

FILED

DEC 23 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31858-3-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

VENKATARAMAN SAMBASIVAN,
an individual,
Appellant,

vs.

KADLEC MEDICAL CENTER,
a corporation,
Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
<u>INTRODUCTION</u>	1
<u>ARGUMENT IN REPLY</u>	3
I. APPLYING CONTROLLING AUTHORITY TO THE FACTS OF THIS CASE SHOWS THAT DR. SAMBASIVAN HAS ESTABLISHED THE CONTRACTUAL PREDICATE FOR HIS FEDERAL RETALIATION CLAIM.	3
II. APPLYING THE BROAD PROTECTIONS OF THE WASHINGTON LAW AGAINST DISCRIMINATION (WLAD) TO THE FACTS OF THIS CASE SHOWS THAT DR. SAMBASIVAN HAS A CAUSE OF ACTION AGAINST KADLEC FOR ITS RETALIATION AGAINST HIM AS AN INDEPENDENT CONTRACTOR.	9
III. WHERE, AS HERE, KADLEC COULD HAVE RAISED THE CONTRACTUAL PREDICATE DEFENSE IN THE PRIOR APPEAL, BUT DID NOT, THE LAW OF THE CASE NOW PRECLUDES THAT DEFENSE.	12
<u>CONCLUSION</u>	14

APPENDIX

Initial Complaint for Damages, CP 3-11 of record on prior appeal (No. 30657-7-III)

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>CBOCS West, Inc. v. Humphries</i> , 553 U.S. 442 (2008)	3,4
<i>Columbia Steel Co. v. State</i> , 34 Wn. 2d 700, 209 P. 2d 482 (1949)	14
<i>Domino's Pizza, Inc. v. McDonald</i> , 546 U.S. 470 (2006)	5
<i>Greene v. Rothschild</i> , 68 Wn. 2d 1, 414 P.2d 1013 (1966)	14
<i>Marquis v. Spokane</i> , 130 Wn. 2d 97, 922 P. 2d 43 (1996)	9,10
<i>Miller v. Sisters of St. Francis</i> , 5 Wn. 2d 204, 105 P. 2d 32 (1940)	14
<u>Statutes</u>	<u>Page</u>
42 USC 1981	1,2,3,4,5,6
RCW 49.60.030(1)	9
RCW 49.60.210	10

INTRODUCTION

After noticing that he was treated disparately vis-à-vis other interventional cardiologists, Dr. Sambasivan sued Kadlec for discrimination on the basis of race and national origin. Kadlec then retaliated against Dr. Sambasivan for his discrimination suit by retroactively applying new credentialing requirements for interventional cardiologists. This action was contrary to the Medical Executive Committee's recommendation. In addition to an absence of medical justification, according to Christopher Ravage, M.D. (chair of Kadlec's cardiology department), Kadlec's action was unprecedented and unfair.(CP 395) As a consequence of losing his privileges in interventional cardiology, Dr. Sambasivan suffered economic damages greater than \$1.9 million.(CP 113)

Dr. Sambasivan replaced his discrimination claim with a claim of retaliation under 42 USC 1981, and the Washington Law Against Discrimination.

All but one of Dr. Sambasivan's claims were summarily dismissed by the trial court. His claim of unjust enrichment arising from Kadlec's refusal to pay him for call service, unlike all the other Kadlec interventional cardiologists, was tried and Dr. Sambasivan prevailed. On appeal to this Court, the judgment for Dr. Sambasivan was affirmed; the dismissal of the retaliation claim was reversed and remanded for trial.

On remand, Kadlec sought and obtained another summary dismissal of Dr. Sambasivan's retaliation claim. Kadlec's effort to avert trial on the merits misconceives retaliation law and mischaracterizes the record in both the prior and the instant appeals. Demystification of Kadlec's position reveals that Dr. Sambasivan has established all legal elements of his federal retaliation claim, including the contractual predicate. That Kadlec's medical staff bylaws have not been recognized as an enforceable contract avails Kadlec nothing. As the defendant in a claim under 42 USC 1981, Kadlec is not entitled to prevail by seizing from several economic relationships only one that may lack contractual force. As the record shows, Kadlec's retaliation deprived Dr. Sambasivan of the benefits of contractual relationships in addition to and other than that embodied in the medical staff bylaws.

Dr. Sambasivan has proven a prima facie case of retaliation under the WLAD. This Court has so held.(CP 395) Contrary to Kadlec's assertion, Dr. Sambasivan, as an independent contractor, has a cause of action. The contractual predicate element of 42 USC 1981 is not a requirement of the WLAD. Finally, as Kadlec failed to raise issues it now presents, when it could have done in the prior appeal, it should be precluded by the law of the case from raising them now.

ARGUMENT IN REPLY

I. APPLYING CONTROLLING AUTHORITY TO THE
FACTS OF THIS CASE SHOWS THAT DR. SAMBA-
SIVAN HAS ESTABLISHED THE CONTRACTUAL
PREDICATE FOR HIS FEDERAL RETALIATION CLAIM.

As noted by Dr. Christopher Ravage, chair of Kadlec's cardiology department, Kadlec's retroactive application of volume requirements to Dr. Sambasivan was "unprecedented, unfair to the doctor, and not medically necessary." (CP 395) Therefore, this Court held:

Viewing these facts in a light most favorable to the doctor, they establish a prima facie case of retaliation--because the doctor filed a discrimination lawsuit, the hospital revoked his privileges.
(CP 395)

By taking away Dr. Sambasivan's privileges in retaliation for his discrimination lawsuit, Kadlec violated his right "to make and enforce contracts," contrary to 42 USC 1981.

Claims of retaliation are cognizable under the federal civil rights statute codified as 42 USC 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). *CBOCS* does not require one who brings a retaliation claim under 42 USC 1981 to prove that he or she suffered an impaired

contractual opportunity or relationship. Rather, *CBOCS* makes a retaliation claim available to anyone who suffers adverse action as a result of supporting another's 1981 claim. The plaintiff in a 1981 retaliation case must prove that someone, not necessarily the plaintiff, who was supported by the plaintiff did have a good faith claim that a contractual relationship was impaired by the defendant. Therefore, Kadlec's contention that Dr. Sambasivan has a federal retaliation claim only if he can prove that he was party to an existing, enforceable contract, which contract must be Kadlec's medical staff bylaws, misses the mark.

To be eligible for relief under 42 USC 1981, a plaintiff need only show a lost opportunity to form a contractual relationship. Thus, as articulated by Justice Scalia:

Any claim brought under § 1981, therefore, must initially identify an impaired "contractual relationship," §1981(b), under which the plaintiff has rights. Such a contractual relationship need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts. We have made this clear in *Runyon v. McCreary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), which subjected defendants to liability under § 1981 when, for racially motivated reasons, they prevented individuals who "*sought to enter* into contractual relationships" from doing so, *id.* at 172, 96 S.Ct. 2586 (emphasis added). We have never retreated from what should be obvious from reading the text of the statute: Section 1981 offers relief when racial dis-

crimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) (footnote omitted)

In a retaliation setting, Justice Scalia's conceptual framework requires Dr. Sambasivan to show that he supported someone in bringing a 1981 claim concerning an impaired contractual relationship. Obviously, the person with that claim here is Dr. Sambasivan, himself.

In Dr. Sambasivan's initial discrimination claim, he alleged injury to contractual relationships. Specifically, in pleading that claim, Dr. Sambasivan realleged in paragraph 31 all prior allegations. (see complaint at CP 8 of prior record; a copy of the complaint is found in the appendix of this brief) Thus alleged was Kadlec's refusal to pay Dr. Sambasivan for providing call service to Kadlec patients.(CP 4 of prior record; paragraph 10 of initial complaint) Therefore, Dr. Sambasivan's initial race and national origin discrimination claim showed that Kadlec's discriminatory refusal to compensate him for providing call service implicated rights that are protected by 42 USC 1981.

That Dr. Sambasivan's initial discrimination claim established the contractual predicate required by 42 USC 1981 was amply proven at the

trial of his unjust enrichment claim. Findings of fact supporting Dr.

Sambasivan's judgment against Kadlec included:

When the plaintiff was placed on the on call list and began providing certain cardiological services in July, 2005, he was not offered a contract by the defendant. The plaintiff was not paid for providing his services. The plaintiff was treated unfairly.(Finding of Fact 32; CP 140)

In affirming Dr. Sambasivan's judgment, this Court noted:

. . . Dr. Sambasivan was providing call service for free while the other three specialists were being paid for their call service.(CP 399)

Thus, Kadlec was proven to have deprived Dr. Sambasivan of his contractual right to be fairly paid for his work.

By stripping Dr. Sambasivan of his privileges in retaliation for his initial discrimination claim, Kadlec violated 42 USC 1981. That initial discrimination claim was predicated on, *inter alia*, discriminatory refusal to pay Dr. Sambasivan for call service and discriminatory refusal to contract with Dr. Sambasivan for call service. Having shown the contractual predicate for a 1981 claim with respect to his initial discrimination claim, Dr. Sambasivan need not prove it anew with respect to his retaliation claim. Nonetheless, Kadlec's retaliation against Dr. Sambasivan deprived him of his rights under an existing contractual relationship, as well as proposed contractual relationships.

At the time Kadlec retaliated against Dr. Sambasivan, he had an existing contractual relationship with Kadlec. This existing contractual relationship was in the form of an Emergency Department Call Coverage Agreement Interventional Cardiology.(CP 424) Among other things, that agreement set forth compensation payable to Dr. Sambasivan for providing services in the specialty of interventional cardiology to the Kadlec emergency department, as an independent contractor.(CP 425, 426,427) By stripping Dr. Sambasivan of his privileges to practice interventional cardiology, Kadlec deprived him of the benefits flowing to him from that contract. Therefore, Dr. Sambasivan has proven again or re-established a contractual predicate for his federal retaliation claim under 42 USC 1981.

Not only did Kadlec's retaliation against Dr. Sambasivan deprive him of benefits under an existing contract, it also deprived him of a capacity to form beneficial contractual relationships with patients. Contrary to Kadlec's assertion, Dr. Sambasivan has identified patients who likely would have sought and received interventional cardiology services from him, but for Kadlec's retaliatory action against him in August, 2008.(CP 473-474) By depriving Dr. Sambasivan of his capacity to provide interventional cardiology services to prospective patients,

Kadlec violated 42 USC 1981 and caused Dr. Sambasivan substantial economic damages.(CP 113)

Kadlec's insistence that a hospital's medical staff bylaws have no contractual force avails it nothing. Dr. Sambasivan's federal retaliation claim does not depend on the contractual efficacy of medical staff bylaws. In the prior appeal, this Court declined to resolve that issue.(CP 389) It need not resolve it now. Yet, it should be noted that Kadlec's medical staff bylaws have contractual force in this case because they are a component of Dr. Sambasivan's Emergency Department Call Coverage Agreement Interventional Cardiology which incorporates them by reference.(CP 425) Dispositive authority is not to the contrary. Indeed, by Kadlec's own count, more jurisdictions recognize the contractual force of medical staff bylaws than reject that view. (Brief of Respondent, APPENDIX A-65, A-67, A-68)

II. APPLYING THE BROAD PROTECTIONS OF THE
WASHINGTON LAW AGAINST DISCRIMINATION
(WLAD) TO THE FACTS OF THIS CASE SHOWS THAT
DR. SAMBASIVAN HAS A CAUSE OF ACTION
AGAINST KADLEC FOR ITS RETALIATION AGAINST
HIM AS AN INDEPENDENT CONTRACTOR.

By its retaliatory revocation of Dr. Sambasivan's privileges to practice interventional cardiology, Kadlec acted adversely against him as an independent contractor, thereby violating the Washington Law Against Discrimination. Kadlec misconceives the WLAD, a broad law against discrimination, that provides a cause of action to Dr. Sambasivan as an independent contractor. As noted by Justice Guy, federal cases interpreting Title VII of the Civil Rights Act of 1964 are "not helpful" in determining the scope of the WLAD, as set forth in RCW 49.60.030(1). *Marquis v. Spokane*, 130 Wn. 2d 97,111, 922 P. 2d 43 (1996). The WLAD contains "a broad statement of the right to be free of discrimination in other areas [not just employment]." *Marquis*, 130 Wn. 2d at 110. Just as the federal Civil Rights Act of 1964 is "not helpful" in interpreting WLAD, limits on federal retaliation claims under 42 USC 1981 should not be imported to the WLAD.

By stripping Dr. Sambasivan of his privileges to practice interventional cardiology, Kadlec directly denied him contractual rights as an independent contractor under the Emergency Department Call Coverage Agreement Interventional Cardiology. Cases cited by Kadlec concerning “collateral damage” are inapposite. Mere “collateral damage” was not inflicted here. Rather, Kadlec directly denied Dr. Sambasivan his rights as an independent contractor pursuant to the Emergency Department Call Coverage Agreement Interventional Cardiology. Moreover, there is no authority holding that the WLAD disallows recovery for retaliation in cases that result only in “collateral damage.”

Contrary to Kadlec’s insistence, nothing in the WLAD prohibition of retaliation limits that cause of action to plaintiffs having a contract with the defendant. RCW 49.60.210. Cases of retaliation generally involve an employment relationship, but, as held in *Marquis*, 130 Wn. 2d at 100-101, the WLAD provides a full measure of protection to independent contractors, as well. Dr. Sambasivan did have a contract for professional services with Kadlec.(CP 424) Although not an employee, under *Marquis, supra*, he may bring a claim for retaliation against Kadlec as an independent contractor. The elements of that claim were set forth by Judge Korsmo in his opinion in the prior appeal in this case: The plaintiff must show that he engaged in a statutorily protected activity, an adverse

action was taken and there was a causal link between protected activity and the adverse action.(CP 393) As held by this Court, Dr. Sambasivan has made the requisite showing to establish a prima facie case under the WLAD. (CP 395) The trial court should be reversed.

III. WHERE, AS HERE, KADLEC COULD HAVE
RAISED THE CONTRACTUAL PREDICATE
DEFENSE IN THE PRIOR APPEAL, BUT DID
NOT, THE LAW OF THE CASE NOW PRE-
CLUDES THAT DEFENSE.

Kadlec saddles the wrong horse by insisting that it may avoid preclusion of the contractual predicate defense because it raised the issue concerning the contractual force of medical staff bylaws in the prior appeal. (Brief of Respondent at 17) Much of the prior appeal concerned the contractual power of medical staff bylaws. But, that concern had to do with Dr. Sambasivan's express contract claim, not his retaliation claim. One is not a proxy for the other.

As stated in Dr. Sambasivan's opening brief in the instant appeal:

Kadlec has conflated Dr. Sambasivan's express contract claim that was litigated in the prior appeal with the contractual relationship that must be shown to ground a retaliation claim. This Court declined Dr. Sambasivan's invitation to rule that medical staff bylaws gave him contractual due process rights, and affirmed the dismissal of that breach of contract claim. (CP 389) This Court did not hold that absent a breach of contract claim Dr. Sambasivan could have no retaliation claim. Nothing in law or fact allows Dr. Sambasivan a retaliation claim only if medical staff bylaws constitute a

binding contract between hospital and medical staff members. (Brief of Appellant at 29)

Kadlec, quite plainly in the prior appeal, never raised, by cross appeal or argument, a defense to Dr. Sambasivan's retaliation claim, under either federal or state law, based on lack of a contractual predicate.

That Kadlec could have raised the contractual predicate defense in the prior appeal is demonstrated by its assertion that it did so:

The court of appeals did not decide the threshold issue of whether Sambasivan had identified a contractual nexus for a state or federal retaliation claim, despite the fact that Kadlec had briefed the issue extensively for the trial court and had raised the issue for the court of appeals' consideration in its brief. *See* Brief of Respondent/Cross-Appellant Kadlec Medical Center at 17 (Nov. 17, 2011) (*See* appendix). (Brief of Respondent in instant case at 12)

Here, as noted above, Kadlec extensively briefed the "contractual nexus" issue for the trial court. . . . Kadlec also, however, raised the issue of whether the medical staff bylaws create a contract. (Brief of Respondent at 17)

Actually, Kadlec never raised the contractual predicate defense in the prior appeal.

The decision of this Court remanding this case for trial requires reversal of the trial court. The doctrine of the law of the case precludes

questions that were formerly determined, but also questions “that might have been determined.” *Columbia Steel Co. v. State*, 34 Wn. 2d 700,705, 209 P. 2d 482 (1949), quoting *Miller v. Sisters of St. Francis*, 5 Wn. 2d 204,207, 105 P. 2d 32 (1940). *Accord: Greene v. Rothschild*, 68 Wn. 2d 1,7, 414 P. 2d 1013 (1966). Therefore, the law of the case doctrine controls and the trial court should be reversed.

CONCLUSION

On the basis of the foregoing argument, as well as that submitted in the opening brief of the appellant, the summary judgment below should be reversed, and Dr. Sambasivan’s retaliation claim should be remanded for trial.

Dated this 20th day of December, 2013.

Respectfully submitted,


Michael E. de Grasse WSBA #5593
Counsel for Appellant

APPENDIX

Initial Complaint for Damages, CP 3-11 of record
on prior appeal No. 30657-7-III

1 licensed at all times material hereto.

2 5. At all times material hereto, the plaintiff has held
3 privileges as a member of the defendant's medical staff.

4 6. As a member of the defendant's medical staff, the
5 plaintiff mainly provides cardiological services, including
6 interventional cardiology to his patients. The defendant's
7 medical facilities in Richland, Washington are essential to the
8 practice of the plaintiff's medical specialty.

9 7. The plaintiff makes no claim against the defendant that
10 raises a question of federal law. All of the plaintiff's claims
11 are grounded in the statutory and common law of the State of
12 Washington.

13
14 FIRST CLAIM

15 8. By reason of the plaintiff's position as a holder of
16 privileges as a member of the defendant's medical staff, the
17 plaintiff and the defendant are parties to an express contract.

18 9. A component of the contract between the plaintiff and
19 the defendant is a covenant of good faith and fair dealing.

20 10. The defendant has repeatedly failed and refused to pay
21 the plaintiff fees for his provision of call services to medical
22 patients of the parties.

23 11. The defendant has repeatedly denied to or withheld from
24 the plaintiff the opportunity to provide call services to medical
25 patients of the parties.

COMPLAINT FOR DAMAGES - 2

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1 12. The defendant has repeatedly subjected the plaintiff to
2 reviews of his professional practice without factual or legal
3 cause.

4 13. The defendant has repeatedly denied or restricted,
5 actually or constructively, the plaintiff's privileges to perform
6 certain procedures at the defendant's medical facilities in
7 Richland, Washington.

8 14. By the defendant's repeated threats to and actions
9 against the plaintiff's status as a holder of medical staff
10 privileges at the defendant's medical facilities, the plaintiff,
11 in responding to those threats and actions, has necessarily
12 incurred certain professional fees and related expenses.

13 15. By the actions alleged in the foregoing paragraphs, the
14 defendant has breached the covenant of good faith and fair
15 dealing that is a component of the contract between the parties.

16 16. By the defendant's breach of the covenant of good faith
17 and fair dealing, the defendant has injured the plaintiff and
18 has caused him to sustain substantial economic damages.

19 17. As a direct and proximate result of the defendant's
20 failure and refusal to pay the plaintiff for providing call
21 services to medical patients of the parties, the plaintiff has
22 sustained monetary damages in an amount not less than \$78,000.00,
23 and should have judgment against the defendant therefor, together
24 with prejudgment interest, costs, disbursements and attorney
25 fees.

COMPLAINT FOR DAMAGES - 3

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0-000000005

1 18. As a direct and proximate result of the defendant's
2 failure to allow the plaintiff opportunities to provide call
3 services to medical patients of the parties, the plaintiff has
4 sustained monetary damages in an amount not less than \$893,956.00,
5 and should have judgment against the defendant therefor,
6 together with prejudgment interests, costs, disbursements and
7 attorney fees.

8 19. The plaintiff should have judgment against the defendant
9 in an amount to be determined herein for the professional fees
10 and related expenses he has necessarily incurred by reason of
11 the defendant's actions alleged above, together with prejudgment
12 interest, costs, disbursements and attorney fees.

13
14 SECOND CLAIM

15 20. The allegations set forth in paragraphs 1 through 7
16 are hereby re-alleged.

17 21. In the alternative to allegations set forth in the first
18 claim of this complaint, the defendant has violated an implied
19 contract between the parties, and has been unjustly enriched.

20 22. As a direct and proximate result of the defendant's
21 unlawful refusal to pay the plaintiff for call services provided
22 to the patients of the parties, the plaintiff has been injured,
23 and has sustained monetary damages in an amount not less than
24 \$78,000.00, and should have judgment against the defendant
25 therefor, together with prejudgment interests, costs, disburse-
ments and attorney fees.

COMPLAINT FOR DAMAGES - 4

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THIRD CLAIM

1
2 23. The allegations set forth in the foregoing paragraphs
3 are re-alleged.

4 24. For several years last passed, the plaintiff has had
5 a business expectancy in the form of prospective medical
6 patients to whom he has provided cardiological services. A
7 significant number of those patients came to the plaintiff by
8 reason of his position as a holder of certain privileges on
9 the defendant's medical staff.

10 25. Currently and for the future, the plaintiff has a proper
11 business expectancy based on his provision of cardiological
12 services as a member of the defendant's medical staff.

13 26. At all times material hereto, the defendant had
14 knowledge of the plaintiff's business expectancy.

15 27. The defendant has and continues to interfere inten-
16 tionally with the plaintiff's business expectancy by its conduct
17 alleged in the first claim of this complaint.

18 28. The defendant has interfered and continues to interfere
19 with the plaintiff's business expectancy for an improper
20 purpose or by use of improper means to so interfere.

21 29. As a direct and proximate result of the defendant's
22 tortious conduct alleged above, the plaintiff has sustained
23 economic damages as alleged in the first claim of this complaint,
24 and should have judgment against the defendant therefor,
25 together with prejudgment interest, costs, disbursements and

COMPLAINT FOR DAMAGES - 5

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1 attorney fees.

2 30. As a direct and proximate result of the defendant's
3 tortious conduct alleged above, the plaintiff has suffered
4 noneconomic damages, and should have judgment against the
5 defendant therefor in an amount to be determined herein, together
6 with his costs, disbursements and attorney fees.

7 FOURTH CLAIM

8 31. The allegations set forth in the foregoing paragraphs
9 are re-alleged.

10 32. The plaintiff's country of origin is India.

11 33. The plaintiff is perceived by certain others as a person
12 who is not white.

13 34. By its conduct alleged above, the defendant has unlaw-
14 fully discriminated against the plaintiff on the basis of his
15 race, ethnicity or national origin. Specifically, the defendant
16 has violated Washington state statutory and common law prohibiting
17 discrimination on the basis of race, ethnicity or national
18 origin.

19 35. The plaintiff has been injured as a direct and proximate
20 result of the defendant's unlawful discrimination against him,
21 and has sustained economic and noneconomic damages.

22 36. The plaintiff should have judgment against the defendant
23 for all his damages in an amount to be determined herein,
24 including, but not limited to all damages alleged above together
25 with costs, disbursements and attorney fees.

1 consumers of cardiological services of the benefits and
2 competition within the relevant product and geographic markets.

3 44. The defendant's conduct as alleged above violated the
4 Washington State Consumer Protection Act, RCW 19.86, and the
5 common law of the State of Washington.

6 45. The defendant's conduct as alleged above has injured
7 the plaintiff in his business or property.

8 46. As a direct and proximate result of the defendant's
9 conduct as alleged above, the plaintiff has sustained economic
10 damages in an amount to be determined herein, but not less than
11 alleged in the first claim of this complaint, and he should have
12 judgment against the defendant therefor together with prejudgment
13 interest, costs, disbursements and attorney fees.

14 47. The damages to be awarded the plaintiff against the
15 defendant should be trebled.

16
17 SIXTH CLAIM

18 48. The allegations of the fifth claim of this complaint
19 are re-alleged.

20 49. The defendant's conduct as alleged above constitutes
21 monopolization or attempts to monopolize the market for certain
22 cardiological services all of which are provided by the plaintiff
23 to members of the public.

24 50. The defendant's conduct as alleged above, in concert
25 with at least one other person, constitutes a conspiracy to

COMPLAINT FOR DAMAGES - 8

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1 monopolize the market for certain cardiological services all of
2 which are provided by the plaintiff to members of the public.

3 51. The defendant's conduct as alleged above is a predatory
4 attack on the plaintiff's position as a provider of cardiological
5 services.

6 52. The defendant's conduct as alleged above has injured the
7 plaintiff in his business or property.

8 53. By reason of its conduct alleged above, the defendant
9 has caused the plaintiff to sustain damages for which he should
10 have judgment against the defendant in an amount to be determined
11 herein, but not less than alleged in the fifth claim of this
12 complaint, together with prejudgment interest, costs, disburse-
13 ments and attorney fees.

14 54. The damages to be awarded the plaintiff against the
15 defendant should be trebled.

16
17 WHEREFORE, plaintiff prays for judgment against the defendant
18 in an amount to be determined herein in accordance with the
19 foregoing claims together with such other and further relief as
20 the Court deems just and equitable.

21 Dated this 20th day of June, 2008.

22
23 
24 Michael E. de Grasse WSBA #5593
25 Counsel for Plaintiff