Standard**

20 Complaints must make a short and plain statement showing that the pleader is
21 entitled to relief for its claims. Fed. R. Civ. P. 8(a)(2). There must be factual allegations
22 from which a court may reasonably infer that a defendant has acted unlawfully. *Ashcroft*
23 *v. Iqbal*, 556 U.S. 662, 678 (2009). Simply presenting “[t]hreadbare recitals of the
24 elements of a cause of action, supported by mere conclusory statements,” does not suffice
25 to state a claim. *Id.*

26 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim.
27 *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Dismissal of a complaint for failure
28 to state a claim can be based on either the “lack of a cognizable legal theory or the absence

1 of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
2 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

3 In reviewing a motion to dismiss, “all factual allegations set forth in the complaint
4 ‘are taken as true and construed in the light most favorable to the plaintiffs.’” *Lee*, 250
5 F.3d at 679 (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996)).
6 But courts are not required “to accept as true a legal conclusion couched as a factual
7 allegation.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan*
8 *v. Allain*, 478 U.S. 265, 286 (1986)).

9 **III. Analysis**

10 To begin, Plaintiffs agreed to dismiss their Arizona Civil Rights Act claim, (Doc.
11 60 at 17), after WARMC noted that Plaintiffs have not filed a charge against WARMC
12 with Arizona’s Civil Rights Division. (Doc. 47 at 18). With that claim dismissed, the
13 Court will evaluate the § 504 Rehabilitation Act claim and then turn to the several tort and
14 contract claims.

15 *a. § 504 of Rehabilitation Act of 1973*

16 The Rehabilitation Act of 1973 aims to “promote and expand employment
17 opportunities in the public and private sectors for handicapped individuals and place such
18 individuals in employment.” 29 U.S.C. § 701(8). An individual may bring a claim under
19 § 504 of the Act by showing: “(1) he is an individual with a disability; (2) he is otherwise
20 qualified to receive the benefit; (3) he was denied the benefits of the program solely by
21 reason of his disability; and (4) the program receives federal financial assistance.” *Duvall*
22 *v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001), *as amended on denial of reh’g*
23 (Oct. 11, 2001); *see also* 29 U.S.C. § 794(a). WARMC argues the FAC fails to show the
24 second and third elements. (Doc. 47 at 4–6).

25 *i. Otherwise Qualified*

26 WARMC argues that the FAC admits Dr. Mirza’s Privileges were revoked because
27 of “his poor patient care, failure to provide continuous care, and falsification of medical
28 records,” showing that Dr. Mirza was not otherwise qualified to remain on staff. (*Id.* at 6).

1 But the FAC alleges other facts from which the Court can infer that those reasons offered
2 by WARMC were a pretext. For example, the FAC alleges that Dr. Mirza performed well
3 as a doctor and that his Privileges were revoked because of a perceived mental illness and
4 for fear that Dr. Mirza’s practice would be too competitive. (*See* Doc. 41 at ¶¶ 1, 66, 167–
5 70, 180). WARMC also implies in its briefing that it revoked Dr. Mirza’s Privileges
6 because he actually had bipolar disorder. (Doc. 47 at 6) (“[B]ipolar disorder has long been
7 recognized as a condition that can pose a direct threat to the health and safety of patients.”).
8 But the alleged psychiatric reports allow the Court to infer that he did not suffer from
9 bipolar disorder. (*See* Doc. 41 at ¶¶ 80, 177). Overall, the FAC presents sufficient
10 allegations to show Dr. Mirza was otherwise qualified for his position. *See Iqbal*, 556 U.S.
11 at 678 (noting that courts must look for sufficient facts in a complaint by which they may
12 infer culpable conduct at the motion to dismiss phase).

13 *ii. Solely by Reason of Disability*

14 WARMC argues that the FAC shows Dr. Mirza’s perceived disability was not the
15 sole reason his privileges were revoked. (Doc. 47 at 4). For support, WARMC points to
16 allegations in the FAC discussing how Defendants complained of patient care issues and
17 Dr. Mirza’s non-compliance with the WARMC Agreement. (*Id.*) (citing Doc. 41 at ¶ 173).
18 Again, the Court may infer that these stated reasons were just a pretext for revoking Dr.
19 Mirza’s Privileges because of a perceived disability. (*See* Doc. 41 at ¶ 180). That being
20 said, allegations of pretext do not defeat the core of WARMC’s argument because the FAC
21 clearly alleges Defendants acted “*with the goal of eliminating a key competitor* in order to
22 monopolize the interventional cardiology market” (*Id.*) (emphasis added). The FAC
23 plainly alleges that “Defendants collaborated, conspired, and engaged in a concerted effort
24 to ruin Dr. Mirza’s reputation and thriving medical practice and drive him from the Western
25 Arizona cardiology and internal medicine market.” (*Id.* at ¶ 1). Given the allegations that
26 Defendants were motivated by business reasons, it seems the FAC shows Defendants had
27 mixed motives, or that the mental health issues raised by Defendants were also a pretext.

28 There is limited caselaw supporting the proposition that when a complaint shows a

1 defendant had mixed motives, a court may dismiss § 504 claims for failing to show the
2 defendant was solely motivated by reason of disability. *See Ward v. Kaiser Found. Hosp.*,
3 2006 WL 2529479, at *4 (N.D. Cal. Aug. 31, 2006) (suggesting that dismissing a § 504
4 claim may be appropriate when a complaint demonstrates mixed motives); *Lewin v. Med.*
5 *Coll. of Hampton Rds.*, 910 F. Supp. 1161, 1172 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th
6 Cir. 1997) (dismissing a § 504 claim after a plaintiff admitted that defendants had mixed
7 motives). However, the Court is not convinced that it may dismiss the § 504 claim in this
8 instance.

9 To be clear, Plaintiffs make contradictory arguments. They argue in their briefing
10 that Defendants’ “true motive[.]” for firing Dr. Mirza was his perceived disability. (Doc.
11 60 at 7). There are sufficient allegations in the FAC to support this position. (*See* Doc. 41
12 at ¶¶ 167–70, 201–217). And yet the FAC argues with equal fervor that Defendants were
13 motivated by business reasons to remove Dr. Mirza from their area of practice. (*Id.* at ¶¶
14 1–4, 180). But a contradictory position is not necessarily fatal to a complaint.

15 Federal Rule of Civil Procedure 8(d) allows a party to make inconsistent statements
16 of fact in its pleadings. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 918 n.10 (9th Cir. 2012);
17 *Molsbergen v. United States*, 757 F.2d 1016, 1018–19 (9th Cir. 1985); Charles A. Wright
18 & Arthur R. Miller, *Fed. Prac. & Proc.*, § 1283 (3rd ed., Supp. 2011). If any one of a
19 party’s alternative pleadings is sufficient, then they all are. Fed. R. Civ. P. 8(d)(2). In
20 addition, at this stage, the Court is required to view allegations in the light most favorable
21 to Plaintiffs. *See Lee*, 250 F.3d at 679. Given these pleading standards, the Court finds
22 that Plaintiffs have alleged sufficient facts to infer that Defendants revoked Dr. Mirza’s
23 Privileges solely by reason of a perceived disability, or, in the alternative, because they saw
24 him as a business threat. Therefore, at this juncture, the Court will not dismiss Plaintiffs’
25 § 504 claim.

26 *b. Immunity Relating to Review of Medical Practices*

27 The Court will now proceed to address the FAC’s tort and contract claims for
28 damages resulting from the peer review process. Defendants, WARMC and the individuals

1 who participated in the peer review process, collectively argue that Arizona statute bars the
2 FAC’s Second through Thirteenth claims. (Docs. 47 at 8; 50 at 2; 51 at 6; 52 at 4).

3 Arizona statute governs the medical peer review process. *See* A.R.S. § 36-445 *et*
4 *seq.* Within the statutory requirements for review are certain legal protections for hospitals
5 and those involved with the review process.

6 A. Any individual who, in connection with duties or functions of a hospital . . .
7 makes a decision or recommendation as a member . . . employee of the medical or
8 administrative staff of a hospital . . . is not subject to liability for civil damages or
9 legal action in consequence thereof.

10 B. No hospital . . . and no individual involved in carrying out review or disciplinary
11 duties or functions of a hospital . . . may be liable in damages to any person who is
12 denied the privilege to practice in a hospital The only legal action which may
13 be maintained by a licensed health care provider based on the performance or
14 nonperformance of such duties and functions is an action for injunctive relief
15 seeking to correct an erroneous decision or procedure.

16 A.R.S. § 36-445.02.

17 Plaintiffs present three arguments why their claims are not barred by A.R.S. § 36-
18 445.02. They argue that Defendants waived their statutory protections, that the statutory
19 protection is irrelevant because the claims arise from conduct outside of the peer review
20 process, and that the Arizona Constitution’s anti-abrogation clause permits their torts
21 claims. (Doc. 60 at 9–14).

22 *i. Waiver*

23 First, Plaintiffs argue that WARMC’s bylaws waive immunity in cases of malice,
24 bad faith, or fraud. (*Id.* at 9–10). Under Arizona law, some statutory immunities may be
25 waived when a party clearly intends to do so. *In re Estate of King*, 269 P.3d 1189, 1194
26 (Ariz. Ct. App. 2012). Plaintiffs point to sections of WARMC’s bylaws that waive general
27 liability in instances of malice. (*Id.*) (citing Doc. 47-1 at 32, 76).² But none of these

28 ² “I extend immunity to, and release from any and all liability, the Hospital, its authorized
representatives and any third parties, as defined in subsection (3) below, for any acts,
communications, recommendations or disclosures performed without intentional fraud or
malice involving me” (Doc. 47-1 at 32).

“No representative of the hospital . . . shall be liable to a practitioner . . . for damages or
other relief by reason of providing information . . . provided such disclosure or
representation is in good faith and without malice. (Doc. 47-1 at 76).

1 provisions appear to specifically address the peer review process. To the contrary, the
2 bylaws state that “[a]ll members of the Board, the Medical Staff and hospital personnel
3 assisting in Medical Staff peer review shall have immunity from any civil liability to the
4 fullest extent permitted by state and federal law” (*Id.* at 56). The fullest extent would
5 include A.R.S. § 36-445.02. Therefore, because it is not clear to the Court that the bylaws
6 intended to waive those protections, they do not.

7 *ii. Outside the Peer Review Process*

8 Plaintiffs argue that their claims are based on conduct outside of the peer review
9 process, such that A.R.S. § 36-445.02 does not apply. (Doc. 60 at 12). Specifically, they
10 argue that the FAC’s fraud claims involve conduct that occurred “before peer review
11 immunity would have attached.” (Doc. 60 at 13). Plaintiffs also claim that anything related
12 to the “Wellness Committee and its activities is not part of the peer review process.” (Doc.
13 60 at 13).

14 Plaintiffs cite *Humana Hospital Desert Valley v. Superior Court of Arizona*, 742
15 P.2d 1382, 1386 (Ariz. Ct. App. 1987), and *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir.
16 1999), for the proposition that, as they say, “[i]f a cause of action is derived by conduct
17 that was not part of the peer review process, then no immunity attaches.” (Doc. 60 at 13).
18 The Court notes that *Humana* dealt with the issue of whether information outside a peer
19 review process was admissible, which is not at issue here. 742 P.2d at 1386. Likewise,
20 *Mishler* dealt with the scope of immunity for the *Nevada* Board of Medical Examiners and
21 it is not relevant, either. 191 F.3d at 1007. Of importance is the fact that the main injury
22 in the FAC’s fraud claims was caused by the revocation of Dr. Mirza’s Privileges. (Doc.
23 41 at ¶¶ 224, 234). In fact, all the injuries Plaintiffs claim are plainly the “consequence”
24 of the peer review process. *See* A.R.S. § 36-445.02(A). And it may be that the Wellness

25 _____
26 “The representatives of the hospital, including its Board, CEO, administrative employees
27 and Medical Staff shall not be liable to a practitioner or AHP for damages or other relief
28 for any action taken or statement of recommendation made within the scope of such
representative’s duties, if such representative acts in good faith and without malice after a
reasonable effort to ascertain the facts and in a reasonable belief that the action, statement
or recommendation is warranted by such facts.” (*Id.*)

1 Committee acted outside of this process by finding that Dr. Mirza potentially had bipolar
2 disorder and recommending a leave of absence, but the FAC fails to show what culpable
3 conduct that Committee engaged in, as it was the MEC that began the process of revoking
4 Dr. Mirza’s Privileges. (See Doc. 41 at ¶ 153). Overall, the FAC’s tort and contract claims
5 plainly relate to the consequences of the peer review process. Therefore, those claims fall
6 within the scope of A.R.S. § 36-445.02.

7 *i. Anti-Abrogation Clause*

8 Finally, Plaintiffs argue the Arizona Constitution’s anti-abrogation clause renders
9 A.R.S. § 36-445.02 invalid, thereby permitting Plaintiffs’ claims. (Doc. 60 at 11).
10 Plaintiffs do not say so explicitly, but if the Court were to accept Plaintiffs’ argument, it
11 would necessarily find that an Arizona statute was invalid under Arizona’s Constitution.
12 Generally, Arizona courts presume a statute’s constitutionality, and a party challenging a
13 statute must convince the court beyond a reasonable doubt before the court may declare
14 the statute unconstitutional. *Hall v. A.N.R. Freight Sys., Inc.*, 717 P.2d 434, 437 (Ariz.
15 1986).

16 The anti-abrogation clause states that “[t]he right of action to recover damages for
17 injuries shall never be abrogated, and the amount recovered shall not be subject to any
18 statutory limitation” Ariz. Const. art. XVIII, § 6. “This provision serves the purpose
19 of protecting the fundamental right to recover money damages pursuant to recognized
20 common law tort causes of action.” *Goodman v. Samaritan Health Sys.*, 990 P.2d 1061,
21 1065 (Ariz. Ct. App. 1999). Plaintiffs argue A.R.S. § 36-445.02 violates the anti-
22 abrogation clause because the statute abrogates their right to recover damages from
23 Defendants’ activities. (Doc. 60 at 11).

24 This is not the first challenge to A.R.S. § 36-445.02 under the anti-abrogation
25 clause. In *Samaritan Health Sys. v. Superior Court of State of Arizona*, the Arizona Court
26 of Appeals held that A.R.S. § 36-445.02 barred a party’s breach of contract claims against
27 a hospital because “application of the anti-abrogation clause does not extend to common
28 law contract claims.” 981 P.2d 584, 594 (Ariz. Ct. App. 1998). Plaintiffs concede this

1 point. (Doc. 60 at 12). Therefore, the Court finds that claims Nine through Twelve in the
2 FAC are barred by A.R.S. § 36-445.02.

3 Plaintiffs maintain that the FAC’s remaining tort claims, which are for fraud,
4 tortious interference with prospective economic advantage, and civil conspiracy to
5 tortiously interfere with prospective economic advantage, are still permissible because of
6 the anti-abrogation clause. (*Id.*)

7 On this issue, the analysis in *Goodman v. Samaritan Health System* is instructive.
8 990 P.2d 1061. There, a physician sued a hospital alleging negligent peer review and
9 malicious prosecution after being denied staff privileges. *Id.* at 1064. The physician, like
10 Dr. Mirza, argued that the anti-abrogation clause allowed his tort claims, despite A.R.S. §
11 36-445.02. *Id.* at 1065. The court began its analysis by noting the anti-abrogation clause
12 “operates to preclude the legislature from abolishing a common law right of action for
13 money damages that either existed as of statehood or judicially evolved into existence
14 thereafter.” *Id.* (citing *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625, 628–29 (Ariz.
15 1993)). The court then reviewed the history of medical peer review. *Id.*

16 In Arizona, statutorily mandated peer review did not exist until 1971. *Id.* at 1066.
17 Before then, local medical societies had their own private process of review, and a
18 physician could only seek an injunction to be reinstated if the physician claimed to be
19 wrongly expelled from the society. *Id.* at 1067 (citing *Blende v. Maricopa Cnty. Med.*
20 *Soc’y*, 393 P.2d 926, 929–30 (Ariz. 1964)). Courts of that period hesitated to become more
21 involved than was necessary in the private affairs of medical societies. *Id.* Once this
22 process was formalized in statute, the legislature amended the law in 1984 “to remove any
23 liability for any legal consequence, including money damages, for any individual or
24 hospital involved in peer review activities, except for injunctive relief for an erroneous
25 decision or procedure occurring during the process.” *Id.* at 1066. After recounting this
26 history, the *Goodman* court found that, “in connection with malicious or negligent peer
27 review as alleged by Goodman, we conclude that prior to 1971, no common law right of
28 action for damages existed in Arizona.” *Id.* at 1067.

1 Plaintiffs argue that *Goodman*'s ruling is narrow, that the court only decided the
2 specific torts of negligent peer review and malicious prosecution were barred by A.R.S. §
3 36-445.02. (Doc. 60 at 12). Therefore, Plaintiffs argue, *Goodman* poses no obstacle to
4 their different tort claims for fraud, tortious interference with prospective economic
5 advantage, and civil conspiracy to tortiously interfere with prospective economic
6 advantage. (*Id.*) This Court is not persuaded.

7 The *Goodman* court did note that if the physician had brought a defamation claim
8 against an individual peer reviewer, the analysis might have been different. 990 P.2d at
9 1068 n.9. But there are no such defamation claims brought against individuals in this case.
10 All the claims are rooted in in the allegedly "malicious" peer review process that revoked
11 Dr. Mirza's Privileges. (Doc. 41 at ¶¶ 227, 237). Furthermore, the *Goodman* court found
12 that to determine what rights of action existed under common law, the focus of its analysis
13 was "the context out of which the claim arises," not the exact name of the tort alleged. *Id.*
14 at 1065–66 ("It is not enough, as [plaintiff] attempts here, to append to the asserted claim
15 a name derived from the catalogue of common law actions. Rather, the context out of
16 which the claim arises must be examined to determine whether it supports a conclusion
17 that it implicates a right of action recognized by the common law.").

18 The context for the *Goodman* court's inquiry was "that of peer review of a health
19 care provider that determines the provider's entitlement to work in a hospital setting." *Id.*
20 at 1066. While Plaintiffs may label their tort claims differently than the plaintiff in
21 *Goodman*, the damages claims' context is still an alleged harm arising from the peer review
22 process. The Court sees no reason why applying the *Goodman* court's analysis would
23 produce a different result in this instance simply because Plaintiffs "append" a different
24 tort to their claim than the plaintiff in *Goodman*. *See id.* "[W]ith respect to peer review in
25 connection with admittance to a hospital staff, no common law right of action for money
26 damages either existed or would have been recognized in Arizona before 1971." *Id.* at
27 1068. Because there was no such common law right of action for damages, the protections
28 offered by A.R.S. § 36-445.02 do not violate the anti-abrogation clause. *Id.* at 1067

1 (emphasis added).

2 This position is further bolstered by the policy considerations described in
3 *Goodman*. The aim of statutory peer review is “reducing morbidity and mortality and for
4 the improvement of the care of patients provided in the institution.” A.R.S. § 36-445.

5 That these are worthy goals cannot be gainsaid. However, militating against
6 effective peer review is the fact that it “is not only time consuming, unpaid
7 work, it is also likely to generate bad feelings and result in unpopularity. If
8 lawsuits by unhappy reviewees can easily follow any decision . . . then the
peer review demanded by A.R.S. § 36-445 will become an empty formality,
if undertaken at all.”

9 *Goodman*, 990 P.2d at 1068 (quoting *Scappatura v. Baptist Hosp. of Phx.*, 584 P.2d 1195,
10 1201 (Ariz. Ct. App. 1978)). Overall, Plaintiffs fail to persuade the Court beyond a
11 reasonable doubt that the anti-abrogation clause precludes the protections offered by
12 A.R.S. § 36-445.02. *See Hall*, 717 P.2d at 437. Therefore, the Court continues to presume
13 the statute’s constitutionally. *See id.* Claims Two through Twelve will be dismissed as
14 statutorily barred.

15 **IV. Conclusion**

16 To the extent that the FAC has pleaded facts in the alternative, the Court denies
17 Defendants’ request to dismiss the § 504 Rehabilitation Act claim against WARMC. The
18 Court will dismiss claims Two through Twelve as they are barred by A.R.S. § 36-445.02,
19 and it will dismiss the Fourteenth claim, which Plaintiffs have voluntarily dismissed. Only
20 the § 504 claim and the request for injunctive relief remain. As the claim for injunctive
21 relief requests action by WARMC alone, (Doc. 41 at ¶ 333), the Court will dismiss all other
22 Defendants.

23 Accordingly,

24 **IT IS HEREBY ORDERED** that Motions to Dismiss (Docs. 50; 51; 52) are
25 **granted**. Defendant Bullhead City Hospital Corporation dba Western Arizona Regional
26 Medical Center’s Motion to Dismiss (Doc. 47) is **granted** in part and **denied** in part as set
27 forth in this Order. The Court will dismiss all but the First and Thirteenth claims in the
28 First Amended Complaint (Doc. 41). The Court will also dismiss all parties except for


1 Defendant Bullhead City Hospital Corporation dba Western Arizona Regional Medical
2 Center.

3 **IT IS FURTHER ORDERED** that Defendant Bullhead City Hospital Corporation
4 dba Western Arizona Regional Medical Center's Motion to Seal (Doc. 48) is **denied** as
5 moot.

6 **IT IS FURTHER ORDERED** resetting the Rule 16 Scheduling Conference for
7 June 1, 2021, at 10:30 a.m. The remainder of the Court's Order at Doc. 16 is otherwise
8 **AFFIRMED.**

9 Dated this 26th day of April, 2021.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


Honorable Diane J. Humetewa
United States District Judge