S205568

LIU, J.

No. S_____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK T. FAHLEN,
Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, et al.,
Defendants and Appellants.

After a Published Decision by the Court of Appeal,
Fifth Appellate District
Case No. F063023

PETITION FOR REVIEW; DECLARATION IN SUPPORT OF REQUEST FOR STAY (IMMEDIATE STAY OF SUPERIOR COURT PROCEEDINGS REQUESTED)

Action Pending in Stanislaus County Superior Court, Department 22, the Honorable Timothy W. Salter presiding, (209) 530-3171

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rules 8.208, 8.488)

This form is being submitted on behalf of the following parties: SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full Name of Interested Entity or Person	Nature of Interest
Sutter Health	Parent company and sole corporate member of Sutter Central Valley Hospitals

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) are all such entities, other than the parties, that either: (1) have an ownership interest of 10 percent or more in a party; or (2) have a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

DATED: September 24, 2012 HANSON BRIDGETT LLP

By: _____
JOSEPH M. QUINN

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ISSUE PRESENTED FOR REVIEW

Medical staff privileges are the product of peer review and a physician may pursue damages on the basis that a peer review action was maliciously motivated only if he first secures mandamus relief. This exhaustion rule governs statutory damages claims unless abrogation is express or necessarily implied. Health and Safety Code section 1278.5 allows damages claims by physicians who prove that a hospital or official harmed his economic interests out of retaliatory malice. Abrogation is neither express nor necessary to give effect to the statute. By Section 1278.5, did the Legislature abrogate the exhaustion rule?

WHY REVIEW SHOULD BE GRANTED

The Court should grant review for two reasons: first, on the issue presented, the appellate districts are split; and, second, on its own, the issue is sufficiently important to the public, hospitals, health care professionals and physicians across California that timely resolution by this Court is merited. (See Cal. Rules of Court, rule 8.500(b)(1).)

First and foremost, the issue is one on which the appellate districts are split. In *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465 at page 484 ("*Westlake*"), this Court held that a physician may pursue damages on the basis that a peer review action was maliciously motivated only if he first secures mandamus relief. In its published opinion in this case, the Fifth District held that, under Section 1278.5, a physician may pursue damages on the basis that a peer review action was maliciously motivated *without first challenging the revocation in an administrative mandamus proceeding.*[1] (*Fahlen v. Sutter Central Valley Hosp.* (2012) 208 Cal.App.4th 557, 579 (*Fahlen*).) Only months earlier, Division Two of the

[1] A copy of the Fifth District's opinion is attached as Exhibit "A."

Fourth District published its opinion in *Nesson v. Northern Inyo County Local Hospital District* (2012) 204 Cal.App.4th 65 (*Nesson*). In *Nesson*, the Fourth District held that the judicial exhaustion rule survived Section 1278.5. (*Id.* at p. 85.) Thus, review is necessary to establish uniformity of decision on the viability of the *Westlake* exhaustion rule in light of Section 1278.5.

Even if the Court of Appeal decisions were uniform—which they are not—review would be appropriate to settle the status of the judicial exhaustion rule. The rule is the result of this Court's unanimous decision in *Westlake*, which has been on the books for nearly four decades and is now well integrated into hospital and medical staff operations across California. Moreover, *Westlake* and the relevant portions of Section 1278.5 have coexisted for more than five years. Now a published case holds that *Westlake* and Section 1278.5 are irreconcilable, and that Section 1278.5 trumps. This Court should grant review to determine whether or to what extent *Westlake* remains good law.

And there can be little doubt that this case is a proper vehicle for addressing the issue. The record on the issue is developed. The parties have briefed the issue to the trial court and the Fifth District. Moreover, amici joined the appeal to add their analysis. Every indication is that the Court will have the resources necessary to resolve the issue.

Appellants respectfully request that this Court grant review to decide whether under Section 1278.5 a physician may seek damages on the basis that a peer review action was maliciously motivated without first exhausting judicial remedies. To avoid undue burden on the parties and in furtherance of judicial economy, Appellants respectfully request that this Court stay superior court proceedings pending disposition of the instant petition for review. The case is pending in the Stanislaus County Superior

Court, Department 22, the Honorable Timothy W. Salter presiding, (209) 530-3171.

BACKGROUND

Brief discussions of the Legislature's and this Court's treatment of medical peer review, as well as a review of the competing opinions in *Nesson* and *Fahlen*, are in order.

A. Medical Staff Privilege Actions Are Subject to Peer Review, Which Includes Judicial Mandamus Review

Medical peer review is the process by which a committee comprised of licensed medical personnel evaluates physicians applying for staff privileges, establishes standards and procedures for patient care, assesses the performance of physicians currently on staff, and reviews other matters critical to the hospital's functioning. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10 (*Arnett*); see also *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*); Bus. & Prof. Code, § 805, subd. (a)(1).) Initially, a physician's rights to procedural and substantive safeguards during peer review were defined by common law. (See *Anton v. San Antonio Comm. Hosp.* (1977) 19 Cal.3d 802, 829 [procedural requirements for fair process]; *Miller v. Eisenhower Medical Ctr.* (1980) 27 Cal.3d 614, 628-629 [substantive requirements for fair process].) More recently, the Legislature has set rules and standards, as well. (See Bus. & Prof. Code, § 805 *et seq.*) "Peer review, fairly conducted," the Legislature has declared, "is essential to preserving the highest standards of medical practice." (Bus. & Prof. Code, § 809, subd. (a)(3).)

A licensed hospital must have an organized medical staff. (Cal. Code Regs., tit. 22, § 70703, subd. (a); *Mileikowsky*, *supra*, 45 Cal.4th at p. 1267.) The medical staff must adopt written bylaws "which provide formal procedures for the evaluation of staff applications and credentials,

appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." (Cal. Code Regs., tit. 22, § 70703, subd. (b); see Bus. & Prof. Code, § 2282.5; Cal. Code Regs., tit. 22, §§ 70701, 70703.) Peer review committees investigate complaints about physicians and make recommendations regarding staff privileges. (*Mileikowsky*, *supra*, 45 Cal.4th at p. 1267.)

Certain peer review actions, including suspension, restriction, or denial of a physician's privileges for a medical disciplinary cause or reason, require the filing of an "805 Report" with the Medical Board of California. (Bus. & Prof. Code, § 805, subd. (b); *Mileikowsky*, *supra*, 45 Cal.4th at p. 1268.) A physician who is the subject of a final proposed peer review action that requires an 805 Report is entitled to written notice of the proposed action, the right to request a hearing on the proposed action, and the time limit for such a request. (Bus. & Prof. Code, § 809, subd. 1(b).) If the physician timely requests a hearing, the peer review body must give her written notice stating the reasons for the final proposed action, including the acts or omissions with which she is charged, and the time, place, and date of the hearing. (Bus. & Prof. Code, § 809.1, subd. (c); *Mileikowsky*, *supra*, 45 Cal.4th at pp. 1268-69.) The hearing must conform to the medical staff bylaws and fair hearing requirements. (See Bus. & Prof. Code, §§ 809.2, 809.3; *Mileikowsky*, *supra*, 45 Cal.4th at p. 1268.) These procedural protections include, the right to voir dire the panel members and any hearing officer; the right to inspect and copy documentary evidence; the right to call, examine, and cross-examine witnesses; and the right to submit a written statement at the close of the hearing. (Bus. & Prof. Code, §§ 809.2, 809.3.)

After the hearing, the physician and the peer review body must be given the trier of fact's written decision, including findings of fact and a

conclusion connecting the decision to the evidence. (Bus. & Prof. Code, § 809.4, subd. (a)(1); *Mileikowsky*, *supra*, 45 Cal.4th at p. 1269.) If an appellate mechanism exists under the bylaws, the physician and the peer review body must be advised of the procedure. (Bus. & Prof. Code, § 809.4, subd. (a)(2).) An appellate mechanism must provide certain minimum rights. (Bus. & Prof. Code, § 809.4, subd. (b).)

As part of the peer review process, the Legislature acknowledged and preserved the availability of judicial review under Section 1094.5 of the Code of Civil Procedure. (Bus. & Prof. Code, § 809.8.) Thus, following completion of the review mechanisms under the bylaws, a physician may seek administrative mandamus relief.

B. Before Pursuing Damages on the Basis That a Peer Review Action Was Maliciously Motivated, a Physician Must Exhaust Judicial Remedies

Central to medical peer review is the well-established rule that a physician must exhaust judicial remedies before pursuing damages on the basis that a peer review action was maliciously motivated. This rule was established by this Court in its unanimous opinion in *Westlake*.

Westlake Community Hospital accorded staff privileges to Dr. Sarah Kaiman. (*Westlake*, *supra*, 17 Cal.3d at pp. 469-470.) Approximately a year later, a committee composed of the chief of staff and two other doctors reviewed the hospital medical records and treatments of Dr. Kaiman and prepared a report for the credentialing committee recommending revocation of her staff privileges. (*Id.* at p. 471.) The credentialing committee approved the report and recommendation, as did the hospital's board of directors. (*Ibid.*) The hospital promptly notified Dr. Kaiman of its decision and advised her of her right to request a hearing before the judicial review committee. (*Ibid.*) At Dr. Kaiman's request, a hearing was held. Both

sides, through counsel, called witnesses and introduced evidence. (*Ibid.*) The committee determined that Dr. Kaiman's staff privileges should be revoked. (*Ibid.*) The hospital advised her of her right to appeal the decision to the board of directors and she exercised that right by appearing before the board and presenting her objections to the committee's determination. (*Id.* at pp. 471-472.) The board affirmed the committee determination. (*Id.* at p. 472.)

Dr. Kaiman sued the hospital and numerous committee and board members. She alleged that her privileges were revoked as a result of a malicious conspiracy against her and sought damages under several tort theories. (*Westlake*, *supra*, 17 Cal.3d at p. 470.) The defendants moved for summary judgment arguing that before Dr. Kaiman could seek damages on the grounds that the revocation of privileges was maliciously motivated, she had to first challenge the quasi-judicial decision in a mandamus proceeding; her failure to do so meant that her claims were barred. (*Id.* at p. 473.) The trial court denied the motion. The Supreme Court agreed to consider defendants' petition for a writ of prohibition. (*Id.* at p. 474.)

In a unanimous opinion authored by Justice Tobriner, the Court "determined that under the present circumstances, plaintiff should be required to proceed initially through a mandamus action; accordingly we conclude that, in this respect, defendant[s'] motion for summary judgment should have been granted." (*Westlake*, *supra*, 17 Cal.3d at p. 483.) The Court found that Dr. Kaiman's "malicious motivation" action was akin to a malicious prosecution action, "which can only be maintained after the allegedly maliciously initiated proceeding has terminated in favor of the person against whom it was brought. [Citations.]" (*Ibid.*) A similar "favorable termination" is appropriate for challenges to quasi-judicial decisions by private associations, including hospitals. "Accordingly, we

conclude that plaintiff must first succeed in overturning the quasi-judicial action before pursuing her tort claim[s] against defendants." (*Id.* at p. 484.)

The Court emphasized that its judicial exhaustion rule is designed to facilitate peer review and ensure proper administration of justice. As the Court explained, the rule: (1) "accords a proper respect to an association's quasi-judicial procedure;" (2) "affords a justified measure of protection to the individuals who take on, often without remuneration, the difficult, time-consuming and socially important task of policing medical personnel;" and (3) promotes judicial economy "by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions." (*Westlake*, *supra*, 17 Cal.3d at p. 484.)

C. The Exhaustion Rule Governs Statutory Damages Claims Unless the Statute Expressly Abrogates the Rule or Abrogation Is Necessary to Give the Statute Effect

Westlake's judicial exhaustion rule governs statutory claims for damages, even if the statute suggests that exhaustion is not required, "'unless [the intention to overthrow the rule] is made clearly to appear either by express declaration or by necessary implication.' (*Torres* [*v. Auto. Club of So. Cal.* (1997) 15 Cal.4th 771,] at p. 779 [(*Torres*)].)" (*Campbell v. Regents of the University of Cal.* (2005) 35 Cal.4th 311, 329 (*Campbell*).) In other words, a physician must exhaust her judicial remedies before pursuing statutory damages on the basis that a peer review action was maliciously motivated unless the statute itself "evince[s] a clear expression of intent" to abrogate the exhaustion rule or abrogation is *necessary* to "give [the statute] effect." (See *Torres*, *supra*, 15 Cal.4th at pp. 779-780.)

D. This Court Strengthens Protections for Medical Peer Review and Professionals Who Participate in Peer Review

Thirty years after *Westlake*, this Court issued another unanimous opinion regarding physicians' claims for damages on the basis that a peer review action was maliciously motivated. In *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192 (*Kibler*), the issue was whether, for purposes of the anti-SLAPP statute, the underlying peer review procedure was as an "official proceeding authorized by law." (See *id.* at pp. 194-196, quoting Code Civ. Proc., § 425.16, subd. (e)(2).) Unanimously, this Court held that medical peer review is an official proceeding authorized by law. (*Id.* at p. 199.)

The Court emphasized the important public interests informing peer review:

- **Quality Care**: "Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California (Bus. & Prof. Code, § 809, subd. (a)(3).)" (*Kibler*, *supra*, 39 Cal.4th at p. 199.)
- **Cost-Effective Care**: Following peer review, "a hospital may remove a physician from its staff as a means to reduce its exposure to possible malpractice liability." (*Kibler*, *supra*, 39 Cal.4th at p. 199.)
- **Public Protection**: "Because a hospital's disciplinary action may lead to restrictions on the disciplined physician's license to practice or to the loss of that license, its peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians. (*Arnett*, *supra*, 14 Cal.4th at pp. 7, 11.)" (*Kibler*, *supra*, 39 Cal.4th at p. 200.)

Judicial exhaustion, the Court noted, is a bulwark of the peer review process. (*Kibler*, *supra*, 39 Cal.4th at p. 201.) Peer review rules should encourage participation by physicians who serve without compensation and are put in the uncomfortable position of "sitting in judgment of their peers." (*Kibler*, *supra*, 39 Cal.4th at p. 201.) Medical peer review proceedings are

"official proceeding[s] authorized by law" under the anti-SLAPP statute in large part because such a holding encourages participation by protecting hospitals and professionals from "harassing lawsuits." (*Ibid.*)

E. The Legislature Amends Section 1278.5 to Allow Damages Where a Physician Proves that a Hospital Harmed Her Economic Interests Out of Retaliatory Malice

A year after *Kibler*, the Legislature amended Section 1278.5, a statute that prohibited health facilities from retaliating or discriminating against patients or employees who complain to government agencies about the health facility or cooperate in a government investigation or proceeding. (§ 1278.5, subd. (a).) Employees who suffer discrimination on the basis of filing a complaint could seek damages. (§ 1278.5, subd. (g).) As initially drafted, Section 1278.5 did not expressly cover physicians.

The 2007 amendment expressly extended the statute to "members of the medical staff" and broadened the protections to cover not only complaints and grievances to government agencies, but also to accreditation entities and to health facilities themselves. (§ 1278.5, subd. (b)(1)(A).) Under the amendment, a physician who has been subjected to discriminatory treatment is entitled to reinstatement, reimbursement for lost income resulting from changes in the terms or conditions of her privileges, and legal costs. (§ 1278.5, subd. (g).)

The 2007 amendment established a rebuttable presumption that an adverse action was discriminatory if responsible staff knew of the physician's complaint or cooperation and the action occurred within 120 days of the complaint or cooperation. (§ 1278.5, subd. (d)(1).) The presumption, however, is not one affecting the burden of proof, but only a presumption "affecting the burden of producing evidence as provided in Section 603 of the Evidence Code." (See § 1278.5, subd. (e).) As the Law

Revision Commission's comments on Section 603 make clear, such a presumption is neither "based on any public policy extrinsic to the action in which [it is] invoked" nor of practical consequences as long as the party against whom it operates has some evidence on the issue:

> Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases. Cf. Bohlen, Studies in the Law of Torts 644 (1926). Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions relating to the authenticity of documents (Sections 643-645).

(See Cal. Law Revision Comm., 29B West's Ann. Evid. Code (1995 ed.) foll. § 603, p. 57.)

The scope of adverse actions upon which a physician might base a Section 1278.5 claim is broad—apparently covering any action that harms his professional or economic interests. The issue here, however, is limited to the prerequisites for a Section 1278.5 claim when the physician bases the claim on a peer review action. The amendment wasn't even addressed to adverse peer review actions. Early on, the sponsor California Medical Association ("CMA") enumerated the methods that hospitals can use to suppress physician whistleblowers, such as "[u]nderwriting the salary

and/or practice expense of a competing physician" and "[b]uying the medical building with a physician's office and refusing to renew the physician's lease." (Assem. Com. on Health, Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as introduced Feb. 21, 2007, pp. 3-4, Exh. 1 to Request for Judicial Notice ("RJN"); Sen. Judiciary Com., Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007, pp. 6-7, Exh. 2 to RJN.) Adverse peer review action, such as terminating a physician's privileges, was not included.

After concerns were raised about the "unintended consequences" that the legislation might have on peer review, AB 632 was amended to clarify that the Legislature did not intend to interfere with peer review actions. (Sen. Judiciary Com., Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007, pp. 7-8, Exh. 2 to RJN); Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007, p. 2, Exh. 3 to RJN.) In particular, subdivision (l) was added, which provides, "Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code." (§ 1278.5, subd. (l).) Also added was subdivision (h) enabling medical staff to seek an injunction "to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing" if the demands "would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process." (§ 1278.5, subd. (h).)

Even after these amendments, CMA continued its support for AB 632, advising the State Assembly members that "this bill is not to interfere with legitimate peer review activities." (Cal. Medical Ass'n, Floor Alert to State Assem. on Assem. Bill No. 632 (2007-2008 Reg. Sess.) Sept. 11, 2007, Exh. 4 to RJN.)

F. The Fourth District Holds that the Judicial Exhaustion Rule Applies Where a Physician Bases a Section 1278.5 Claim on a Peer Review Action

In February 2012, Division Two of the Fourth District Court of Appeal issued its opinion in *Nesson*. The Fourth District held that a physician must exhaust his administrative and judicial remedies before pursuing a claim under Section 1278.5.

Dr. Nesson held privileges at a hospital. (*Nesson, supra*, 204 Cal.App.4th at p. 72.) In 2007, he entered into a service agreement with the hospital, and that agreement required him to maintain hospital privileges. (*Id.* at p. 73.) A year later, he complained about the quality of transcription services at the hospital. (*Ibid.*) The transcriptionists, in turn, complained about him. (*Ibid.*) In 2009, the medical executive committee ("MEC") summarily suspended his staff privileges based on "recent incidents of substandard and dangerous patient care" and "abrupt change in your behavior characterized by volatile and erratic actions." (*Id.* at pp. 73-74.) The MEC recommended neuropsychiatric and clinical competency evaluations as part of the summary suspension. (*Id.* at p. 74.)

Shortly after the MEC imposed the summary suspension, the hospital terminated Dr. Nesson's agreement because he had not maintained hospital privileges. (*Nesson, supra*, 204 Cal.App.4th at p. 74.) Dr. Nesson declined to appeal the suspension. (*Ibid.*) Instead, he sought and obtained a six-month leave of absence. (*Ibid.*) The MEC informed him that he would still have to comply with the evaluation conditions before returning. (*Ibid.*) Approximately six weeks later, Dr. Nesson sought reappointment to the medical staff. (*Id.* at p. 75.) He did not prove he had completed the evaluations, however, and his application was denied. (*Ibid.*)

Dr. Nesson sued the hospital alleging a Section 1278.5 claim. (*Nesson, supra*, 204 Cal.App.4th at p. 75.) The hospital filed a special

motion to strike under the anti-SLAPP statute, arguing that he had no probability of succeeding on the Section 1278.5 because it was based on peer review actions and he had failed to exhaust his administrative and judicial remedies. (*Ibid.*) The trial court granted the motion. (*Id. at p.* 76.) Dr. Nesson appealed. (*Ibid.*)

The Fourth District affirmed. (*Nesson, supra*, 204 Cal.App.4th at p. 89.) The court conducted an extensive analysis of medical peer review and held that the suspension and the board's termination of the agreement were peer review actions, protected activity under the anti-SLAPP statute. (*Nesson, supra*, 204 Cal.App.4th at pp. 78-82.) Next, the court analyzed the "steps a physician who claims he is the victim of faulty medical peer review must take to rectify the situation, before filing a lawsuit." (*Id.* at p. 84.) After discussing *Westlake* and related authorities, the court held that before seeking statutory damages, a physician must exhaust "his administrative and judicial remedies." (*Id.* at p. 85.) Because Dr. Nesson failed to exhaust his remedies, he could not demonstrate a reasonable probability of prevailing on his Section 1278.5 claim. (*Id.* at pp. 85-86.)

Dr. Nesson did not seek review and the Fourth District's opinion is now final.

G. The Fifth District Holds that the Judicial Exhaustion Rule Does *Not* Apply Where a Physician Bases a Section 1278.5 Claim on a Peer Review Action

Seven months later, the Fifth District issued its opinion in this case. Disagreeing with *Nesson*, the Fifth District held that a physician need not exhaust judicial remedies before pursuing a claim under Section 1278.5.

Dr. Fahlen is a nephrologist who was employed by Gould Medical Group ("Gould") in Modesto, California. (*Fahlen, supra*, 208 Cal.App.4th at p. 562.) In 2003, he was granted provisional staff privileges at Memorial

Medical Center ("Hospital"), a hospital operated by Sutter Central Valley Hospitals. (*Ibid.*) The following year, the Hospital granted Dr. Fahlen staff privileges. (*Ibid.*)

From 2004 through 2008, Dr. Fahlen had a number of clashes with nurses at the Hospital, and the administration became concerned about his conduct. (*Fahlen, supra*, 208 Cal.App.4th at p. 562.) Dr. Fahlen, in turn, complained about the nursing supervisors. (*Ibid.*) In May 2008, Steve Mitchell, the Hospital's chief operating officer, raised Dr. Fahlen's disruptive conduct with Gould's medical director and Gould terminated Dr. Fahlen's employment. (*Ibid.*) Since the termination also resulted in the cancellation of his medical malpractice insurance, Dr. Fahlen was unable to continue treating patients at the Hospital. (*Ibid.*)

On May 30, 2008, Dr. Fahlen met with Mitchell to discuss his staff privileges. (*Fahlen, supra*, 208 Cal.App.4th at p. 562.) According to Dr. Fahlen, Mitchell advised him that he should leave Modesto and that if he did not do so, the Hospital would begin an investigation and peer review that would result in an 805 Report to the Medical Board. (*Id.* at pp. 562-563.) Dr. Fahlen informed Mitchell that he intended to open his own practice in Modesto. (*Id.* at p. 562.) In the meantime, a peer review investigation regarding Dr. Fahlen was underway. (*Fahlen, supra*, 208 Cal.App.4th at p. 563.) As a result of the investigation, the Hospital's medical executive committee ("MEC") recommended against renewal of Dr. Fahlen's medical staff privileges. (*Ibid.*)

Dr. Fahlen requested a hearing in accordance with the procedures set forth in the medical staff bylaws. (*Fahlen, supra*, 208 Cal.App.4th at p. 563.) The MEC issued a statement of charges describing seventeen incidents in which Dr. Fahlen engaged in disruptive or abusive behavior toward staff between 2004 and 2008 and one incident of abusive and contentious behavior during a 2008 interview with the MEC's investigative

committee. (*Ibid.*) A Judicial Review Committee ("JRC") composed of six physicians conducted an evidentiary hearing. (*Fahlen, supra*, 208 Cal.App.4th at p. 563.) After the hearing, the JRC concluded that the MEC's recommendation not to renew Dr. Fahlen's privileges based on medical disciplinary cause was not warranted. (*Ibid.*)

Pursuant to the bylaws, the board of directors made the final decision. (*Fahlen, supra*, 208 Cal.App.4th at p. 564.) The board found that the JRC's decision was not supported by the facts revealed during the hearing. (*Ibid.*) The board overturned the JRC decision and upheld the MEC recommendation. (*Ibid.*) Dr. Fahlen's privileges were, therefore, terminated. (*Ibid.*)

Dr. Fahlen did not pursue mandamus relief. Instead, he filed a complaint for damages and other relief against the Hospital and Mitchell. (*Fahlen, supra*, 208 Cal.App.4th at pp. 564-565.) He alleged that Defendants retaliated against him in violation of Section 1278.5. (*Id.* at p. 565.) Defendants demurred and filed a special motion to strike pursuant to the anti-SLAPP statute as to all but one claim. (*Ibid.*) The trial court overruled the demurrer and denied the motion. (*Ibid.*) Defendants appealed the ruling on the special motion to strike. (*Id.* at pp. 582-583.)

On appeal, Defendants argued that the Hospital's peer review proceedings were covered by the anti-SLAPP statute and Dr. Fahlen could not establish a probability of success on his Section 1278.5 claim because the claim was unexhausted. (*Fahlen, supra*, 208 Cal.App.4th at pp. 565-566.) Dr. Fahlen argued that termination of his staff privileges was not covered by the anti-SLAPP motion and, in any event, by Section 1278.5, the Legislature abrogated the *Westlake* exhaustion rule. (*Id.* at pp. 565-567.) The California Hospital Association filed an amicus brief in support of Defendants, and the California Medical Association filed an amicus brief in support of Dr. Fahlen. (*Id.* at p. 578.)

The Fifth District held that the medical peer review proceedings are official proceedings under the anti-SLAPP statute. (*Fahlen*, *supra*, 208 Cal.App.4th at p. 572.) The court, however, affirmed the trial court's denial of the anti-SLAPP motion on the Section 1278.5 claim, holding that a physician need not exhaust his administrative remedies before seeking tort damages under Section 1278.5. (*Id.* at p. 579.) As a result, the Hospital and Mitchell were held to answer the Section 1278.5 claim.

Defendants' timely petition for review followed.

STATEMENT REGARDING REHEARING IN THE COURT OF APPEAL

No party sought rehearing in the Court of Appeal.

LEGAL DISCUSSION

The Court should grant review because, on the exhaustion issue, the appellate districts are split and, on its own, the issue is sufficiently important to hospitals, health care professionals and physicians across California, as well as the public at large, that this Court's prompt attention is merited. (See Cal. Rules of Court, rule 8.500(b)(1).) And, here, the issue is well framed, making this case an appropriate vehicle for decision.

I. REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION

"The Supreme Court may order review of a Court of Appeal decision . . . when necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).) Here, the Fifth District acknowledged that its *Westlake* exhaustion holding created a conflict among the appellate districts. (*See Fahlen*, supra, 208 Cal.App.4th at p. 574, fn. 6.) This Court should resolve the conflict.

The Fourth District's opinion in *Nesson* and the Fifth District's opinion in this case are, indeed, in conflict. In both cases, a physician lost

medical staff privileges after peer review. (See *Nesson*, *supra*, 204 Cal.App.4th at pp. 74-75; *Fahlen*, *supra*, 208 Cal.App.4th at pp. 563-564.) Without exhausting his judicial remedies, the physician brought a Section 1278.5 claim based on allegations that the peer review action was maliciously motivated. (See *Nesson*, *supra*, 204 Cal.App.4th at p. 75; *Fahlen*, *supra*, 208 Cal.App.4th at pp. 564-565.) The hospital and individual defendants argued that the physician could pursue Section 1278.5 damages on the basis that the peer review action was maliciously motivated only if he first exhausted his judicial remedies. (See *Nesson*, *supra*, 204 Cal.App.4th at p. 75; *Fahlen*, *supra*, 208 Cal.App.4th at pp. 564-565.) The Fourth District held that the exhaustion rule applied. (*Nesson*, *supra*, 204 Cal.App.4th at p. 85.) The Fifth District held that it did not. (*Fahlen*, *supra*, 208 Cal.App.4th at p. 579.) A side-by-side comparison of the holdings makes plain the conflict:

Where a physician seeks damages under Section 1278.5 based on allegations that a peer review action was maliciously motivated must he first exhaust his judicial remedies?

Nesson	*Fahlen*
Yes. A physician must exhaust his judicial remedies before pursuing damages under Section 1278.5 on the basis that a peer review action was maliciously motivated. (*Nesson*, *supra*, 204 Cal.App.4th at p. 85.)	**No.** A physician need not exhaust his judicial remedies before seeking damages under Section 1278.5, even if his claim is that a peer review action was maliciously motivated. (*Fahlen*, *supra*, 208 Cal.App.4th at p. 579.)

The Fifth District suggests that the conflict may be illusory. (*Fahlen*, *supra*, 208 Cal.App.4th at p. 574, fn. 6.) But the conflict is real. First, the Fifth District claims that *Nesson*'s holding may be disregarded because "[the Fourth District] did not separately consider or analyze the requirement for exhaustion of judicial remedies with respect to Nesson's

section 1278.5 cause of action." (See *ibid.*). But the Fourth District makes express reference to Dr. Nesson's statutory tort claims, including his claimed "violation of Health and Safety Code section 1278.5" and properly characterizes the statutory claims, including "Nesson's retaliation [claim]" as asserting that "the Hospital somehow acted wrongfully" when it terminated the agreement in reliance on the MEC's suspension of his staff privileges. (*Nesson*, *supra*, 204 Cal.App.4th at pp. 75, 83.) The fact that the Fourth District did not parse Section 1278.5 does not prove that the court was careless; instead, it suggests that the court (and the parties) did not see anything in Section 1278.5 that compelled abrogation of the exhaustion rule.

Second, the Fifth District suggests that *Nesson*'s judicial exhaustion holding is dicta because Dr. Nesson failed to exhaust both his administrative and judicial remedies and the administrative exhaustion holding is enough to support the judgment. (See *Fahlen*, *supra*, 208 Cal.App.4th at p. 574, fn. 6.) But the Fourth District clearly held that failing to exhaust administrative *or* judicial remedies bars pursuit of damages. (*Nesson*, *supra*, 204 Cal.App.4th at pp. 78, 84-86.)

Third and finally, while the Fifth District believes that the Fourth District's analysis was not sufficiently "dee[p]" (*Fahlen*, *supra*, 208 Cal.App.4th at p. 574, fn. 6),[2] it remains true that the courts' exhaustion

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[2] The Fifth District's opinion is vulnerable to the same criticism. For example, the court reviews Section 1278.5 to determine whether the Legislature "implicit[ly]" abrogated the *Westlake* rule (see *Fahlen*, *supra*, 208 Cal.App.4th at pp. 577-578) when the standard is that the long-established judicial exhaustion rule applies unless abrogation is *express* or *necessarily implied* (see *Torres*, *supra*, 15 Cal.4th at p. 779; *Campbell*, *supra*, 35 Cal.4th at p. 328). The court applies the analysis in *State Board of Chiropractic Examiners v. Superior Court* (*Arbuckle*) (2009) 45 Cal.4th 963 (*Arbuckle*) and *Runyon v. Board of Trustees of the California State* (footnote continued)

holdings are in conflict. (Compare *Fahlen*, *supra*, 208 Cal.App.4th at p. 579 with *Nesson*, *supra*, 204 Cal.App.4th at p. 85.)

At this point, the issue is only whether the published decisions are in equipoise. They are not. *Nesson* stands for the proposition that a physician must exhaust judicial remedies before pursuing Section 1278.5 relief based on a peer review action and *Fahlen* stands for the opposite. This conflict will likely lead to confusion and inconsistent judgments. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4 (*McCallum*) [where decision from intermediate appellate court in conflict, courts free to choose between holdings].) Review is necessary to secure uniformity of decision.

II. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW

Even if the appellate holdings on the issue were consistent—and they aren't—the issue is sufficiently important to merit review. (See Cal. Rules of Court, rule 8.500(b)(1).) The exhaustion issue implicates

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University (2010) 48 Cal.4th 760 (*Runyon*). (See *Fahlen*, *supra*, 208 Cal.App.4th at pp. 573-577.) But, in those cases, the issue was whether by requiring whistleblowers to document retaliation in an administrative claim prior to filing suit, the Legislature intended to *create* administrative and judicial exhaustion rules. (See *Arbuckle*, *supra*, 45 Cal.4th at pp. 971-976; *Runyon*, *supra*, 48 Cal.4th at pp. 767-774), whereas here the exhaustion rule is well established and the issue is whether the Legislature abrogated the rule expressly or by necessary implication. And, the court gives no consideration to the constitutional implications of its abrogation holding: If Section 1278.5 abrogates the *Westlake* rule and the related qualified immunity for hospitals and officials, how is Section 1278.5 reconciled with federal law that confers immunity for hospitals and professionals participating in peer review. (42 U.S.C. § 11111(a)(1), (a)(2) [professional review bodies immune for damages for professional review actions]; see 42 U.S.C. § 11151(11), (4)(A) [professional review body includes hospital].)

important public interests and its resolution is of profound importance to hospitals, health care professionals, and physicians across California.

In California, medical peer review, including peer review related to privilege actions, "is essential to preserving the highest standards of medical practice." (See Bus. & Prof. Code, § 809, subd. (a)(3).) A mandamus proceeding is part of the medical peer review process. (Bus. & Prof. Code, § 809.4, subd. (a)(1).) And, the judicial exhaustion rule is essential to the workings of medical peer review. As this Court recognizes, requiring a physician to exhaust his judicial remedies prior to seeking damages based on a claim that a peer review action was maliciously motivated promotes deference to expert and professional judgment; supports the integrity of the peer review process; promotes judicial economy and extends "a justified measure of protection" to hospitals and professionals, including physicians, who volunteer their time and expertise for the difficult task of judging their colleagues in order to ensure quality care. (*Westlake*, *supra*, 17 Cal.3d at pp. 476, 484; see also *Kibler*, *supra*, 39 Cal.4th at pp. 199-200.)

The judicial exhaustion rule is the result of a unanimous ruling of this Court. If it is to be undone, then that decision should come from this Court. If hospitals and professionals are now exposed to endless discovery, public trial and substantial liability, if responsibility for the medical peer review process now rests with juries, if judicial economy must be forfeited, then such consequences are important enough to warrant this Court's attention. Indeed, this Court often takes note when a common-law issue affects such diverse and important public interests. This case should not be an exception.

This case, in fact, is an even-more compelling candidate for review because the finding that Section 1278.5 abrogates the judicial exhaustion rule is based on not an express legislative statement, but the Fifth District's

view that the Legislature "implicit[ly]" abrogated the rule. (See *Fahlen*, *supra*, 208 Cal.App.4th at pp. 577-578.) Appellants submit that the express legislative statements favor non-abrogation and that the Fifth District's analysis of Section 1278.5 was incomplete. (See § 1278.5, subd. (l) ["Nothing in [Section 1278.5] shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with [law]."].) But if, as the Fifth District held, Section 1278.5 has such a profound effect on the common law of health care in California, then the analysis leading to that pronouncement should be based on all of Section 1278.5, should be the result of a careful construction of the statute, and should come from this Court, the original source of the *Westlake* rule.

Dr. Fahlen may contend that the Fifth District's holding is only a minor narrowing of *Westlake* and that *Westlake* remains good law in all circumstances other than where a physician challenges a peer review action based on allegations of retaliatory motive. First, *Westlake* itself clearly encompassed claims of retaliation—in the Court's words, "tort action[s] against either the hospital or its board or committee members on the ground that the revocation of [the doctor's] hospital privileges was maliciously motivated." (*Westlake*, *supra*, 17 Cal.3d at p. 482.) Thus, the Fifth District's holding strikes at the heart of *Westlake*. Second, to create an exception for complaint-based retaliation is to obliterate the rule. Retaliation claims are easy to allege and hard to overcome short of trial. (See, *e.g.*, *Mendiondo v. Centinela Hosp. Med. Ctr.* (9th Cir. 2008) 521 F.3d 1097, 1105 [allegations of complaint and adverse action sufficient].) Thus, a physician facing a peer review investigation need only lodge a complaint. In the event of an adverse outcome, he can pursue a tort action for retaliation, thereby bypassing deferential judicial review and transferring quality-of-care decisions from informed experts to juries. Indeed, attorneys who represent physicians have opined that it could be

malpractice not to advise clients to position themselves to allege retaliation claims. Given its far-reaching consequences, the Fifth District's holding amounts not to a narrowing, but a wholesale nullification of the *Westlake* judicial exhaustion rule.

This Court's decision in this case will help resolve whether, by Section 1278.5, the Legislature meant for hospitals and health care professionals, including physicians who participate in peer review, to be liable for damages on the basis of a peer review action even if that proceeding was fair and the outcome was justified. If the answer is yes, then the Court's decision will help resolve the circumstances under which such liability can be found. These are questions of paramount importance to all California hospitals, health care professionals and physicians, as well as the public at large.

III. THIS CASE IS A PROPER VEHICLE FOR REVIEWING THE EXHAUSTION ISSUE

The Court should grant review in this case because the issue is well presented and the other available responses, such as depublication or allowing the conflict to stand, will yield undesirable consequences.

A. The Issue Is Squarely Presented

This case affords the Court an ideal opportunity to consider the judicial exhaustion question because the issue is at the heart of the case, the record is sufficient and uncomplicated, and the parties have demonstrated their ability to identify and develop the relevant legal and policy issues.

The legal issue is well framed. Without first seeking mandamus relief, Dr. Fahlen filed a civil action that included a Section 1278.5 claim for alleged retaliation based on his complaints about nursing staff. Defendants moved to strike the retaliation claim because Dr. Fahlen failed

to exhaust his administrative remedies. Dr. Fahlen argued that, by Section 1278.5, the Legislature abrogated the *Westlake* rule. The trial court denied the motion; the Fifth District affirmed, holding that as to complaint-based retaliation claims, *Westlake* is no longer good law. Under Section 1278.5, a physician could pursue damages from a jury without first obtaining mandamus relief. Only months earlier, the Fourth District issued a published opinion holding otherwise.

Now, the Court has before it an ideal vehicle for deciding whether, by Section 1278.5, the Legislature substantially undid *Westlake*'s judicial exhaustion rule.

B. Depublication Would Put the Hospital at a Substantial Disadvantage; Allowing the Conflict to Stand Would Create Uncertainty in the Medical Field

The Court could secure uniformity of decision by depublishing the Fifth District's opinion. But depublication would be inequitable and it would likely be only a short-term solution. Alternatively, the Court could allow the conflict to stand, but such action would likely result in inconsistent judgments.

Depublication would be inequitable because it would put the Hospital and its officials at a disadvantage. Relying on *Nesson*, all other California hospitals and their staffs could continue to pursue quality-of-care objectives and manage liability without the threat that a doctor will be able to bypass mandamus review, sue for tort damages, and transfer decision making from professionals to juries. Care decisions at the Hospital, however, will have to be informed by the risk that those decisions will be reviewed not by professionals and courts applying deferential mandamus standards, but by juries with broad discretion to second-guess decisions and to impose devastating judgments. Professionals and physicians would

likely decline involvement in peer review actions, compromising the Hospital's operations.

Additionally, depublication would likely be only a short-term fix. The bar is well aware of the Fifth District's analysis and holding in *Fahlen*. Physicians subjected to adverse peer review actions will likely continue to press for adoption of the *Fahlen* analysis and holding. It is very likely that a conflict will again surface, leaving the public, litigants and the bench in the same position they are in today.

Alternatively, the Court could allow the conflict to stand. But this approach would create great uncertainty among hospitals, among medical professionals and, perhaps most important, among physicians who must decide whether to participate in peer review. It would also likely lead to inconsistent judgments, some courts following *Nesson* and others following *Fahlen*. (See *McCallum, supra,* 190 Cal.App.3d at p. 315, fn. 4 [courts may choose between conflicting holdings].) These consequences are avoidable and should be avoided.

IV. THE COURT SHOULD STAY SUPERIOR COURT PROCEEDINGS PENDING FINAL DISPOSITION OF THE INSTANT PETITION FOR REVIEW

The Hospital and Mitchell respectfully request that this Court stay superior court proceedings pending a final disposition of the instant petition for review. Absent such a stay, the Hospital and Mitchell will likely suffer undue burden and the superior court will be drawn into proceedings that may prove entirely unnecessary.

Dr. Fahlen has already pressed the Hospital and Mitchell to identify and produce voluminous records and respond to interrogatories. (See

Declaration of Glenda M. Zarbock in Support of Request for Stay, ¶¶ 3-4.)[3] Surely, more requests are forthcoming, including subpoenas and deposition notices. Given the history of the case, it is likely that the parties will involve the superior court in substantial motions practice. The burdensome discovery and motions practice may be for naught if this Court grants review.

A stay will also preserve the policy objectives of the anti-SLAPP statute and the judicial exhaustion rule. Both the statute and the rule allow the parties and the courts to cut short harassing lawsuits. If the Hospital and Mitchell are subject to ranging discovery and broad motions practice, then the purpose behind the statute and the rule will be frustrated.

Given the likelihood of prejudice absent a stay, the Court should stay the underlying action until proceedings on this petition have come to an end.

CONCLUSION

The Hospital and Mitchell respectfully request that the Court grant review to resolve the conflict among the appellate districts on the important issue whether, by Section 1278.5, the Legislature intended to displace the *Westlake* judicial exhaustion rule and allow a physician alleging that a peer-review action was maliciously motivated to seek damages without first securing mandamus relief. Appellants further request that this Court stay

[3] The Declaration of Glenda M. Zarbock in Support of Request for Stay is attached as Exhibit "B."

proceedings in the Superior Court pending disposition of the instant petition for review.

DATED: September 24, 2012 HANSON BRIDGETT LLP

By: _____
JOSEPH M. QUINN
Attorneys for Defendants and Appellants SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL

WORD CERTIFICATION

I, Joseph M. Quinn, counsel for SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL, hereby certify, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing Petition for Review, that it contains 7,373 words, including footnotes (and excluding caption, certificate of interested entities or persons, tables, signature block, and this certification).

Dated: September 24, 2012

By: _____
Joseph M. Quinn

MARK T. FAHLEN, Plaintiff and Respondent, v. SUTTER CENTRAL VALLEY HOSPITALS et al., Defendants and Appellants.

F063023

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

208 Cal. App. 4th 557; *2012 Cal. App. LEXIS 877*

August 14, 2012, Opinion Filed

PRIOR HISTORY: [**1]

APPEAL from a judgment of the Superior Court of Stanislaus County, No. 662696, Timothy W. Salter, Judge.

Safari v. Kaiser Found. Health Plan, 2012 U.S. Dist. LEXIS 98388 (N.D. Cal., July 16, 2012)

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A doctor sued a hospital alleging, among other things, that he lost his hospital privileges as a form of whistleblower retaliation (*Health & Saf. Code, § 1278.5*). The trial court denied the hospital's motion to strike under *Code Civ. Proc., § 425.16*, the anti-SLAPP statute. (Superior Court of Stanislaus County, No. 662696, Timothy W. Salter, Judge.)

The Court of Appeal affirmed the denial of the anti-SLAPP motion with respect to causes of action for retaliation under *Health & Saf. Code, § 1278.5*, and intentional interference with contractual relations, and seeking a declaratory judgment pursuant to *Bus. & Prof. Code, § 803.1*. The court reversed as to the remaining causes of action. The anti-SLAPP motion was properly denied as to the whistleblower retaliation claim because that claim would not be defeated on the merits by the doctor's failure to pursue writ relief. There is no requirement that a *§ 1278.5* plaintiff seek judicial review of administrative action taken in peer review proceedings under *Bus. & Prof. Code, §§ 809-809.9*, as a precondition to a civil action under *§ 1278.5*. The doctor's failure to pursue writ relief also did not bar his claim under *Bus. & Prof. Code, § 803.1*, for declaratory judgment concerning bad faith in the peer review process. In the current case, the allegation was not a separate cause of action but could result in additional relief under *§ 1278.5*. However, neither judicial economy nor fundamental fairness required an exception from the requirement for exhaustion of judicial remedies as to claims of interference with the right to practice an occupation, interference with prospective advantage, retaliation for advocating for appropriate patient care, or wrongful termination of hospital privileges. Those claims were barred. (Opinion by Wiseman, Acting P. J., with Cornell and Detjen, JJ., concurring.) [*558]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Pleading § 93--Anti-SLAPP Motions--Protected Activities--Scope.--Although *Code Civ. Proc., § 425.16, subd. (b)(1)*, states that the statute is intended to protect only those persons who are sued because of any act of that person in furtherance of the person's right of petition or free speech in connection with a public issue, the statute subsequently defines that phrase in a manner specific to *§ 425.16*, the anti-SLAPP statute. *Section 425.16, subd. (e)(2)*, includes within that phrase any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. As a result, a defendant who invokes subparagraph (2) need not separately demonstrate that the statement concerned an issue of public significance.

(2) Pleading § 93--Anti-SLAPP Motions--Protected Activities--Hospital Peer Review--Governing Board.--Actions of a peer review committee are statements made in connection with an issue under considera-

tion or review by any other official proceeding authorized by law, as provided by *Code Civ. Proc., § 425.16, subd. (e)(2)*. The statements or writings of a hospital's governing board in reviewing a determination on medical staff privileges, and in making a final decision on such termination or nonrenewal of such privileges, are also made in connection with an issue under consideration or review in an official proceeding authorized by law (*Code Civ. Proc., § 425.16, subd. (e)(2)*).

(3) Healing Arts and Institutions § 47.6--Physicians--Tort Claims Arising from Administrative Actions--Exhaustion of Judicial Remedies--Retaliation.--A doctor must exhaust all available administrative remedies and successfully set aside a hospital's final administrative determination through mandamus review before the doctor may pursue a tort claim against defendants. Under the doctrine of exhaustion of judicial remedies, once an administrative decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims. Generally speaking, if a complainant fails to overturn an adverse administrative decision by writ of mandate, and if the administrative proceeding possessed the requisite judicial [*559] character, the administrative decision is binding in a later civil action brought in superior court. In some circumstances, however, a quasi-judicial proceeding is alleged by a plaintiff not to be a vehicle for administrative resolution of an administrative grievance, but is alleged to be, or to be a part of, a retaliatory action itself. This retaliation cannot be resolved within the administrative grievance process when the process itself provides the forum for retaliation, it is argued, and such an administrative proceeding is not entitled to the deference traditionally afforded by the standard of review in administrative mandate cases. In these circumstances, the Legislature may recognize, explicitly or by implication, that the administrative decision in question should not be given preclusive effect in later judicial proceedings, even when the administrative decision has not been set aside through administrative mandate proceedings. When the Legislature has made this type of determination, the courts will not require exhaustion of judicial remedies in the administrative proceeding. The court may find a legislative intent not to require exhaustion of writ remedies when the Legislature has expressly acknowledged the existence of the parallel administrative remedy, yet did not require that the administrative findings be set aside by way of a mandate action.

(4) Healing Arts and Institutions § 47.6--Physicians--Tort Claims Arising from Administrative Actions--Exhaustion of Judicial Remedies--Retaliation--Whistleblowers--Anti-SLAPP Motions.--There is no requirement that a whistleblower plaintiff under *Health & Saf. Code, § 1278.5*, seek judicial review of administrative action taken in peer review proceedings as a precondition to a civil action under *§ 1278.5*. Therefore, a doctor's failure to seek mandamus review did not render improbable his success on a *§ 1278.5* claim, and the hospital's anti-SLAPP motion was properly denied.

[Cal. Forms of Pleading and Practice (2012) ch. 295, Hospitals, § 295.13.]

(5) Employer and Employee § 9--Wrongful Discharge--Retaliation.--A retaliation lawsuit is not an action to review the decision of an administrative decision maker, but a completely separate damages action in the superior court in which the employee will enjoy all the procedural guarantees and independent factfinding that generally accompany such actions. [*560]

(6) Healing Arts and Institutions § 22--Physicians--Peer Review--Bad Faith--Actions.--*Bus. & Prof. Code, § 803.1, subd. (b)(6)*, does not rely upon somehow convincing a court in a writ proceeding that an administrative peer review decision was in bad faith, when the good faith or bad faith of the administrative decision maker is not an issue in the writ proceeding.

COUNSEL: Arent Fox, Lowell C. Brown, Debra J. Albin-Riley and Jonathan E. Phillips for Defendants and Appellants.

Jana N. DuBois; Davis Wright Tremaine and Terri D. Keville for California Hospital Association as Amicus Curiae on behalf of Defendants and Appellants.

Stephen D. Schear; Justice First and Jenny Huang for Plaintiff and Respondent.

Francisco J. Silva and Long X. Do for California Medical Association as Amicus Curiae on behalf of Plaintiff and Respondent.

JUDGES: Opinion by Wiseman, Acting P. J., with Cornell and Detjen, JJ., concurring.

OPINION BY: Wiseman

OPINION

WISEMAN, Acting P. J.--*Health and Safety Code section 1278.5*[1] is a whistleblower protection law designed to encourage health care workers to notify authorities of "suspected unsafe patient care and conditions." (*§ 1278.5, subd. (a).*) One of the issues we must decide is whether a doctor claiming he lost his hospital privileges as a form of whistleblower retaliation must exhaust his judicial remedy of pursuing review, via writ of mandate, of the hospital's action before he can file a whistleblower lawsuit under *section 1278.5*. A *section 1278.5* [**2] claim cannot be asserted in writ proceedings, so applying the exhaustion requirement would delay relief for a whistleblower.

1 Subsequent statutory references are to the Health and Safety Code unless noted otherwise.

In two recent cases interpreting the California Whistleblower Protection Act (*Gov. Code, § 8547 et seq.*), the California Supreme Court held that a state employee sanctioned by an agency need not file a mandate petition against the agency before suing it under the whistleblower statute. The court recognized the Legislature's intent to encourage employees to report threats to public health without fear of retribution. (*Runyon v. Board of Trustees of* [*561] *California State University (2010) 48 Cal.4th 760, 763, 774 [108 Cal. Rptr. 3d 557, 229 P.3d 985]*; *State Bd. of Chiropractic Examiners v. Superior Court (2009) 45 Cal.4th 963, 977-978 [89 Cal. Rptr. 3d 576, 201 P.3d 457].*) For the same reason, prior filing of writ proceedings also is not required here.

Dr. Mark T. Fahlen reported to hospital authorities that some nurses who worked with him at Memorial Medical Center failed to follow his instructions. In some instances, he believed the nurses endangered patients' lives. One nurse refused to follow Fahlen's order to shock a patient with defibrillator paddles. [**3] Another disobeyed Fahlen's order to transfer a patient to intensive care. Some of these incidents involved heated exchanges between Fahlen and the nurses, and complaints were made about Fahlen's behavior as well.

The hospital's chief operating officer allegedly blamed Fahlen and helped persuade Fahlen's medical group to fire him. The hospital then declined to renew Fahlen's staff privileges. A judicial review committee of six physicians reviewed the nonrenewal of Fahlen's staff privileges. It found no professional incompetence and reversed the decision. The hospital board of trustees then reversed the committee. The board found that Fahlen's conduct was not acceptable and was "directly related to the quality of medical care at the Hospital." This outcome was reported to the Medical Board of California. Fahlen did not file a petition for a writ of mandate challenging the decision. Instead, he filed this lawsuit, asserting a *section 1278.5* claim among others.

This appeal is from an order denying the hospital's anti-SLAPP motion. (*Code Civ. Proc., § 425.16.*) The crucial issue is presented by the hospital's contention that the motion should have been granted because Fahlen's whistleblower [**4] claim will be defeated on the merits due to his failure to pursue writ relief. In light of our holding on the exhaustion issue, we reject that contention. We conclude the trial court correctly denied the motion with respect to the *section 1278.5* cause of action and one other. As to the remaining causes of action, however, we must reverse, because the exhaustion requirement does apply to them.

The Legislature's intent in enacting *section 1278.5* is clear: Medical personnel must be protected from retaliation when they report conditions that endanger patients. This policy of putting patients first would be undermined if retaliation victims had to pursue writ review before seeking the statute's protection.

This case illustrates why this is true. Fahlen reported what he thought were serious threats to patient safety. The hospital expelled him. A committee of his peers found that he should retain his staff privileges, but the hospital [*562] persisted. If we accepted the hospital's argument in this case, Fahlen could have to spend years pursuing writ relief before being able even to assert his whistleblower claim in court. This type of delay is incompatible with the Legislature's goals.

FACTUAL AND [**5] *PROCEDURAL HISTORIES*

Plaintiff and respondent Mark T. Fahlen is a nephrologist, a physician specializing in the treatment of diseases of the kidneys. Prior to June 2008, he was employed by Gould Medical Group (Gould). Fahlen was granted provisional staff privileges at Memorial Medical Center (MMC) in 2003 and was granted medical staff privileges at MMC in September 2004. MMC is operated by defendant and appellant Sutter Central Valley Hospitals.

Twice in 2004 and twice in 2006, Fahlen argued with nurses who failed to follow his directions concerning the care and treatment of patients. Between August 16, 2007, and April 28, 2008, there were six other incidents in which Fahlen had negative interactions with particular nurses providing care to Fahlen's patients. On many of these occasions, Fahlen reported the substandard or insubordinate nursing activity to nursing supervisors or by written complaint to MMC administration.

Around the beginning of May 2008, after the last of Fahlen's negative interactions with nursing staff, defendant and appellant Steve Mitchell, MMC's chief oper-

ating officer, contacted Gould's medical director with information concerning Fahlen's interactions with MMC's [**6] nursing staff. Mitchell testified at the peer review hearing that he contacted Gould's director in the hope that the director would meet with Fahlen, that Fahlen would become angry during the meeting, and that Gould would terminate Fahlen's employment as a result of the director's "own personal experiences" in such a meeting. Mitchell said his hope was that if Fahlen were fired by Gould he would leave town, with the net effect being to eliminate the need for peer review proceedings by MMC's medical staff. "Or at least that is my plan," Mitchell wrote in an earlier e-mail to MMC's chief executive officer.

Gould terminated Fahlen's at-will employment contract on May 14, 2008. Since the termination also resulted in the cancellation of Fahlen's medical malpractice insurance, Fahlen was immediately unable to continue treating patients at MMC. On May 30, 2008, Fahlen met with Mitchell to determine the status of Fahlen's staff privileges at MMC, because Fahlen intended to open a private medical practice in Modesto. At that meeting, according to Fahlen, Mitchell advised Fahlen that he should leave Modesto and that if he did not do so, MMC would begin an investigation and peer review that would [**7] result in a report of disciplinary proceedings to the Medical Board of [*563] California. Fahlen advised Mitchell that he intended to stay in town. Ten days later, MMC made a written request to Fahlen that he provide information concerning his interactions with nurses on five occasions, beginning in December 2007. Fahlen provided a written response dated June 10, 2008. Three days prior to this meeting, after Fahlen had scheduled the meeting with Mitchell, Mitchell sent an e-mail to MMC's chief executive officer stating that Fahlen "does not get it"--that is, as Mitchell testified, that Fahlen was going to lose his staff privileges at MMC. The chief executive officer responded: "Looks like we need to have the Medical Staff take some action on his MedQuals!!! Soon!"

MMC appointed an investigative committee, which reported to the medical executive committee (MEC) at its meeting on August 11, 2008. MEC is charged under the bylaws of MMC's medical staff with the review of applications for staff privileges at MMC and for the initiation of corrective or disciplinary action against medical staff. At the August 11, 2008, meeting, MEC recommended that MMC not renew Fahlen's staff privileges.

MEC notified [**8] Fahlen of its decision, and of his right to contest that decision, by letter dated August 28, 2008. Fahlen responded by letter from his attorney, requesting a hearing. By letter dated October 2, 2008, MMC advised Fahlen that the review hearing would be conducted by a judicial review committee (JRC) in accordance with the procedures contained in the bylaws. The letter also included a statement of charges against Fahlen, including 17 incidents of disruptive or abusive behavior toward MMC staff occurring from 2004 through 2008, and one incident of "abusive and contentious behavior" during a 2008 interview with the MEC's appointed investigative committee.

The JRC, composed of six physicians with staff privileges at MMC, and with an attorney as hearing officer, conducted an evidentiary hearing on the proposed termination of Fahlen's staff privileges over 13 sessions between October 8, 2009, and May 24, 2010. By written findings and conclusions unanimously adopted and issued on June 14, 2010, the JRC concluded that MEC "did not sustain its burden of proving that its recommendation not to reappoint Dr. Fahlen to the Medical Staff of Memorial Medical Center for medical disciplinary cause [**9] or reason is reasonable and warranted."

The JRC found that Fahlen's "interaction with the nursing staff at Memorial Medical Center was inappropriate and not acceptable" "on several occasions." In essence, the JRC concluded the medical staff should have intervened earlier with Fahlen, but failed in its responsibility to do so, leaving the matter to the administrators of MMC. MMC, in turn, delegated the primary responsibility for investigation of the matter to an outside attorney, whose investigative report, though highly influential with MEC, failed to [*564] consider other options, such as counseling. As a result, MEC failed to consider "intermediate steps short of recommending loss of Medical Staff privileges ... ." The JRC concluded that the evidence before it did "not establish any professional incompetence on the part of [Fahlen]." Similarly, the evidence did "not establish that any behavior of [Fahlen] was, or is, reasonably likely to be detrimental to patient safety." Further, after MEC recommended termination of privileges, Fahlen "voluntarily obtained psychological counseling and attended anger management sessions." Fahlen's behavior "has appreciably improved." To the extent the evidence [**10] indicated that, prior to the MEC recommendation, anyone's conduct was "detrimental to the delivery of patient care, the nursing staff ... was more to blame for such conduct than was [Fahlen]." The JRC reversed the MEC decision not to reappoint Fahlen to the MMC medical staff.

Pursuant to the medical staff bylaws, the final decision on termination of medical staff privileges rests with the MMC board of trustees. The board determined that it "need[ed] the JRC's assistance" in fulfilling its duties under the bylaws and, by letter dated September 16, 2010, propounded 21 questions, with subsidiary parts, to the JRC, asking whether each alleged incident of misconduct occurred, what findings the JRC made with respect to the individual charge, and "[w]hat evidence

produced at the hearing was considered in making those findings of fact?" The board requested the JRC's response within 30 days.

The JRC met and considered the board's request. It determined that answering the board's questions would require its members to read the entire transcript of the proceedings, together with the documentary evidence, and that the request was unreasonable. As a result, the JRC advised the board that "the Board [**11] will have to proceed on the basis of all the materials available to it at this time, including the Findings of Fact and Conclusion that was previously rendered by the Judicial Review Committee."

In a lengthy letter to Fahlen's attorneys from MMC's chief executive officer dated January 7, 2011, the board conveyed its decision "to reverse the JRC's decision and not to reappoint [Fahlen] to the medical staff." The board was critical of the JRC's findings and conclusions, which the board characterized as "unlinked to any factual support in the hearing record." In summary, the board concluded from its own review of the evidence at the JRC hearing that Fahlen's conduct "was inappropriate and not acceptable, [and was] directly related to the quality of medical care at the Hospital." Fahlen did not seek judicial review of this determination. MMC subsequently filed a report of disciplinary action with the Medical Board of California.

On March 9, 2011, Fahlen filed a complaint for damages and injunctive and declaratory relief against Sutter Central Valley Hospitals and Steve [*565] Mitchell. The first cause of action alleged retaliation in violation of *section 1278.5*, which prohibits any health facility [**12] from retaliating against, among others, members of its medical staff because the member has presented a complaint or report concerning quality of care, services, or conditions at the facility. (See *§ 1278.5, subd. (b)(1).*) The second cause of action requested a declaratory judgment "pursuant to ... *Business and Professions Code Section 803.1.*"[2] The third cause of action is for interference with the right to practice an occupation. The fourth cause of action is for intentional interference with Fahlen's contractual relations with Gould.[3] The fifth cause of action is for interference with prospective advantage, including loss of reputation and loss of the directorship of the Merced dialysis center. The sixth cause of action is for retaliation against Fahlen for "advocat[ing] for appropriate care for [his] patients," in violation of *Business and Professions Code sections 510* and *2056*. The seventh cause of action is for wrongful termination of Fahlen's hospital privileges. Along with damages and declaratory relief, Fahlen sought an injunction ordering his reinstatement to the medical staff of MMC.

2 *Business and Professions Code section 803.1* provides that the Medical Board of California [**13] shall disclose to "an inquiring member of the public" (*id., subd. (b)*) "[a]ny summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason, unless a court finds, in a final judgment, that the peer review resulting in the disciplinary action was conducted in bad faith and the licensee notifies the board of that finding ..." (*id., subd. (b)(6)*).

3 While defendants' opening brief states that defendants seek reversal of the anti-SLAPP order "in its entirety," in their summary of the proceedings in the lower court, defendants concede that the fourth cause of action is "not subject to the anti-SLAPP Motion and this subsequent appeal."

Defendants demurred to the complaint and filed an anti-SLAPP motion. After extensive briefing and submission of evidence, the court overruled the demurrer and denied the anti-SLAPP motion. With respect to the order on the anti-SLAPP motion, the court concluded that Fahlen's causes of action did not arise from "protected activity" as described in *Code of Civil Procedure section 425.16* because "disciplinary action is not protected activity." In addition, the [**14] court concluded, "plaintiff has established a prima facie case that he will prevail on the merits," requiring denial of the motion under *Code of Civil Procedure section 425.16, subdivision (b)(1).*

DISCUSSION

I. *The parties' contentions*

The parties make several overarching arguments. Defendants' primary arguments are: First, that all of Fahlen's causes of action arise from protected activity as contemplated by *Code of Civil Procedure section 425.16* since the California Supreme Court has held that hospital peer review proceedings are [*566] official proceedings authorized by law. (See *Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal.4th 192, 203 [46 Cal. Rptr. 3d 41, 138 P.3d 193]* (*Kibler*) [construing *Code Civ. Proc., § 425.16, subd. (e)(2)*].) As a result, the trial court's first basis for denying the motion was erroneous. Second, that Fahlen's failure to seek judicial review of the MMC board's final administrative decision makes that determination final and precludes, as a matter of fundamental jurisdiction, an attack on that decision in collateral judicial proceedings pursuant to *Westlake Community Hosp. v. Superior Court (1976) 17 Cal.3d 465, 485-486 [131 Cal. Rptr. 90, 551 P.2d 410]* (*Westlake*). Defendants argue there is no possibility

[**15] Fahlen can prevail on any of the six causes of action challenged on appeal.

Fahlen contends, primarily, that his first cause of action for retaliation under *section 1278.5* is not precluded by his failure to obtain judicial review of the MMC board's termination decision. In addition, he takes the position that he was not required to obtain judicial review because the peer review proceedings were pretextual; the result was unsupported by the evidence and conflicted with the JRC's findings. Finally, he argues he should be permitted to pursue the second through seventh causes of action even if those causes of action might otherwise require exhaustion of judicial review. This is because requiring exhaustion would compel him to split the remedies available for remediation of a single primary right, namely, the right to practice his profession "without facing unlawful retaliation or other wrongful interference."

We review an order granting or denying an anti-SLAPP motion de novo. (*Smith v. Adventist Health System/West (2010) 190 Cal.App.4th 40, 52 [117 Cal. Rptr. 3d 805]*.)

II. *The statutory framework*

This case involves two statutory provisions that are not inherently contradictory, since both provisions ultimately seek [**16] to protect and improve patient care. The parties, however, assert these statutory rights in a manner that conflicts with aspects of the opposing party's asserted statutory rights. To some extent, the statutes anticipate the type of conflicting assertion of rights presented in this case and they attempt to resolve the conflict. (See *Bus. & Prof. Code, § 809.05, subd. (d)*; *Health & Saf. Code, § 1278.5, subd. (h)*.) We begin with a summary of the relevant statutes.

A. *Section 1278.5*

Section 1278.5 was enacted in 1999 to prohibit certain forms of retaliation and discrimination against patients and employees of health facilities. (See Stats. 1999, ch. 155, § 1, p. 2054.) The definition of a health facility includes [*567] a hospital. (See *§ 1250, subd. (a)*.) In 2007, *section 1278.5* was amended to include among those protected from retaliation or discrimination any "member of the medical staff ... or any other health care worker of the health facility ... ." (*§ 1278.5, subd. (b)(1)*, as amended by Stats. 2007, ch. 683, § 1, p. 5809.)

Section 1278.5 implements a public policy "to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions." [**17] (*§ 1278.5, subd. (a)*.) It does so, in part, by protecting persons who have "[p]resented a grievance, complaint, or report to the [health] facility ... ." (*Id., subd. (b)(1)(A)*.) *Section 1278.5, subdivision (d)(1)*, establishes a rebuttable presumption that any discriminatory action taken is retaliation if the action is taken within 120 days of the filing of the grievance or complaint by the protected person and if the "responsible staff" of the facility knew about the filing of the complaint. (*Ibid.*) Discriminatory treatment includes changes in the terms or conditions of privileges of a member of the facility's medical staff. (*Id., subd. (d)(2)*.)

The consequence to the facility for this type of discriminatory treatment is also specified: "A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or operates a health facility ... , and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter [**18] or any other applicable provision of statutory or common law." (*§ 1278.5, subd. (g)*.)

B. *Business and Professions Code Sections 809 Through 809.9*

As we previously mentioned, Fahlen seeks a declaratory judgment concerning the peer review process under *Business and Professions Code sections 809 through 809.9*. These sections were initially enacted in 1989 (see Stats. 1989, ch. 336, §§ 1-9.5, pp. 1444-1450). The goal was to provide a peer review process to "exclude ... those healing arts practitioners who provide substandard care or who engage in professional misconduct" (*Bus. & Prof. Code, § 809, subd. (a)(6)*), "with an emphasis on early detection of potential quality problems and resolutions through informal educational interventions" (*id., subd. (a)(7)*). In the case of acute care hospitals, such as MMC, the statutory requirements for the peer review process are only indirectly applicable: "*Sections 809 to 809.8*, inclusive, shall not affect the respective responsibilities of the organized medical staff or the governing body of an acute care hospital with respect to peer review in the acute care hospital [*568] setting. It is the intent of the Legislature that written provisions implementing *Sections 809 to 809.8*, [**19] inclusive, in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval, which approval shall not be withheld unreasonably." (*Id., subd. (a)(8)*.) The parties do not dispute that the medical staff bylaws were adopted pursuant to *Business and Professions Code section 809, subdivision (a)(8)*, that the bylaws satisfy its require-

ments, and that the peer review proceeding for Fahlen procedurally complied with the bylaws.

As implied by the term "peer review," a peer review body is generally composed of licensed persons of the same statutory classification (such as "physician and surgeon" or "clinical social worker") (*Bus. & Prof. Code, § 805, subd. (a)(2)*) as the individual whose work is under review. (See *id., § 805, subd. (a)(1)(B)(i) & (iv).*) In the case of an acute care hospital, however, the peer review statutes permit the final determination concerning disciplinary action to be taken by the governing body of the hospital--not by the peer review body. (*Bus. & Prof. Code, § 809, subd. (a)(8).*) Even so, however, "the governing body shall give [**20] great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." (*Bus. & Prof. Code, § 809.05, subd. (a).*) As relevant here, the governing body of a hospital has the authority to take final disciplinary action against a member of the medical staff "[i]n the event the peer review body fails to take action in response to a direction from the governing body ... ." (*Id., subd. (c).*) In doing so, the governing body "shall act exclusively in the interest of maintaining and enhancing quality patient care." (*Id., subd. (d).*)

The medical staff bylaws of MMC, in addition, provide for review of the JRC's decisions upon appeal by the MEC or by the staff member in question. If neither party appeals, as in this case, the board "shall have the ultimate responsibility to affirm or reverse the decision of the [JRC], but it shall give great weight to the actions of the [JRC], and in no event, shall act in an arbitrary or capricious manner." (Medical Staff Bylaws, MMC, § 8.5-1.) This review, when permitted by the bylaws of a hospital, is not prohibited by the statutory peer review requirements. (*Ellison v. Sequoia Health Services (2010) 183 Cal.App.4th 1486, 1494 [108 Cal. Rptr. 3d 728].*) [**21] "A hospital's final decision in a peer review proceeding may be judicially reviewed by a petition for writ of administrative mandate." (*Id. at p. 1495.*) Further, where a hospital's disciplinary decision is not set aside through judicial review, the decision becomes a final adjudication of the issues in the peer review proceeding. (*Westlake, supra, 17 Cal.3d at p. 484.*) [*569]

C. *Express Cross-related Provisions*

In addition to the general requirement of *Business and Professions Code section 809.05, subdivision (d)*, that peer review proceedings be conducted "exclusively in the interest of maintaining and enhancing quality patient care," *Health and Safety Code section 1278.5* recognizes the potential for conflict between a retaliation lawsuit under that section and peer review proceedings for a member of a medical staff. It states: "The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the [**22] health and safety of patients of the health facility during the peer review proces. ... If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm." (*§ 1278.5, subd. (h).*)

D. *Code of Civil Procedure Section 425.16*

In addition to these substantive provisions of law, this case arises in the procedural context of the anti-SLAPP statute, *Code of Civil Procedure section 425.16*. The familiar principles governing anti-SLAPP motions were summarized by the California Supreme Court in *Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12 [109 Cal. Rptr. 3d 329, 230 P.3d 1117]*: "A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Id. at p. 21.*) "In 1992, out of concern over 'a disturbing increase' in these types of lawsuits, the Legislature enacted ... the anti-SLAPP statute. ... The statute authorized [**23] the filing of a special motion to strike to expedite the early dismissal of these unmeritorious claims." (*Ibid.*, citation omitted.)

"A special motion to strike involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's 'cause of action ... aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech ... in connection with a public issue.'" (*Simpson Strong-Tie Co., Inc. v. Gore, supra, 49 Cal.4th at p. 21.*) If the defendant meets this threshold, the court considers the second step of the inquiry, i.e., whether the plaintiff has established a probability that the plaintiff will prevail on the claim. (*Ibid.*) Ordinarily, a court should consider the two steps of the analysis in order. (*Oasis West Realty, LLC v. Goldman (2011) 51* [*570] *Cal.4th 811, 820 [124 Cal. Rptr. 3d 256, 250 P.3d 1115].*) As we mentioned, the trial court here decided that the anti-SLAPP motion failed under both the first and the second steps of the statutory analysis.

III. *First step: The complaint arises from protected activity*

(1) Although *Code of Civil Procedure section 425.16, subdivision (b)(1)*, states that the statute is intended to protect only those persons who are sued because of "any act [**24] of that person in furtherance of the person's right of petition or free speech ... in connection with a public issue," the statute subsequently defines that phrase in a manner specific to the anti-SLAPP statute. As relevant to this case, *section 425.16, subdivision (e)(2)*, includes within that phrase "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law ... ." As a result, a "defendant who invokes ... *subparagraph (2)* ... need not 'separately demonstrate that the statement concerned an issue of public significance.'" (*Kibler, supra, 39 Cal.4th at p. 198.*)

(2) In *Kibler*, a hospital peer review committee summarily suspended a doctor "after a series of hostile encounters" with other members of the hospital staff. (*Kibler, supra, 39 Cal.4th at p. 196.*) The doctor entered into a written agreement with the hospital for reinstatement of privileges upon certain conditions. The doctor then sued the hospital, together with certain physicians and nurses, "seeking damages under a variety of theories including defamation, abuse of process, and interference [**25] with [his] practice of medicine." (*Ibid.*) The Supreme Court affirmed the trial court's conclusion that these causes of action arose from protected activity under the anti-SLAPP statute. (*Kibler, supra, at p. 203.*) As particularly relevant here, the court held that actions of a peer review committee were statements "made in connection with an issue under consideration or review by ... any other official proceeding authorized by law," as provided by *Code of Civil Procedure section 425.16, subdivision (e)(2)*. (See *Kibler, supra, at p. 200.*)

In this case, as in *Kibler*, the challenged causes of action (except the fourth cause of action relating to the termination of Fahlen's employment by Gould) all arise from the hospital peer review proceedings. Fahlen contends that, notwithstanding the holding in *Kibler*, the acts alleged in his complaint are not protected activity under the anti-SLAPP statute for two reasons.

First, Fahlen argues that defendants' acts were not protected because they were retaliatory. Fahlen relies on *McConnell v. Innovative Artists Talent & Literary Agency, Inc. (2009) 175 Cal.App.4th 169 [180, 96 Cal. Rptr. 3d 1]*, to support his contention that "[r]etaliatory actions taken against a person are [**26] [*571] not actions in furtherance of free speech, even though they are conveyed through words." *McConnell* is inapposite, however, primarily because the employment action did not occur in the context of a quasi-judicial peer review proceeding established by statute. Instead, *McConnell* involved action taken by a nonmedical employer under an ordinary employment contract. (*Id. at p. 174.*) The employer did not contend its employment decision resulted from a quasi-judicial proceeding, such as the peer review proceeding in *Kibler, supra, 39 Cal.4th at page 203*, but took the position, instead, that the letter reflecting the changes in employment was issued in connection with ongoing litigation over the terms of employment. (*McConnell, supra, at p. 176.*) The appellate court concluded that the defendant had failed to carry its burden to establish that the letter was written in connection with the ongoing litigation. (*Id. at p. 178.*) Consequently, it was not the retaliatory character of the defendant's activity that stripped that activity of protection under the anti-SLAPP statute but, rather, the fact that the acts were not in connection with an official proceeding. (*McConnell, supra, at p. 181.*)

In [**27] this case, by contrast, defendants have met their initial burden under the anti-SLAPP statute to "make a prima facie showing" (*Simpson Strong-Tie Co., Inc. v. Gore, supra, 49 Cal.4th at p. 21*) that the challenged causes of action arise from--and are based directly upon--actions taken in the peer review proceedings, an "official proceeding authorized by law" (*Code Civ. Proc., § 425.16, subd. (e)(2)*), as held in *Kibler, supra, 39 Cal.4th at page 200.*[4] We conclude this prima facie showing by defendants, as the moving party on the anti-SLAPP motion, resolves the only issue before the court in the first phase of the anti-SLAPP inquiry. (See *Simpson Strong-Tie Co., Inc. v. Gore, supra, at p. 21.*)

4 Fahlen suggests that the causes of action do not "*arise from*" the protected activity, citing *City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78 [124 Cal. Rptr. 2d 519, 52 P.3d 695]*. In that case, mobilehome park owners sued in federal court to invalidate a city's rent control ordinance. The city sued seeking a declaratory judgment that the ordinance was constitutional. The park owners filed an anti-SLAPP motion, contending the city's suit arose from the owners' protected activity of filing the federal suit. Our Supreme Court held that [**28] the city's cause of action arose from the rent control ordinance, not from the owners' federal challenge to the ordinance. (*Cashman, supra, at p. 78.*) As a result, the anti-SLAPP motion was properly denied. (*Cashman, supra, at p. 80.*) *Cashman* is not relevant to resolution of this case, since all of Fahlen's causes of action seek to remedy injuries caused by the protected activity itself. (See *ibid.*)

Fahlen's second contention is that the determination made to terminate his privileges at MMC was not made by the JRC, composed of his "peers," but by MMC's governing board. Fahlen contends the policy reasons that

attach a public interest to medical staff peer review are not applicable when the act in question is taken by the board, which is not required to be composed entirely of medical personnel. We disagree. To the contrary, the code provisions [*572] establishing the peer review process expressly recognize that, in the case of an acute-care hospital, the peer review process culminates in a final decision by the hospital's governing board. (See *Nesson v. Northern Inyo County Local Hospital Dist. (2012) 204 Cal.App.4th 65, 80-81 [138 Cal. Rptr. 3d 446].*) While it is true that in *Kibler, supra, 39 Cal.4th at page 196*, [**29] the action in question was taken by the medical review committee, we do not view this fact as a limitation on the scope of the court's ultimate holding. It would serve neither reason nor public policy to conclude that an intermediate decision made pursuant to the statutory peer review scheme was an "official proceeding," but to conclude that the final decision made pursuant to that same scheme was not an "official proceeding."[5]

5 Fahlen appears to take the position that the written decision of the board terminating his staff privileges was not a protected act because it was not "communicative," citing *Smith v. Adventist Health System/West, supra, 190 Cal.App.4th at pages 57-58*. The relevant discussion in *Smith* concerned the second step of analysis under the anti-SLAPP statutes, namely, the probability of prevailing step (see *Smith, supra, at pp. 56-57*), not the first, or protected-activity, step. (See *id. at p. 56* ["we will assume for purposes of this appeal that ... defendants' acts ... were protected activity for purposes of the anti-SLAPP statute"].)

We hold that the statements or writings of a hospital's governing board in reviewing a determination on medical staff privileges, and [**30] in making a final decision on such termination or nonrenewal of such privileges, are made "in connection with an issue under consideration or review [in an] ... official proceeding authorized by law." (*Code Civ. Proc., § 425.16, subd. (e)(2)*; see *Kibler, supra, 39 Cal.4th at p. 203*; see also *Nesson v. Northern Inyo County Local Hospital Dist., supra, 204 Cal.App.4th at p. 81.*) The trial court erred in concluding to the contrary.

IV. *Second step: Fahlen's probability of prevailing on the causes of action*

In the second step of consideration of an anti-SLAPP motion, the burden shifts to the plaintiff to establish "a probability that the plaintiff will prevail on the claim" (*Code Civ. Proc., § 425.16, subd. (b)(1)*). (See *Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67 [124 Cal. Rptr. 2d 507, 52 P.3d 685].*) In order to meet this burden, the plaintiff must have stated, and substantiated by a sufficient prima facie showing of facts, a legally sufficient claim. (*Navellier v. Sletten (2002) 29 Cal.4th 82, 88 [124 Cal. Rptr. 2d 530, 52 P.3d 703].*) Further, factual disputes are to be resolved in favor of the plaintiff. (*Ibid.*) In this case, defendants do not dispute the factual sufficiency of Fahlen's underlying allegations. They contend, however, that [**31] each cause of action is legally barred by the doctrine of exhaustion of judicial remedies and, in the case of two causes of action, the complaint fails to state a cause of action. [*573]

(3) In *Westlake, supra, 17 Cal.3d 465*, a doctor sued a hospital in tort, alleging that the hospital and various staff and board members had maliciously conspired together to deny staff privileges at the hospital through a peer review process that was unfair and in violation of the hospital's own bylaws and constitution. (*Id. at p. 470.*) Our Supreme Court held that a doctor must exhaust all available administrative remedies and successfully set aside the hospital's final administrative determination through mandamus review before the doctor may "pursu[e] her tort claim against defendants." (*Id. at p. 484*; see *id. at p. 486.*) This rule has been repeated in numerous Supreme Court decisions and in the context of several different types of administrative proceedings. (See *Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 70-71 [99 Cal. Rptr. 2d 316, 5 P.3d 874].*) The rule was summarized in *Runyon v. Board of Trustees of California State University, supra, 48 Cal.4th at page 773*, citations omitted (*Runyon*): "Under the doctrine of exhaustion of judicial remedies, [**32] '[o]nce a[n administrative] decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. ... Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims. ...' ... Generally speaking, if a complainant fails to overturn an adverse administrative decision by writ of mandate, 'and if the administrative proceeding possessed the requisite judicial character ... , the administrative decision is binding in a later civil action brought in superior court.'" (Citations omitted.)

In some circumstances, however, the quasi-judicial proceeding is alleged by a plaintiff not to be a vehicle for administrative resolution of an administrative grievance, but is alleged to be, or to be a part of, a retaliatory action itself. This retaliation cannot be resolved within the administrative grievance process when the process itself provides the forum for retaliation, [**33] it is argued,

and such an administrative proceeding is not entitled to the deference traditionally afforded by the standard of review in administrative mandate cases. In these circumstances, the Legislature may recognize, explicitly or by implication, that the administrative decision in question should not be given preclusive effect in later judicial proceedings, even when the administrative decision has not been set aside through administrative mandate proceedings. When the Legislature has made this type of determination, the courts will not require exhaustion of judicial remedies in the administrative proceeding. (*Runyon, supra, 48 Cal.4th at p. 774.*)

No Supreme Court case since *Westlake, supra, 17 Cal.3d 465*, has considered the requirement for exhaustion of judicial remedies in the context of medical peer review proceedings. Since the medical whistleblower statute, [*574] *section 1278.5*, was amended in 2007 to include staff physicians within its protections, one published opinion of the Court of Appeal has applied *Westlake* to support dismissal of a physician's *section 1278.5* retaliation cause of action. (See *Nesson v. Northern Inyo County Local Hospital Dist., supra, 204 Cal.App.4th at p. 87.*) [**34] In *Nesson*, however, the "claim for retaliation under ... *section 1278.5* also fail[ed] because the evidence show[ed] the summary suspension [of staff privileges] was unrelated to the complaints [about patient care] made more than eight months before ..." the termination. (*Ibid.*) In any event, *Nesson* did not consider the exception to exhaustion of judicial remedies established in *Runyon, supra, 48 Cal.4th 760*, and similar cases addressing other whistleblower or antiretaliation statutes. As a result, we will examine the requirements described in these more recent Supreme Court cases.[6]

> 6 We recognize the outcome in Fahlen's case differs from the outcome in *Nesson v. Northern Inyo County Local Hospital Dist., supra, 204 Cal.App.4th at page 86.* Although one of the claims made by Dr. Nesson was based on *section 1278.5* (*Nesson, supra, at p. 75*), the *Nesson* opinion did not separately consider or analyze the requirement for exhaustion of judicial remedies with respect to Nesson's *section 1278.5* cause of action. (*Nesson, supra, at pp. 85-86.*) Significantly, Nesson not only did not exhaust his administrative remedies, he also refused to cooperate with the hospital's peer review process and "took [**35] a leave of absence and actively thwarted any determination as to whether he should have continued in his position as the medical director of radiology," all of which form a separate and sufficient basis for resolving the case against Nesson. (*Id. at pp. 82, 85.*) Further, a review of the briefs filed in *Nesson* reflects that the parties did not focus on the *section 1278.5* claim. (We take judicial notice of the parties' briefs in *Nesson* upon Fahlen's request [see *Evid. Code, § 452, subd. (d)*].) Although Nesson mentioned *section 1278.5* in his briefs, the hospital district did not mention it at all. Under these circumstances, it is not surprising that the appellate court did not delve deeply into *section 1278.5*. For all these reasons, we consider the *Nesson* court's conclusions concerning exhaustion of judicial remedies to be dicta. (See *Nesson, supra, at p. 86.*) To the extent they are not, we disagree with *Nesson's* implicit conclusion that a plaintiff suing under *section 1278.5* first must exhaust judicial remedies in any underlying peer review proceeding.

In *Campbell v. Regents of University of California (2005) 35 Cal.4th 311 [25 Cal. Rptr. 3d 320, 106 P.3d 976]*, our Supreme Court considered whether an employee of the university [**36] was required to exhaust administrative remedies provided by the Regents "to handle complaints of retaliatory dismissal for whistleblowing" (*id. at p. 324*) before the employee was permitted to sue the university for damages for violation of *Government Code section 12653*, a whistleblower provision within the False Claims Act (*Gov. Code, § 12650 et seq.*) (*Campbell, supra, at p. 325*). The plaintiff in that case had not exhausted her administrative remedies. She contended that *Government Code section 12653* should not require exhaustion, in reliance on a related whistleblower statute within the California Whistleblower Protection Act, *Government Code section 8547.10*, which applies to University of California employees. (*Campbell, supra, at p. 327.*) The latter statute requires initiation of an administrative proceeding and permits court action if the university has [*575] not acted on the administrative complaint within a specified time. (*Ibid.*) Campbell argued that the absence of a similar requirement in *Government Code section 12653* required an inference that the Legislature did not intend to require administrative exhaustion in *section 12653*. (*Campbell, supra, at p. 327.*) The court rejected this contention. In light of [**37] the general applicability of a requirement for exhaustion of administrative remedies, "the Legislature's silence in [*Government Code section 12653*] makes the common law exhaustion rule applicable ... and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit." (*Id. at p. 328.*)

The court also applied this rule in its consideration of a different whistleblower statute, *Labor Code section 1102.5*. (*Campbell v. Regents of University of California, supra, 35 Cal.4th at p. 329.*) For that statute, there was ambiguous legislative history that was "unclear on the question whether the Legislature intended to depart from

the exhaustion doctrine" when it enacted the statute. (*Id. at p. 331.*) In those circumstances, the court concluded "that absent a clear indication of legislative intent, we should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies." (*Id. at p. 333.*)

State Bd. of Chiropractic Examiners v. Superior Court, supra, 45 Cal.4th 963 (*Arbuckle*), also involved an action under the California Whistleblower Protection Act (Act). (*Arbuckle, supra, at p. 967.*) The [**38] provisions of the Act applicable in *Arbuckle* (*Gov. Code, § 8547.8, subd. (c)*) required administrative exhaustion, similar to the related *Government Code section 8547.10* discussed in *Campbell v. Regents of University of California, supra, 35 Cal.4th 311.* The plaintiff in Arbuckle had exhausted her administrative remedies before the State Personnel Board, and the board had issued a final order finding that the negative actions taken against the plaintiff "were for reasons unrelated to Arbuckle's protected disclosures," that is, her whistleblower activities. (*Arbuckle, supra, at p. 969.*) The primary issue before the Supreme Court was whether the plaintiff's action for damages was precluded under the requirement for exhaustion of judicial remedies articulated by *Westlake, supra, 17 Cal.3d 465*, and subsequent cases. (*Arbuckle, supra, at p. 974.*)

The *Arbuckle* court began its analysis by observing the general rule that a litigant is required to seek judicial review of an adverse administrative determination "before pursuing other remedies that might be available." (*Arbuckle, supra, 45 Cal.4th at p. 975.*) This general rule is applicable, however, only where the Legislature intended to "elevate[] [**39] those [administrative] findings to the same status as a final civil judgment rendered after a full hearing ... ." (*Ibid.*) Two factors led the court to conclude that the Legislature had not intended a requirement of judicial exhaustion under the relevant portions of the Act. First, the statutes "expressly acknowledged [*576] the existence of the parallel administrative remedy [but] did not require that the [administrative] findings be set aside by way of a mandate action" prior to a civil damages action. (*Arbuckle, supra, at p. 976.*) Instead, the Legislature only required a final administrative determination as a precondition to the civil remedy. (*Ibid.*) This factor distinguished the case from the *Westlake* line of cases, particularly *Johnson v. City of Loma Linda, supra, 24 Cal.4th 61.*

Second, the Legislature clearly intended to provide a civil damages remedy under the Act. Yet judicial review of the administrative action would occur either under a substantial evidence or an arbitrary and capricious standard of review (depending on the section of the Code Civ. Proc. applicable to the proceeding), making it "very [**40] difficult for a complaining employee to have the board's adverse factual findings overturned." (*Arbuckle, supra, 45 Cal.4th at p. 977.*) "Nothing in [*Government Code] section 8547.8[, subdivision] (c)* suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed, and such a narrow interpretation of the damages remedy would hardly serve the Legislature's purpose of protecting the right of state employees 'to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.' ([*Gov. Code,] § 8547.1.*)" (*Id. at pp. 977-978.*)

In *Runyon, supra, 48 Cal.4th 760*, the Supreme Court considered another portion of the Act, *Government Code section 8547.12*, which protects employees of the California State University system. (*Runyon, supra, at pp. 763-764.*) This section requires an employee to file a complaint with the appropriate university official, but permits the employee to file a civil damages action "if the university has not satisfactorily addressed the complaint within 18 months." (*Gov. Code, § 8547.12, subd. (c).*) The primary issue before the court in *Runyon* was whether a thorough and procedurally [**41] fair administrative decision could be deemed to not "satisfactorily address[]" the whistleblower complaint, thereby permitting a civil action. The court concluded that a decision that did not provide full relief to the complainant, so long as that decision constituted final action by the university, permitted the filing of a civil whistleblower complaint. (*Runyon, supra, at p. 773.*) Second, the court considered whether the whistleblower had to exhaust judicial remedies before proceeding with a civil damages action. (*Ibid.*) Applying the two considerations articulated in *Arbuckle, supra, 45 Cal.4th at page 976*, the *Runyon* court concluded the Legislature did not intend to require writ review of the administrative determination as a precondition for a civil whistleblower action. (*Runyon, supra, at p. 774.*)

There are a number of differences between medical staff peer review under *Business and Professions Code section 809 et seq.*, and the administrative proceeding authorized under the Act. In particular, peer review is a process [*577] started by a hospital (whether through the MEC or the board of trustees), with the putative whistleblower as the respondent. Under the Act, the whistleblower initiates [**42] the administrative review of retaliatory actions taken by his or her employer. Thus, the whistleblowing and alleged retaliation are at the very core of the administrative proceeding under the Act. In peer review proceedings, on the other hand, the quality of medical care provided by the putative whistleblower is the primary focus--not the hospital's response to complaints made by the doctor. In our view, the differences make it more persuasive, not less, that the Legislature did not intend to require exhaustion of judicial remedies as a

precondition to filing a civil action under *section 1278.5*, applying the *Arbuckle/Runyon* analysis. In *Arbuckle, supra, 45 Cal.4th at page 976*, the court found a legislative intent not to require exhaustion of writ remedies when the Legislature "expressly acknowledged the existence of the parallel administrative remedy," yet "did not require that the [administrative] findings be set aside by way of a mandate action ... ." In these circumstances, "to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the evident legislative intent." (*Runyon, supra, 48 Cal.4th at p. 774.*)

In this case, *section 1278.5*, [**43] from its adoption in 1999 through the 2007 amendments, applied primarily to retaliation against patients and employees of health facilities, persons who are not subject to [*578] the peer review process of *Business and Professions Code section 809 et seq.* When the initial amendments to *section 1278.5* were introduced in 2007, the bill simply added nonemployee doctors who had staff privileges at a health facility to those persons who were protected from discrimination and retaliation as a result of whistleblowing. (See Assem. Bill No. 632 (2007-2008 Reg. Sess.) as introduced Feb. 21, 2007.) As the bill moved through the Senate, however, opponents of the bill raised the issue of peer review proceedings in relation to the proposed civil whistleblower remedy for medical staff: "The critical question, according to the principal opponents of AB 632, is what would happen to a pending peer review action, or to the evidentiary protections and immunity from liability that attend peer review actions, once the member of the medical staff files a *§ 1278.5* action?" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007, p. 10.)

Apparently in response to [**44] these concerns, the bill was amended by the Senate on July 17, 2007, to add the provision that became a portion of *subdivision (h)* of the final version of *section 1278.5*: "The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on pending peer review matters from the complainant in an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process." (Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007, italics omitted.)

The bill was further amended in the Senate on September 5, 2007, to add the remainder of *section 1278.5, subdivision (h)* as it appears in the final legislation: "Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in *Section 805* and *Sections 809 to 809.5, inclusive, of the Business and Professions Code*, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing [**45] in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm." (*§ 1278.5, subd. (h).*)

It is evident from this legislative history that the Legislature was not only cognizant of the possibility of parallel peer review administrative proceedings, but that it expressly contemplated that such proceedings could, with certain limitations, occur simultaneously with a civil action under *section 1278.5*.[7] In such circumstances, "to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the evident legislative intent." (*Runyon, supra, 48 Cal.4th at p. 774.*)

> 7 Because Fahlen fully exhausted his administrative remedies in this case, we need not consider whether the 2007 amendments to *section 1278.5*, particularly the addition of *subdivision (h)*, create a limited exception to the administrative-exhaustion requirement established in *Westlake, supra, 17 Cal.3d at pages 485-486.*

We have reviewed the account of the legislative history of the 2007 [**46] amendments provided by the California Hospital Association in its brief in this case as amicus curiae on behalf of defendants. We disagree with the conclusion that the amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) were intended to leave the *Westlake* rule unaffected. Instead, we find in *section 1278.5, subdivision (l)*, which provides that "[n]othing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities ... ," an implicit recognition of the limitation in *Business and Professions Code section 809.05* that peer review proceedings shall not be "arbitrary or capricious" (*id., subd. (a)*) and shall be conducted "exclusively in the interest of maintaining and enhancing quality patient care" (*id., subd. (d)*). In other words, "legitimate peer review activities" do not include retaliation against medical staff for complaints about quality of care. [*579]

As in *Runyon* and *Arbuckle*, the standard of judicial review of a peer review decision under *Code of Civil Procedure section 1094.5*--one intended in the ordinary case to give the greatest possible deference to the action of the administrative decision maker--"would mean that 'in nearly every case, [**47] an adverse decision from [the hospital] would leave the employee without the benefit of the damages remedy set forth'" in *section*

1278.5. (*Runyon, supra, 48 Cal.4th at p. 774*.) To paraphrase *Arbuckle, supra, 45 Cal.4th at pages 977-978*, nothing in *section 1278.5* suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed. Further, such a narrow interpretation of the damages remedy would not serve the Legislature's purpose of protecting the public from unsafe patient care and conditions through the adoption of *section 1278.5*.

In addition, the evidentiary presumption of *section 1278.5, subdivision (d)(1)*, is incompatible with a requirement for exhaustion of judicial remedies through writ review of the peer review decision. *Section 1278.5, subdivision (d)(1)*, creates a rebuttable presumption that any discriminatory action, such as instituting proceedings to terminate staff privileges (*§ 1278.5, subd. (d)(2)*), is prohibited retaliation for complaints about hospital care made by the staff physician within 120 days of the disciplinary action, if "responsible staff" at the facility knows about the doctor's complaints. It would be virtually [**48] impossible to implement that presumption in a civil action under *section 1278.5* after judicial ratification of a hospital's administrative action under the narrow standard of review in writ proceedings, during which the presumption would not have been operable.

Finally, the range of remedies authorized by *section 1278.5, subdivision (g)*, is incompatible with a requirement for successful judicial review of a peer review decision. If a doctor were required to successfully set aside an administrative order terminating his or her privileges as a precondition to a *section 1278.5* action, as defendants contend in their reliance on *Westlake, supra, 17 Cal.3d at pages 485-486*, there would never be a circumstance in which reinstatement of a doctor's staff privileges would still be required in the civil action. This is true even though reinstatement is a remedy specified by the Legislature in *section 1278.5, subdivision (g)*. We will not impose judicial constraints on the statutory remedy where doing so makes the Legislature's language superfluous. (*Arbuckle, supra, 45 Cal.4th at p. 978*.)

(4) For all of these reasons, we conclude there is no requirement that a *section 1278.5* plaintiff seek judicial [**49] review of administrative action taken in peer review proceedings as a precondition to a civil action under *section 1278.5*. [*580]

V. *Exhaustion of remedies in remaining causes of action*

Fahlen contends that if he is not required to exhaust judicial writ remedies prior to his civil action under *section 1278.5*, he should not be required to do so in order to maintain his remaining causes of action because such a requirement would violate the rule against splitting causes of action. We disagree, with the exception of the second cause of action. As to the third, fifth, sixth, and seventh causes of action, these involve common law and statutory causes of action to which the *Westlake* requirement for judicial exhaustion is applicable (see *Westlake, supra, 17 Cal.3d at pp. 485-486*) and in which there is no legislative intent demonstrated to create an exception to that requirement. Under the rule of *Campbell v. Regents of University of California, supra, 35 Cal.4th at page 325*, exhaustion is required in the absence of legislative intent to the contrary, and we are bound by that rule (*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal. Rptr. 321, 369 P.2d 937]*).

(5) In addition, all of these causes of action are ambiguous [**50] as set forth in the complaint. For example, they might refer to MMC's initiation and prosecution of the peer review proceeding as retaliation, or they might refer to the peer review decision as unsupported by the evidence, in violation of the bylaws, or otherwise defective. Thus, Fahlen argues at length in his brief on appeal that the process and the decision were defective. To that extent, these causes of action are an attempt collaterally to attack the administrative decision, which is not the purpose of a civil action under *section 1278.5*. As stated in *Runyon, supra, 48 Cal.4th at page 769*, a retaliation lawsuit is "'not an action *to review* the decision of the [administrative decision maker], but *a completely separate* damages action in the superior court in which the employee will enjoy all the procedural guarantees and independent factfinding that generally accompany such actions.'" To the extent, however, these causes of action focus purely on retaliation for whistleblowing, they add nothing to the legal theories supporting, and remedies available under, *section 1278.5*. (See *§ 1278.5, subd. (g)* [listing available remedies, including "any remedy deemed warranted by the court pursuant [**51] to this chapter or any other applicable provision of statutory or common law"].)

We conclude neither judicial economy nor fundamental fairness requires an exception from the applicable requirement for exhaustion of judicial remedies. Since Fahlen did not exhaust his judicial remedies prior to filing the third, fifth, sixth, and seventh causes of action, those causes of action are barred. As a result, Fahlen failed to establish a probability of prevailing on those causes of action, and the trial court erred in failing to dismiss them. [*581]

Somewhat different considerations apply to the second cause of action, however, for declaratory relief pursuant to *Business and Professions Code section 803.1*. This section requires the medical, osteopathic, and podiatric boards to "disclose to an inquiring member of the public" a variety of information about licensees and former licensees, including "summaries of hospital disci-

plinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason ... ." (*Bus. & Prof. Code, § 803.1, subd. (b)(6).*)

Pursuant to an amendment to the statute adopted in 2010, however, this information is not to be disclosed, [**52] when "a court finds, in a final judgment, that the peer review resulting in the disciplinary action was conducted in bad faith and the licensee notifies the board of that finding." (*Bus. & Prof. Code, § 803.1, subd. (b)(6)*; see Stats. 2010, ch. 505, § 2.) The amended statute provides no mechanism for a licensee to obtain such a final judgment concerning the bad faith of a peer review proceeding. However, because *Business and Professions Code section 805, subdivision (b)*, requires a hospital to file a report with the Medical Board of California whenever a doctor's staff privileges are terminated (*id., subd. (b)(2)*), the ability of a doctor to block public disclosure of such a report is an important right.

Defendants contend that Fahlen's attempt in his second cause of action to state a statutory cause of action results from "a [tortuous] mischaracterization of *subsection (b)(6)*" and is an attempt to "conjure up a cause of action where none exists." Defendants' alternative characterization of the amended language is that it is applicable only if a doctor "w[ere] somehow able to obtain a final judgment in a writ proceeding finding that the peer review at issue ... was conducted in bad [**53] faith ... ."

(6) We do not construe the amended language of *Business and Professions Code section 803.1, subdivision (b)(6)*, to rely upon "somehow" convincing a court in a writ proceeding that the administrative decision was in bad faith, when the good faith or bad faith of the administrative decision maker is not an issue in the proceeding.[8] In this case, we view the allegations of the second cause of action as functioning in much the same way as do punitive damages allegations in an ordinary tort cause of action. Under *Civil Code section 3294*, an allegation of "oppression" or "malice" is not an independent cause of action. Instead, by alleging and proving oppression or malice, the [*582] plaintiff becomes entitled to an additional remedy that is not otherwise available, namely "damages for the sake of example and by way of punishing the defendant." (*Id., subd. (a).*)

> 8 *Code of Civil Procedure section 1094.5, subdivision (b)*, states: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not [**54] proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

In the circumstances of this case, we view *Business and Professions Code section 803.1, subdivision (b)(6)*, as operating in a similar manner. Even though the mere allegation of "bad faith" is not a separate cause of action in the absence of an allegation that the peer review proceedings violated the plaintiff's statutory rights, the allegation (and proof) of "bad faith" in addition to the proof of retaliation under *section 1278.5* can result in a different, additional remedy under *section 1278.5, subdivision (g)*. It operates as a declaratory judgment that the peer review was conducted in bad faith.

We do not decide whether under certain circumstances an independent, implied cause of action is created by *Business and Professions Code section 803.1, subdivision (b)(6)*. In the circumstances before us, we simply conclude the allegations contained in the second cause of action were not intended to state an independent cause of action. To the contrary, they are there for the purpose of obtaining additional relief under the first cause of action [**55] similar to how an allegation of malice may permit additional relief in a tort cause of action. As a result, in this limited situation, the exception from the requirement for judicial exhaustion applicable to a *section 1278.5* whistleblower cause of action also applies to the additional allegations of bad faith and the request for additional declaratory relief in the second cause of action.

For all these reasons, we conclude that Fahlen has met his burden under *Code of Civil Procedure section 425.16, subdivision (b)(1)*, of establishing that he will prevail on the first and second causes of action. We conclude, however, the exhaustion of judicial remedies doctrine does apply to the third, fifth, sixth, and seventh causes of action. Consequently, the trial court erred in not dismissing those causes of action under the anti-SLAPP statute.

DISPOSITION

The court's June 27, 2011, order on defendants' anti-SLAPP motion is affirmed with respect to the first, second, and fourth causes of action. With respect to the third, fifth, sixth, and seventh causes of action, the order is reversed. The court shall enter a new order granting defendants' anti-SLAPP motion in part, and denying that motion in [**56] part.

The request for judicial notice dated November 16, 2011 (the ruling on which previously was deferred by order of this court), is denied. The request for judicial notice dated April 26, 2012, is granted. (See fn. 6, *ante*.) The stay of trial court proceedings previously entered by

this court on January 10, [*583] 2012, is vacated. The petition for writ relief filed in this case is denied as moot. The petition for writ relief filed in *Sutter Central Valley Hospitals v. Superior Court* (F063959) will be determined by separate order of this court. The parties shall bear their own costs on appeal.

Cornell, J., and Detjen, J., concurred.

I, Glenda M. Zarbock, declare:

1. I am an attorney at law duly licensed to practice before the courts of the State of California. I am a partner at the law firm of Hanson Bridgett LLP, counsel for Defendants and Appellants Sutter Central Valley Hospitals and Steve Mitchell in this action. I make this declaration in support of Petitioners' request for a stay of the trial court proceedings.

2. I have personal knowledge of the following facts, and if called upon as a witness, I could and would testify competently to the contents of this declaration.

3. In its August 14, 2012 published opinion, the Fifth District vacated the stay of the trial court proceedings that had previously been entered on January 10, 2012. On August 27, 2012, even before the decision became final, counsel for plaintiff Mark T. Fahlen pressed Defendants to respond to special interrogatories and document requests that had been pending before imposition of the stay.

4. The document requests at issue seek voluminous documents directed toward Dr. Fahlen's retaliation claim under Health and Safety Code Section 1278.5, which is the subject of this petition. In particular, the requests seek all communications from Dr. Fahlen to Memorial Medical Center regarding nursing and patient care and Memorial's response thereto, and all documents generated and/or reviewed by various peer review committees that reviewed Dr. Fahlen's practice and qualifications for continued medical staff membership and privileges, including the ad hoc investigating committee, the Credentials Committee, the Medical Executive Committee, and Memorial's governing board. Responding to these broad discovery requests would involve extensive work and a substantial commitment of resources. True and correct copies of the special interrogatories and first set of document requests that Dr. Fahlen propounded on Defendants is attached hereto as Exhibit 1 and 2.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California, on September 23, 2012.

By: Glenda M. Zarbock
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF STANISLAUS

MARK T. FAHLEN, M.D., Plaintiff, vs. SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, AND DOES 1-20 Inclusive, Defendants	Case No. 662696 **PLAINTIFF'S INTERROGATORIES, SET ONE**

PROPOUNDING PARTY: Plaintiff Mark Fahlen, M.D.

RESPONDING PARTIES: Sutter Central Valley Hospitals

SET NUMBER: One

Pursuant to Sections 2030.020 and 2030.060 of the Cal. Code of Civil Procedure, Plaintiff herein requests that Defendant Sutter Central Valley Hospitals answer the following interrogatories. The interrogatories are to be answered fully and separately in writing and under

oath, and the answers are to be served on **JUSTICE FIRST, LLP,** 2831 Telegraph Avenue, Oakland, CA 94609 within 30 days of receipt of service of this request.

DEFINITIONS

A. *Document(s)* - The term "document(s)" means a writing, as defined by Cal. Evidence Code §250, and includes the original or a copy of a handwriting, typewriting, printing, photostating, photograph, telex, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing and form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination of them, including but not limited to e-mails, drafts, originals, copies and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, correspondence, insurance records, policies, contracts, memorandum, notes, notations of any conversations (including but not limited to telephone conversations or meeting notes). The term "DOCUMENTS," as used in this request, specifically includes any information contained in non-documentary form, including e-mails or other computerized information, whether or not that information has ever been produced in documentary form.

B. *Sutter Central Valley Hospitals* – The term "Sutter Central Valley Hospitals" includes the business entity itself, its employees, subsidiaries, agents, insurance companies, attorneys, accountants, consultants, and anyone else acting on behalf of Sutter Central Valley Hospitals or Memorial Medical Center.

C. *Defendants* – The term "Defendants" includes executives, managers, supervisors, officers, agents, independent contractors, advisors, consultants, part-time and full-time workers, temporary workers, and contract workers.

D. *Person(s)* - The word "person(s)" means individuals or any natural person, and entities, including sole proprietorships, firms, associations, organizations, companies, partnerships, joint ventures, trusts, corporations and any other legal, business or governmental entity, and their agents.

E. *Employee* – An "employee" is any person who is currently in the employ of, or was at any time employed by, Sutter Central Valley Hospitals, including but not limited to,

executives, managers, supervisors, officers, agents, independent contractors, advisors, consultants, part-time and full-time workers, temporary workers, and contract workers.

F. *Employer* – An "employer" means a person or entity, such as Sutter Central Valley Hospitals, who controls and directs a worker under an express or implied contract of hire and who pays the worker salary or wages.

G. *Employed/Employment* – The word "employed" or "employment" means a relationship in which an employee provides services requested by or on behalf of an EMPLOYER.

H. *Correspondence* – Any "Correspondence" includes any and all e-mails, letters, memoranda, notes, messages, faxes, and recordings.

I. *Discipline* – "Discipline" includes any suspension, demotion, reduction in pay, counseling, reprimand, sanction, penalty, or other action intended to correct or instruct.

J. *And/Or* - "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

K. *Include(s)/Including* - The use of the words "include(s)" and "including" shall be construed to mean "without limitation".

L. *All/Each* – The use of "all" and "each" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

M. *You/Your* – The words "you" or "your" include the persons to whom these requests are addressed, and all that person's agents, employers, investigators, attorneys, and anyone else acting on that person's behalf or within that person's control.

N. *Concerns/Relating/Relate* – The phrase "concerns", "relating" or "relate" shall mean referring to, alluding to, concerning, connected with, commenting on, regarding, discussing, including, mentioning, in respect of, related to, responding to, containing, evidencing, pertaining, reflecting, showing, memorializing, describing, analyzing, reflecting, comprising, constituting or about.

O. *Acting on Your Behalf* – The phrase "acting on your behalf" includes, but is not limited to, your attorneys, employees, agents, representatives and investigators, whether they are hired and appointed by you, your attorneys, or their representatives, or a court of law.

INTERROGATORIES

1. Please state the name, address, job title, and employer of the person(s) answering these interrogatories.

2. Identify each person who served on the governing board of Sutter Central Valley Hospitals and participated in the decision not to reappoint Dr. Fahlen to the medical staff of Memorial Medical Center.

PLEASE TAKE NOTICE that Plaintiff, through counsel, reserves his right to amend and to supplement the interrogatories herein, and to otherwise utilize whatever other discovery mechanisms are available to counsel under and pursuant to the California Code of Civil Procedure.

Dated: April 5, 2011
Oakland, California

JUSTICE FIRST, LLP
Attorneys for Plaintiff
By:
Jenny C. Huang
2831 Telegraph Avenue
Oakland, CA 94609
Tel.: (510) 628-0695

PROOF OF SERVICE
Re: *Fahlen v. Sutter,* Case No. 662696 (TWS)

I, the undersigned, hereby declare:

1. I am a citizen of the United States of America over the age of eighteen years. My business address is 2831 Telegraph Avenue, Oakland, California, 94609. I am not a party to this action.

2. On April ___, 2011, I served this document entitled **Plaintiff's Requests for Documents, Set One** to the following parties in the manner listed below:

Lawrence Dempsey
Sutter Central Valley Hospitals
1316 Celeste Drive, # 120
Modesto, CA 95355

Steve Mitchell
Memorial Medical Center
1700 Coffee Road
Modesto, CA 95355

[ ] **First-Class Mail** - by depositing a prepaid envelope containing the above-listed documents in an official depository under the exclusive care and custody of the U.S. Postal Service.

[ ] **Overnight Mail** – by depositing a prepaid envelope containing the above-listed documents in an official depository under the exclusive care and custody of an overnight delivery carrier.

[ ] **Facsimile** - by transmitting the above-listed documents by electronic means to the fax number listed above, which number was designated by the attorney for such purpose. I received a confirmation from the fax machine indicating that the document(s) was successfully transmitted.

[ ] **Electronic Mail** – by electronically mailing a true and correct copy through Justice First, LLP's electronic mail system to the e-mail address(es), as stated on the attached service list, and the transmission was reported as complete and no error was reported.

[X] **Personal Service** – by personally delivering the above-listed documents by hand to the of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April ___, 2011
Modesto, California

_____
Richard Berberian

STEPHEN D. SCHEAR
State Bar No. 83806
Law Office of Stephen Schear
2831 Telegraph Avenue
Oakland, California 94609
(510) 832-3500

JUSTICE FIRST, LLP
Jenny C. Huang
State Bar No. 223596
2831 Telegraph Avenue
Oakland, CA 94609
Telephone: (510) 628-0695

Attorneys for Plaintiff
MARK T. FAHLEN, M.D.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF STANISLAUS

MARK T. FAHLEN, M.D., Plaintiff, vs. SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, AND DOES 1-20 Inclusive, Defendants	Case No. 662696 **PLAINTIFF'S DOCUMENT REQUESTS, SET ONE**

PROPOUNDING PARTY: Plaintiff Mark Fahlen, M.D.

RESPONDING PARTIES: Sutter Central Valley Hospitals, Steve Mitchell

SET NUMBER: One

Pursuant to Sections 2031.020 and 2031.030 of the Cal. Code of Civil Procedure, Plaintiff herein requests that Defendants produce and permit Plaintiff to inspect and copy the following documents that are in the possession, care, custody, or control of Defendants and its agents, subsidiaries, parent companies, and/or attorneys. The requests for documents are to be

answered fully and separately, in writing and under oath, and the answers are to be served on **JUSTICE FIRST, LLP,** 2831 Telegraph Avenue, Oakland, CA 94609 within 30 days of receipt of service of this request.

INSTRUCTIONS

A. You shall respond separately to each item or category of items contained in this demand by a statement that Respondent will comply with a particular demand for inspection and any related activities, or representation that Respondent lacks the ability to comply with the demand for inspection of a particular item or category of items, or an objection to the particular demand.

B. If a document is called for under more than one request, it should be produced in response to the first request which calls for the document.

C. If copies or drafts exist of documents the production of which has been requested herein, produce and submit for inspection and copying each and every copy and draft which differs in any way from the original document or from any other copy or draft.

D. A statement that Respondent will comply with the particular demand shall state that the production, inspection and related activities demanded will be allowed either in whole or in part, that all documents or things in the demanded category that are in the possession, custody, or control of Respondent and to which no objection is made will be included in the production. Any documents demanded shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the category herein.

E. A representation of inability to comply with a particular demand for inspection shall affirm that a diligent search and a reasonable inquiry have been made in the effort to comply with the demand. The statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced or stolen, or has never been, or is no longer, in the possession, custody, or control of Respondent. The statement shall set forth the name and address of any natural person or organization known or believed by Respondent to have possession, custody, or control of that item or category.

F. If any part of an item or category of items in this inspection demand is objectionable, your response shall contain a statement of compliance, or representation of inability to comply with respect to the remainder of that item or category. If Respondent objects to the demand for inspection of any item or category of items, the response shall:

1. state the identity with particularity of any document, tangible thing, etc. falling within any category of items in the demand to which any objection is being made, and
2. set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a privilege, the particular privilege invoked shall be stated and a statement setting forth:
   (a) the name(s) of the sender(s) of the document;
   (b) the name(s) of the author(s) of the document;
   (c) the name(s) of the person(s) to whom the document and/or any copies were sent;
   (d) the date the document was prepared; and
   (e) the grounds for the claim of privilege.

G. If any documents are withheld from production on the ground of privilege, identify such document and provide the following information:

(1) Date of document;
(2) Type of document;
(3) Name of the document's author(s);
(4) Document content and/or subject matter;
(5) Nature and basis of the privilege claimed.

H. If any document requested herein was at one time in existence, but has been lost, discarded or destroyed, identify such document and provide the following information:

(1) Date of document;
(2) Type of document;
(3) Date or approximate date it was lost, discarded, or destroyed;

(4) Circumstances and manner in which it was lost, discarded, or destroyed;

(5) Document content and/or subject matter.

(6) Identity of all persons having knowledge of the contents thereof.

I. The use of the singular form of any word includes the plural and vice versa.

DEFINITIONS

A. *Document(s)* - The term "document(s)" means a writing, as defined by Cal. Evidence Code §250, and includes the original or a copy of a handwriting, typewriting, printing, photostating, photograph, telex, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing and form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination of them, including but not limited to e-mails, drafts, originals, copies and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, correspondence, insurance records, policies, contracts, memorandum, notes, notations of any conversations (including but not limited to telephone conversations or meeting notes). The term "DOCUMENTS," as used in this request, specifically includes any information contained in non-documentary form, including e-mails or other computerized information, whether or not that information has ever been produced in documentary form.

B. *Sutter Central Valley Hospitals* – The term "Sutter Central Valley Hospitals" includes the business entity itself, its employees, subsidiaries, agents, insurance companies, attorneys, accountants, consultants, and anyone else acting on behalf of Sutter Central Valley Hospitals or Memorial Medical Center.

C. *Defendants* – The term "Defendants" includes executives, managers, supervisors, officers, agents, independent contractors, advisors, consultants, part-time and full-time workers, temporary workers, and contract workers.

D. *Person(s)* - The word "person(s)" means individuals or any natural person, and entities, including sole proprietorships, firms, associations, organizations, companies, partnerships, joint ventures, trusts, corporations and any other legal, business or governmental entity, and their agents.

E. *Employee* – An "employee" is any person who is currently in the employ of, or was at any time employed by, Sutter Central Valley Hospitals, including but not limited to, executives, managers, supervisors, officers, agents, independent contractors, advisors, consultants, part-time and full-time workers, temporary workers, and contract workers.

F. *Employer* – An "employer" means a person or entity, such as Sutter Central Valley Hospitals, who controls and directs a worker under an express or implied contract of hire and who pays the worker salary or wages.

G. *Employed/Employment* – The word "employed" or "employment" means a relationship in which an employee provides services requested by or on behalf of an EMPLOYER.

H. *Correspondence* – Any "Correspondence" includes any and all e-mails, letters, memoranda, notes, messages, faxes, and recordings.

I. *Discipline* – "Discipline" includes any suspension, demotion, reduction in pay, counseling, reprimand, sanction, penalty, or other action intended to correct or instruct.

J. *And/Or* - "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

K. *Include(s)/Including* - The use of the words "include(s)" and "including" shall be construed to mean "without limitation".

L. *All/Each* – The use of "all" and "each" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

M. *You/Your* – The words "you" or "your" include the persons to whom these requests are addressed, and all that person's agents, employers, investigators, attorneys, and anyone else acting on that person's behalf or within that person's control.

N. *Concerns/Relating/Relate* – The phrase "concerns", "relating" or "relate" shall mean referring to, alluding to, concerning, connected with, commenting on, regarding, discussing, including, mentioning, in respect of, related to, responding to, containing,

evidencing, pertaining, reflecting, showing, memorializing, describing, analyzing, reflecting, comprising, constituting or about.

O. *Acting on Your Behalf* – The phrase "acting on your behalf" includes, but is not limited to, your attorneys, employees, agents, representatives and investigators, whether they are hired and appointed by you, your attorneys, or their representatives, or a court of law.

DOCUMENT REQUESTS

1. All documents contained in the Credentials and Privileges file maintained by Memorial Medical Center for Dr. Fahlen in the possession or control of Defendants.

2. All correspondence between Defendants and Lisa Buehler regarding Dr. Fahlen.

3. All correspondence between Defendants and the *ad hoc* committee of the Medical Staff of Memorial Medical Center which investigated Dr. Fahlen in 2008, including but not limited to all correspondence with any individual members of the committee.

4. All documents generated and/or reviewed by the Defendants as part of any investigation of Dr. Fahlen, including but not limited to all correspondence regarding any such investigation, all notes taken by any investigators, and all reports issued as a part of such investigations..

5. All correspondence between Defendants and the Medical Executive Committee of Memorial Medical Center (hereafter, "MEC") regarding Dr. Fahlen, including both correspondence with the committee as a whole and correspondence with any individual members of the MEC..

6. All correspondence between Defendants and the Credentials Committee of Memorial Medical Center regarding Dr. Fahlen.

7. All documents in the possession of Defendants reflecting or concerning the evidence reviewed by the MEC in making its recommendation that Dr. Fahlen's reappointment application should be denied, including but not limited to any documents reviewed and/or discussed at the meeting of the MEC on August 26, 2008.

8. All documents contained in any files presently or previously maintained by Steve Mitchell regarding Dr. Fahlen.

9. All correspondence to and/or from Steve Mitchell regarding Dr. Fahlen.

10. All documents contained in any files presently or previously maintained by James Conforti regarding Dr. Fahlen.

11. All correspondence to and/or from James Conforti regarding Dr. Fahlen.

12. All documents contained in any files presently or previously maintained by Dave Benn regarding Dr. Fahlen.

13. All correspondence to and/or from Dave Benn regarding Dr. Fahlen.

14. All documents contained in any files presently or previously maintained by Patrick Fry regarding Dr. Fahlen.

15. All correspondence to and/or from Patrick Fry regarding Dr. Fahlen.

16. All documents relating to the meeting on December 8, 2010 by the governing board of Sutter Central Valley Hospitals including but not limited to any meeting minutes, notes, transcripts, and/or recording.

17. All documents reviewed by the governing board of Sutter Central Valley Hospitals in making its decision not to reappoint Dr. Fahlen to the medical staff of Memorial Medical Center.

18. All correspondence received by Memorial Medical Center from Dr. Fahlen regarding nursing and/or patient care at Memorial Medical Center.

19. All correspondence by Memorial Medical Center in response to documents produced in response to Request No. 18 above.

20. All correspondence of defendants with the governing board of Sutter Central Valley Hospitals regarding Dr. Fahlen.

21. The minutes of any meetings of the governing board of Sutter Central Valley Hospitals regarding Dr. Fahlen.

22. Any minutes, notes or other documents concerning any other meetings attended by Defendants in which Dr. Fahlen was discussed.

23. All documents contained in any files presently or previously maintained by Myna Gandy regarding Dr. Fahlen.

24. All correspondenee to and/or from Myna Gandy regarding Dr. Fahlen.

25. All documents contained in any files presently or previously maintained by Julie Meyers regarding Dr. Fahlen.

26. All correspondence to and/or from Julie Meyers regarding Dr. Fahlen.

PLEASE TAKE NOTICE that Plaintiff, through counsel, reserves his right to amend and to supplement the requests herein, and to otherwise utilize whatever other discovery mechanisms are available to counsel under and pursuant to the California Code of Civil Procedure.

Dated: April 5, 2011
Oakland, California

JUSTICE FIRST, LLP
Attorneys for Plaintiff
By:
Jenny C. Huang
2831 Telegraph Avenue
Oakland, CA 94609
Tel.: (510) 628-0695

PROOF OF SERVICE
Re: *Fahlen v. Sutter,* Case No. 662696 (TWS)

I, the undersigned, hereby declare:

1. I am a citizen of the United States of America over the age of eighteen years. My business address is 2831 Telegraph Avenue, Oakland, California, 94609. I am not a party to this action.

2. On April ___, 2011, I served this document entitled **Plaintiff's Requests for Documents, Set One** to the following parties in the manner listed below:

Lawrence Dempsey
Sutter Central Valley Hospitals
1316 Celeste Drive, # 120
Modesto, CA 95355

Steve Mitchell
Memorial Medical Center
1700 Coffee Road
Modesto, CA 95355

[ ] **First-Class Mail** - by depositing a prepaid envelope containing the above-listed documents in an official depository under the exclusive care and custody of the U.S. Postal Service.

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[ ] **Facsimile** - by transmitting the above-listed documents by electronic means to the fax number listed above, which number was designated by the attorney for such purpose. I received a confirmation from the fax machine indicating that the document(s) was successfully transmitted.

[ ] **Electronic Mail** – by electronically mailing a true and correct copy through Justice First, LLP's electronic mail system to the e-mail address(es), as stated on the attached service list, and the transmission was reported as complete and no error was reported.

[X] **Personal Service** – by personally delivering the above-listed documents by hand to the of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April ___, 2011
Modesto, California

Richard Berberian

PROOF OF SERVICE

I, Melinda Less, declare that I am a resident of the State of California. I am over the age of 18 years and not a party to the within action; that my business address is Hanson Bridgett LLP, 425 Market Street, 26th Floor, San Francisco, California 94105. On September 24, 2012, I served a true and accurate copy of the document(s) entitled:

PETITION FOR REVIEW; DECLARATION IN SUPPORT OF REQUEST FOR STAY (IMMEDIATE STAY OF SUPERIOR COURT PROCEEDINGS REQUESTED)

on the party(ies) in this action as follows:

Stephen D. Schear, Esq. Law Office of Stephen Schear 2831 Telegraph Avenue Oakland, CA 94609	Counsel for Plaintiff Mark T. Fahlen, M.D.
Jenny C. Huang, Esq. Justice First, LLP 180 Grand Avenue, Suite 1300 Oakland, CA 94612	Counsel for Plaintiff Mark T. Fahlen, M.D.
Court of Appeal of the State of California Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
The Honorable Timothy W. Salter Department 22 Stanislaus County Superior Court 801 10th Street Modesto, CA 95353	Superior Court

Terri Donna Keville, Esq. Davis Wright Tremaine 865 S. Figueroa Street, Suite 2400 Los Angeles, CA 90017	Counsel for California Hospital Association, Amicus Curiae for Appellant
Long Xuan Do, Esq. California Medical Association 1201 J Street, Suite 200 Sacramento, CA 95814	Counsel for California Medical Association, Amicus Curiae for Respondent

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by UPS and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery (next business day) at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 24, 2012, at San Francisco, California.

Melinda Less