IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S259364

SUNDAR NATARAJAN, M.D., Petitioner and Appellant, v. DIGNITY HEALTH, Respondent.	Court of Appeal Case No. C085906 County of San Joaquin Superior Court No. STK-CV-UWM-20164821

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Respondent Dignity Health ("Dignity") does not deny that the hearing officer had a financial incentive to favor it and therefore an appearance of bias. Dignity also implicitly recognizes that if *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 applies here, Dr. Natarajan's petition for a writ of mandate must be granted. It has therefore mustered a variety of arguments against applying *Haas*, none of which have merit.

Except for the Court of Appeal decision below ("*Natarajan*"), California cases have consistently held that physicians working in private hospitals have the same essential protections as physicians working in public hospitals. Dignity does not dispute that physicians are entitled to fair hearings meeting currently prevailing standards of impartiality. It also does not dispute that the appearance of bias is the applicable standard in all other judicial and quasi-judicial tribunals in the state, including private arbitrations. It cannot cite a single case where the actual bias standard was used when an adjudicator had a challenged pecuniary interest.

The legislative history of SB 1211 demonstrates that the Legislature intended to protect physicians' due process rights through Business and Professions Code § 809 et seq. It also provides evidence that the Legislature intended that the common law would continue to protect physicians after passage of Section 809 et seq.

Dignity correctly asserts that Section 809.2 was intended to be consistent with the common law. That position necessarily defeats its argument, since the

common law both before and after the enactment of Section 809.2 has applied the appearance of bias standard to adjudicators' pecuniary interests.

II. LEGAL DISCUSSION

A. The Legislature Intended to Provide Due Process to Physicians in Hospital Hearings.

The legislative history of SB 1211 contains no discussion of the language of Section 809.2, subd. (b), and therefore shines no direct light on its meaning. However, it does show that the Legislature intended physicians to have due process rights, and that a purpose of SB 1211 was to protect physicians' ability to practice medicine. It does not support in any way Dignity's position that the Legislature intended to limit the common law governing financial bias of adjudicators when it enacted Section 809.2, subd. (b).

1. The Legislative Analyses Repeatedly and Consistently Stated That the Bill Would Give Physicians Due Process Rights.

Both the Legislative Counsel's Digest and the Senate Judiciary Committee analysis of SB 1211 explicitly state that a physician subject to an adverse hospital action "shall be entitled to various due process rights, before, during and after a hearing on the matter." (Exhibit A, pp. 5, 58.)[1] The legislative intention to give

[1] All references to the legislative history are to Exhibits A and B of Dr. Natarajan's Response to Dignity's Motion for Judicial Notice ("MJN"), filed August 24-25, 2020.

physicians due process rights is repeated in all of the legislative analyses of the bill. (Exhibit A, pp. 67-68, 72-73, 78-80, 85-87, 91-93, 96.) The right to challenge the impartiality of the hearing officer was listed as one of the "due process" rights granted to physicians. (Exhibit A, p. 68.)

The Senate Judiciary Committee analysis recognized that the existing common law gave physicians a right of fair procedure, including the right to an unbiased hearing officer. (Exhibit A, p. 59.) It also stated that "SB 1211 includes due process rights and obligations which are consistent with case law." (Exhibit A, p. 65.) That analysis is consistent with an intention to codify the common law. It is inconsistent with an intention to limit any protections previously provided to physicians.

Nothing in the legislative history states or even implies that a purpose of SB1211 was to reduce or limit physicians' due process rights in any way. To the contrary, the Assembly bill analysis states that "SB 1211 requires adoption of procedures which may not be required as a matter of the common law doctrine of fair procedure." (Exhibit A, p. 75.) The intention of the Legislature was thus to give physicians due process protections that were equal to or greater than the existing common law.

2. The Legislature History Confirms That a Primary Purpose of SB 1211 Was to Protect Physicians.

The substance of Sections 809.1 - 809.4 and 809.6 makes it obvious that their purpose is to protect the right of physicians to fair hearings. The legislative

history confirms that purpose. The Senate Judiciary Committee analysis states: "[t]he purpose of this bill is to provide statutory procedural rights and protections to practitioners subjected to adverse actions and to opt out of the federal peer review statute." (Exhibit A, p. 58.)

3. Dignity's Contention That Section 809.2 Subd. (b) Was Intended to Incorporate the Common Law Requires the Application of the Appearance of Bias Standard.

a. In 1989, the Common Law Applied the Appearance of Bias Standard.

The legislative history contains references to *Hackethal v. California Medical Association* (1982) 138 Cal.App.3d 435, for the proposition that hospital hearings must be rational and fair. (Exhibit A, pp. 59, 70, 75, 94.) Dignity contends that it is likely that *Hackethal* was the source of the language of Section 809.2, subd. (b) at issue here. (Dignity Answer Brief ("DAB"), pp. 41-45.) *Hackethal* states that the law requires disqualification of an adjudicator with "a direct pecuniary interest in the outcome." (*Id.,* at 443.) Given the similarity of those words to the language contained in Section 809.2, subd. (b), Dignity's theory is likely correct. It is in accord with the legislative history showing that the Legislature wanted to adopt due process protections consistent with the common law. (Exhibit A, p. 65.)

The Legislature's use of language from the common law to draft Section 809.2, subd. (b) provides strong support for the application of the appearance of

bias standard to private hospital hearings, since that was the applicable standard in 1989. (See Appellant's Opening Brief ("AOB"), pp. 55-58.) *Hackethal* expressly used the appearance of bias standard:

> Disqualification may also be necessary if a situation exists under which human experience teaches that the probability of actual bias is too high to be constitutionally tolerable.

(*Id.,* 138 Cal.App.3d at 443.)

The Court then used "direct pecuniary interest in the outcome" as an example of when disqualification is required without proof of actual bias. (*Ibid.*)

Dignity does not dispute that the "probability of actual bias standard" is the same as "the appearance of bias" standard. (AOB, pp. 31-33.) Thus, under Dignity's own theory, the Legislature adopted a standard for disqualification based on the appearance of bias standard. (DAB, p. 41.)

Dr. Natarajan agrees with Dignity that tracing the origins of the *Hackethal* language provides further evidence that the language of Section 809.2, subd. (b) is derived from the common law probability of bias standard. (DAB, pp. 41-45.) *Hackethal* cites *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648 as authority for the "direct pecuniary interest" language. *Applebaum,* in turn, cited *American Motors Sales Corp. v. New Motor Veh. Bd.* (1977) 69 Cal.App.3d 983, as authority that adjudicators with pecuniary interests are not permitted. (*Id.,* 104 Cal.App.3d at 657.)

American Motors analyzed whether a board which had four of nine members who were car dealers was permissible. Applying the probability of bias

standard, it concluded that the board violated due process when addressing dealer-manufacturer conflicts, because of a *potential* financial conflict of interest:

> . . . their mandated presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process.

(*Id.,* 69 Cal.App.3d at 990, 992.)

In support of its decision, *American Motors* cited *Tumey v. Ohio* (1927) 273 U.S. 510, *Ward v. Village of Monroeville* (1972) 409 U.S. 57, and *Gibson v. Berryhill* (1973) 411 U.S. 564. In each of those cases, there was no evidence of actual bias of an adjudicator against a particular party. There were instead financial incentives for the adjudicators to favor one side of a controversy over the other. The Supreme Court found a disqualifying probability of bias due to those financial conflicts of interest in each of those cases.

The second case relied upon in *Hackethal* for its "direct pecuniary interest" language, *Crampton v. Michigan Dept. of State* (1975) 395 Mich. 347, 351-352, cited the same three U.S. Supreme Court cases in support of its holding requiring disqualification of adjudicators with a pecuniary interest in the outcome. Dignity agrees that the language of Section 809.2 was ultimately derived from *Tumey, Ward and Gibson.* Nonetheless, it irrationally argues that the Legislature *rejected* those cases because Section 809.2, subd. (b) uses the term "direct," even though that is the precise term used in *Tumey,* 273 U.S. at 523, as well as *Hackethal.* (DAB, p. 43-44.)

Hackethal and the cases it relied upon applied the appearance of bias

standard to pecuniary interests of an adjudicator, following well-established U.S. Supreme Court precedents. As stated by Dignity, "The statutory rule on financial bias is entirely consistent with the pre-existing common law from which it was derived . . ." (DAB, p. 38.) Analytically, Dignity's admission resolves the question upon which review was granted, since the pre-existing common law applied the appearance of bias standard to financial conflicts of interest.

b. Section 809.2, subd. (b) and *Haas* Were Based on the Same Common Law.

As Dignity correctly states (DAB, pp. 44-45), the Legislature is deemed to be aware of the common law when it enacts statutes. (*People v. Yartz* (2005) 37 Cal.4th 529, 538.) It therefore must be presumed that the Legislature was aware that the language it was using in Section 809.2, subd. (b) was part of the common law that applied an appearance of bias standard to financial conflicts of interest. Nothing in the language of Section 809 et seq. suggests any inclination by the Legislature to alter the common law. To the contrary, both the language and legislative history of Section 809 et seq. indicate a legislative intention to codify common law doctrine to explicitly protect physicians from biased hearing officers and panel members.

Haas also cited *Tumey, Ward* and *Gibson*, the cases that led to the *Hackethal* language on pecuniary interest, as primary authority for its decision that "a direct, personal, and substantial pecuniary interest does indeed exist" when ad hoc hearing officers have a financial incentive to favor the hiring entity, and the

hiring entity has the capacity to choose hearing officers who will favor it. (*Haas,* 27 Cal.4th at 1025-1027, 1031-1033.) *Haas* also cited *Hackethal* in support of its statement that neutral hearing officers are required in administrative hearings, demonstrating that it drew no distinction between public and private administrative hearings. (*Id.,* at p. 1034.)

The Legislature's use of the common law to create the language of Section 809.2, subd. (b) explains why the statutory language is nearly the same as the language used in *Haas.* It was not a coincidence. Both the Legislature and *Haas* used language that originated in *Tumey v. Ohio*, supra, 273 U.S. at 523. (*Haas,* at 1031-1032.)

4. The Legislative History Supports the Application of *Haas.*

The legislative history described above provides additional evidence that *Natarajan* was mistaken on several points. It indicates that the Legislature intended Section 809 et seq. to be consistent with the common law, not to supplant it, contrary to *Natarajan*. (Exhibit A, p. 65; *Natarajan,* 42 Cal.App.5th at 389.) It also provides evidence that the Legislature did not intend to provide physicians only limited "fair procedure" protections, but rather wanted to provide physicians with due process as that term is used in the common law. Nothing in the legislative history suggests that the Legislature had any intention to make the due process required for hospital hearings any less protective than constitutional due process, contrary to *Natarajan*.

Dignity argues that Section 809.7's exclusion of public hospitals from the

protections provided by Section 809 et seq. indicates that the Legislature did not intend to require due process in private hospital hearings. (DAB, p. 46.) However, the more reasonable, straightforward and logical explanation is that the Legislature felt no need to provide additional due process protections to public hospitals that were already governed by constitutional due process requirements.

Natarajan held that *Haas* did not apply to hospital hearings in part because it was decided after the enactment of Section 809 et seq. (*Id.,* 42 Cal.App.5th at 391.) However, *Natarajan* did not consider that Section 809.2, subd. (b) was apparently derived from the same common law applied in *Haas.* *Haas* did not create new law inconsistent with the prior common law. It analyzed and applied long-standing common law principles to a new factual question, i.e., whether the appointment of ad hoc hearing officers created an impermissible appearance of bias. It explicitly relied on the "teaching of the fee system cases," including *Brown v. Vance* (5th Cir. 1981) 637 F.2d 272, 275, and many others. (*Haas,* at 1028-1032.)

The Legislature could not have anticipated the precise decision in *Haas* before it occurred. However, it certainly would have anticipated that this Court's subsequent interpretation of due process requirements would be applied to Section 809 et seq. The Legislature must be deemed aware of the *Applebaum* holdings in 1980 that physicians are entitled to hearings meeting at least the currently prevailing standards of impartiality, and that fair procedure protections are coextensive with constitutional due process. (*Id.,* 104 Cal.App.3d at 657.) The

Legislature would also have anticipated that this Court would engage in statutory interpretation of Section 809 et seq. because that is part of its regular exercise of the judicial power conferred by the California Constitution, Article VI, Section 1.

5. The Passage of AB 120 Shows the Legislature's Support for Due Process Protections.

In 2008, a state-commissioned study found that California's peer review system was "broken." (6 CT 1612.)[2] In 2009, AB 120 was introduced to strengthen physicians' due process protections. Dignity implies that the legislative history of AB 120 in 2009 supports denial of the writ, because it would have strengthened protections against hearing officers with financial conflicts of interest, but did not become law. (DAB, p. 36, n. 25.) However, AB 120 unanimously passed the Legislature with votes of 78-0 in the Assembly and 35-0 in the Senate. (Exhibit B, p. 98.) It was then vetoed by the Governor, not because of any objections to AB 120 itself, but rather because of concerns about a companion bill that addressed reporting issues, SB 820. (*Id.*, pp. 99, 322-323.) The history of AB 120 only demonstrates the Legislature's unanimous support for stronger due process protections. It certainly provides no evidence of a legislative intent to limit or reduce those protections.

SB 820 also passed the legislature unanimously, by a vote of 73-0 in the

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[2] The trial court granted Dr. Natarajan's motion for judicial notice of the study. (8 CT 2188.) Dignity also requested judicial notice of the study in its motion of August 7, 2020.

Assembly and 40-0 in the Senate. (*Id.*, p. 315.) It is noteworthy that the only opponents of both AB 120 and SB 820 were the California Hospital Association and Dignity (when it was named Catholic Healthcare West.) (*Id.*, pp. 117-118, 125, 308-314.)

B. Dignity Does Not Dispute Legal Propositions Requiring Application of the Appearance of Bias Standard.

Although Dignity's lengthy brief has many arguments, it fails to address or dispute key propositions set forth in the AOB that demonstrate that the writ should be granted:

1. The common law is used for statutory interpretation unless the legislation explicitly and unequivocally demonstrates an intent to replace the common law. Implied repeal of the common law only occurs when the statutory language and the common law cannot be harmonized. (AOB, p. 53.)

2. Physicians have a fundamental vested property interest in their hospital privileges. (AOB, pp. 12-13.)

3. In California, the appearance of bias standard applies to ad hoc hearing officers in official quasi-judicial hearings, arbitrators, superior court judges and private attorneys serving as temporary judges. (AOB, pp. 28-34.)

4. Section 809.2 subd. (c) is intended to ensure that physicians have an impartial hearing officer and hearing panel. (AOB, pp. 60-64.)

5. Physicians are entitled to hearings meeting currently prevailing standards of impartiality. (AOB, pp. 76-77.)

6. There is no rational basis or practical reason to give physicians in private hospitals less protection of their hospital privileges than physicians working in public hospitals. (AOB, pp. 15-16, 35-39, 50-51.)

7. Under *Natarajan*, only direct competitors and hearing officers who admit being promised a bribe or a bonus for a favorable outcome would be disqualified from serving as hearing officers, in the absence of an admission of actual bias by the hearing officer. (AOB, p. 67.)

8. Under *Natarajan,* even family members of the person appointing hearing officers could serve as hearing officers, unless they admitted actual bias. (AOB, p. 68.)

9. Under *Natarajan,* Section 809.2's requirements of voir dire and challenges to impartiality would be rendered nugatory. (AOB, p. 68-69.)

C. Dignity Attempts to Avoid *Haas* By Using Factual Distinctions That Have No Merit.

1. Singer Had the Ability to Influence the Hearing Decision.

Dignity argues that *Natarajan* is different from *Haas* because the hearing officer in *Haas* was a decision-maker and Singer was not. (DAB, p. 60.) This distinction is neither accurate nor determinative.

In *Haas* the hearing officer was not the decision-maker. She only made a recommendation to the county board of supervisors. (*Id.,* 27 Cal.4th at 1023.) As recognized by *Yaqub v. Salinas Valley Memorial Healthcare System,* 122 Cal.App.4th 474, 485*,* the critical question is whether the hearing officer had the

ability to significantly influence the outcome of the hearing.

Here, Singer had sufficient opportunity to unfairly influence the hearing decision as a matter of law. The participation in hearing deliberations by persons with a financial conflict of interest violates due process. (*Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, 541.)

Chevrolet Motor Division involved the same laws considered in *American Motors, supra.* In compliance with *American Motors,* the Legislature amended statutes governing the New Motor Vehicle Board in 1977 so that dealer board members could not participate in any way in disputes between dealers and manufacturers. (*Id.,* at 538.) However, in 1979, the Legislature amended the law so that dealers were allowed to participate in the hearings, but not decide such disputes. (*Id.,* at 539.) The Court held that the dealers' participation in the hearings violated due process despite the fact that they were not decision-makers:

> . . . [The dealers] are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decisionmaking process, despite their financial interest in the outcome of that process.

(*Id.,* at 541; accord, *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109 115; see also, *B. C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 954, n. 18.)

Dignity asserts, without citation to evidence or legal authority, that "peer review hearing officers have virtually no ability to influence the outcome of a case." (DAB, p. 50.) That is untrue, as this case demonstrates. Singer's participation in the hearing was considerably greater than the car dealers in *Chevrolet Motor Division.* He decided on the voir dire challenges to himself and the hearing panel, made important evidentiary rulings, deliberated with the hearing panel and wrote the decision. (See AOB, pp. 24-26.) His participation in the deliberations, standing alone, was sufficient to render the hearing unfair, since it gave him an unrestrained and unrecorded opportunity to influence the hearing panel members to terminate Dr. Natarajan's privileges. (19 PAR 4528; 34 PAR 9184.) If, as Dignity argues (DAB, p. 51), *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1271, prohibits a hospital hearing officer from participating in the decision-making process, that rule was clearly violated in this case.

2. Section 809.2 Has No Qualifications for Hearing Officers and No Method for Their Selection.

Dignity argues that *Haas* identified the lack of statutory standards for hearing officers as "the problem" with the County's procedures, and that *Haas* therefore does not apply here, because statutory standards do apply to hospital hearing officers. (DAB, p. 59.) The sentences in *Haas* quoted by Dignity to support this argument were part of the Court's analysis of the *cause* of the problem with county ad hoc hearing officers. *Haas* was comparing the lack of statutory

standards for those hearing officers to the Administrative Procedure Act, which has effective provisions for the selection of neutral hearing officers. (*Id.,* 22 Cal. 4th at 1036-1037.) The Court's analysis of the cause of the problem is different than the actual problem it was addressing – hearing officers with an incentive to favor the hiring entity.

As discussed in the AOB, p. 54, the same lack of specific standards applies to hospital hearings, resulting in the same problem of hearing officers with a financial incentive to favor the hiring entity. Government Code § 27724 at least required the county hearing officer to be an attorney with five years experience. (*Id.,* 27 Cal.4th at 1029.) Section 809.2 has *no* required qualifications for hospital hearing officers. As pointed out by Dignity, a doctor could serve as the hearing officer. (DAB, p. 37.) For that matter, under the statute, a hospital could appoint its own CEO as the hearing officer, or an electrician, or even, as here, the hospital attorney's friend. Likewise, under Government Code § 27720 et seq., the State has authorized county supervisors to appoint county hearing officers. Section 809.2 does not state who appoints hospital hearing officers.

Section 809.2, subd. (b) also does not define what constitutes a "direct financial benefit from the outcome." Section 809.2 does not contain any standards for evaluating whether a hearing officer lacks the impartiality required by subdivision (c). A comparison of Section 809.2 with Code of Civil Procedure §§ 170 - 170.9; the Administrative Procedure Act (Gov. Code, § 11340 et seq.); and Code of Civil Procedure §§ 1281.6 - 1281.96, demonstrates that Section 809.2

suffers from the same lack of statutory standards as the county's system described in *Haas.*

It is therefore left to the courts to ensure due process, by requiring compliance with the common law requirements set forth in *Haas* and *Yaqub.*

3. It Is Untrue That the Hearing Officer Here Had Less Financial Incentive Than the Hearing Officer in *Haas.*

Dignity echoes the statement in *Natarajan* that the hearing officer in *Haas* had a financial incentive to favor the County that is lacking in this case, because the County was the "only player in the hearing officer game." (*Id.,* 42 Cal.App.5th at 392; DAB pp. 57-58.) However, the hearing officer was a lawyer who could have represented anyone in California. (*Haas,* 27 Cal.4th at 1039-1040.) There was no evidence that the *Haas* hearing officer was dependent on the County for her livelihood. (*Ibid.*) Singer, on the other hand, worked only as a hearing officer and all of his earnings came from that work, a large percentage of it coming from Dignity. (AOB, pp. 23-24; 1 PAR 255.) Dignity also paid very well for hearing officer services. (AAR 318.) The theory that Singer had less of a financial incentive to favor the hiring entity than the hearing officer in *Haas* is untenable.

4. The Hearing Officer's Alteration of His Contract to Avoid *Haas* Did Not Eliminate his Financial Incentive to Favor Dignity.

Dignity argues that Singer and Dignity's agreement to amend his contract so that he would be ineligible to work at St. Joseph's for three years removed his

incentive to favor the medical staff or the hospital. (DAB, pp. 69-70.)

The possible exception to *Haas* relied on by Dignity has two elements: (1) a hiring entity adopts a rule limiting a hearing officer's future work for the entity for a predetermined time; and (2) the restriction must be sufficiently long "to eliminate any temptation to favor the [hiring entity]." (*Haas,* 27 Cal.4th at 1037, n. 22.) Here, neither of those two elements are met. Furthermore, whatever system is used must "not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the [hiring entity]." (*Id*., at 1037.)

Having a known rule matters because it limits the ability of the hiring entity and the hearing officer to circumvent *Haas*. When there is no rule, the hiring entity and hearing officer can adopt a temporal restriction only if they face a physician whose counsel is likely to make a *Haas* challenge, and not in other cases, as here. (AOB pp. 21-22.) The hearing officer's request to add the three-year limit to his contract was an attempt to evade application of *Haas,* not to comply with it.

Given that hearings can take 20 months, as here, or longer, the actual hiatus between hearings under a three-year ineligibility provision can be 16 months or less. Since a hearing officer can receive fees in excess of $50,000 per hearing (AAR 318), a three-year limit does not eliminate the incentive to favor the hiring entity.

At the time of his appointment, Dignity had already paid Singer over

$210,000 for his services (AAR 318), a critical fact not mentioned in Dignity's brief. Under Code of Civil Procedure § 170.1, subd. (a)(9)(A), a judge is presumed to have a disqualifying financial interest if s/he has received $1,500 from a party as a campaign contribution, despite the fact that judges are public servants on salary, whose personal income will be unaffected by the contribution. Receipt of 140 times that much money as personal income by a private party, with the opportunity to earn hundreds of thousands more, is obviously sufficient to show a financial interest.

Dignity does not even attempt to argue that it had a system in place sufficient to eliminate any temptation for hearing officers to favor it, the second element of the possible *Haas* exception. It effectively concedes that the hearing officer had an incentive to favor Dignity in order to obtain work at its other hospitals. (DAB, p. 70.) Dignity calls this financial incentive "irrelevant," but it clearly created an appearance of bias.

D. Dignity's Legal Arguments Against the Application of *Haas* Have No Support in the Law.

1. Section 809.2 Requires Statutory Interpretation.

Dignity asserts without explanation or legal authority that Section 809.2, subd. (b) is unambiguous and clear on its face, and there is no need for statutory construction or resort to legislative history to determine its meaning. (DAB, p. 67.) These contentions are incorrect.

Using one of many definitions of "direct" plucked from a dictionary,

Dignity asserts that the Legislature's use of the words "direct" and "gain" in Section 809.2, subd. (b) "strongly suggests" that it " . . . intended and understood that a disqualifying financial benefit is immediate and actual, derived directly by the particular hearing officer from the outcome of the hearing at issue, not an indirect and speculative future benefit that an "average" (Haas, 27 Cal.4th at 1032) hearing officer might anticipate somewhere down the road." (DAB, p. 35.)

This passage from Dignity's brief demonstrates the ambiguity of the statute. Dignity effectively concedes that the language of Section 809.2, subd. (b) is ambiguous and not clear on its face when it admits that its chosen definitions of "direct" and "gain" only "strongly suggest" the Legislature's intention. Dignity also effectively concedes that its interpretation of "direct financial benefit from the outcome" is substantially different from this Court's interpretation of the extremely similar terms used in *Haas* to describe ad hoc hearing officers' financial conflict of interest: "a direct, personal, and substantial pecuniary interest." Given that Dignity and this Court have interpreted virtually the same words differently in the same factual context, the ambiguity of the phrase is obvious.

Dignity argues that Section 809.2 was intended to limit the common law, by restricting the appearance of bias standard to only prohibit "immediate" payments to hearing officers. (DAB, p. 35.) There is no support in the statutory language, the common law or the legislative history for that theory.

Most of the cases involving an impermissible financial conflict of interest did not involve an "immediate" receipt of money by the adjudicator. In *Ward v.*

Village of Monroeville, *supra,* 409 U.S. 57, for example, the fines collected in the mayor's court did not go to the mayor, but rather to the village. In *Gibson v. Berryhill, supra,* 411 U.S. at 578-579, the optometrists on the board had only a "possible" personal interest in eliminating corporate competitors. Nonetheless, the Supreme Court expressly found a disqualifying financial conflict of interest based on that "possible personal interest." As discussed above, in *American Motors, supra,* 69 Cal.App.3d 983, the Court held that board members' "potential" financial conflict of interest made their participation in dealer-manufacturer disputes impermissible. To Petitioner's knowledge, no case has ever used Dignity's definition of "direct" in any context, much less in a case involving a financial conflict of interest.

Furthermore, there is another dictionary definition of "direct" that fits Section 809.2, subd. (b) which is fully in accord with *Haas*.[3] "Direct" is also defined as "characterized by close logical, causal or consequential relationship." (Petitioner's Second MJN, Exh. 6, p. 14.) *Haas* effectively holds that the possibility of future employment has a logical, causal and consequential relationship to a financial incentive to favor the hiring entity, i.e., to have an

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[3] Dignity used an improper source for its definition of "direct", a 2020 online dictionary. (*Lincoln Unified School District v. Superior Court of San Joaquin County* (2020) 45 Cal.App.5th 1079, 1092, n. 4.) However, the same definition used by Dignity appears in the 1989 Merriam-Webster dictionary, so that impropriety is insignificant. (Petitioner's Second MJN, Exh. 6, p. 14.) More significant is Dignity's failure to notify the Court that there were other definitions of "direct" in the dictionary. (DAB, p. 35.)

interest in the outcome of a hearing. (*Id.,* 27 Cal. 4th at 1025-1032.) Another definition of "direct" consistent with *Haas* is "marked by absence of an intervening agency, instrumentality, or influence." (Exh. 6, p. 14.) Given the difference between Dignity's definition and alternative definitions, and the difference between *Haas* and Dignity's interpretation of Section 809.2, subd. (b), the language at issue is clearly ambiguous.

In addition, Section 809.2 contains no definition or explanation of what constitutes "impartiality" under subdivision (c) of the law, and it does not state whether impartiality should be judged under an actual bias or appearance of bias standard. Dignity's attempt to avoid the application of *Haas* by asserting that Section 809.2 is unambiguous has no merit.

2. *Haas* Applies As Common Law Directly On Point.

Dignity provides no legal authority contrary to the black letter law cited in the AOB, p. 53, that statutes should be construed to comply with the common law, unless an "unequivocal" intention to alter or repeal the common law is apparent in the language of the statute, or the statute cannot be harmonized with the common law. (*California Ass'n of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) Instead, it argues that since cases have called Section 809 et seq. "comprehensive" "minimum" requirements of due process for physicians, "there is no room for other sources, including old or new common-law cases, to heighten or lower any of those minimum legislative requirements." (DAB, p. 40.)

Dignity's argument is contrary to the law and makes no sense. The use of the adjective "comprehensive" in court opinions does not demonstrate an unequivocal intent apparent in the language of the statute to alter or abrogate the common law governing hospital hearings. As discussed above, the legislative history shows that the Legislature intended to codify the common law, not to change or repeal it.

Dignity also turns the meaning of "minimum" upside down. It does not also mean "maximum." The use of the term "minimum" in *Mileikowsky, supra,* 45 Cal.4th at 1268, and *Unnamed Physicians v. Board of Trustees* (2001) 93 Cal.App.4th 607, 622, indicates that courts can impose additional or greater requirements when appropriate.

Dignity also attempts to avoid the application of *Haas* by making the peculiar claim, without citing any legal authority, that *"Haas* does not represent common law" because it is based on constitutional due process. (DAB, p. 68.) However, the common law is "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." (Black's Law Dictionary (11th Ed. 2019); see also, Code of Civil Procedure § 1899.)[4] *Haas* is plainly part of the common law and therefore can and should be used to interpret Section 809.2.

The AOB, pp. 54-55, pointed out that *Natarajan* acknowledged that *El-Attar v. Hollywood Presbyterian Med. Center* (2013) 56 Cal.4th 976, 990-991,

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[4] The definition quoted is the first definition in Black's Law Dictionary for "common law." The other three definitions do not apply here.

994, held that the common law applied to Section 809 et seq., but *Natarajan* refused to follow *El-Attar.* In response, Dignity does not deny that *El-Attar* applied the common law. Instead, it asserts that "[a]pplying a common-law rule where the statute is silent does not impose a rule different from what the statute plainly says." (DAB, p. 40.)

Dignity thus effectively concedes that the common law does apply to Section 809 et seq., except when the common law and the statute conflict. In this case, Section 809.2 is silent on what standard should be used to assess the impartiality of a hearing officer. Thus, even under Dignity's analysis, the common law must be used to determine whether the correct standard is actual bias or the appearance of bias. Dignity also thus effectively concedes that Section 809 et seq did not supplant the common law, and that *Natarajan* was wrong in so holding.

Dignity also does not deny that California law requires statutes and the common law to be harmonized to the extent possible. (*California Ass'n of Health Facilities v. Department of Health Services, supra,* 16 Cal.4th at 297.) In response to that requirement, Dignity asserts:

> To the extent section 809.2(b) must be harmonized with *Haas*, the Hospital has harmonized it by showing why Haas is distinguishable and inapplicable.

(DAB, p. 68.)

Dignity's argument is tone deaf, to say the least. Under California law, to "harmonize" means to construe a statute to be consistent with the common law and to avoid conflict with it. (*California Ass'n of Health Facilities,* 16 Cal.4th at 297.)

Dignity's assertion that *Haas* is inapplicable and distinguishable, despite its factual similarity to this case, and despite the fact that it is the leading California case on the bias of ad hoc hearing officers, is the opposite of harmonizing.

As described in the AOB, p. 65, it is exceptionally easy to harmonize *Haas* with Section 809.2, because of the nearly identical language used by the Legislature and *Haas.* There is no conflict between Section 809.2 and *Haas.* This Court should harmonize *Haas* with the statute and find that hospital hearing officers with an appearance of bias are not permitted.

3. Due Process Applies to Hospital Hearings.

As did *Natarajan,* Dignity argues that *Haas* does not apply because it only applies to public entities. (DAB, p. 62.) However, whether or not "constitutional due process" applies to private hospital hearings, both this Court and the Legislature have determined that due process does apply.

In the AOB, Petitioner described how *El-Attar, supra,* 56 Cal.4th at 987, quoted with approval the holding in *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802*,* 815, that both public and private hospitals are required to provide physicians with minimal due process. (AOB, pp. 13.) Rather than squarely addressing that holding, Dignity falsely claims that *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192*,* at 200, and *Anton,* 19 Cal.3d at 815-816, "held that minimal fair procedure, not due process, applies" to private hospital hearings. (DAB, p. 48.)

Kibler did not even mention fair procedure or due process. Likewise, nowhere in *Anton* does it state that due process did not apply to hospital hearings or that fair procedure is different than due process. *Anton* not only expressly required due process, it based its holding in large part on *Ascherman v. Saint Francis Memorial Hosp*. (1975) 45 Cal.App.3d 507. (*Anton,* 19 Cal.3d at 815.) *Anton* described with approval the holding in *Ascherman* that:

> ***There should be no essential difference*** between public and private hospitals with respect to the scope of protections available at the administrative level to a physician seeking to become or remain a member of the medical staff . . .

(*Id.,* at 815, n. 12, emphasis added.)

(Accord, *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 274; *Pinsker v. Pacific Coast Society of Orthodontists* ("*Pinsker II"*) (1974) 12 Cal.3d 541, 554, fn. 12; and *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 377, n. 3.) Indeed, as described in the AOB, pp. 46-49, no Court had disagreed with this rule of law until *Natarajan.*

The legislative history also demonstrates that the Legislature intended to provide physicians with due process protections, not some lesser "fair procedure." Physicians in California are entitled to due process before having their hospital privileges terminated by a private hospital. Since impartial adjudicators are such a fundamental part of due process, hospital hearing officers with financial conflicts of interest are not allowed, whether the hospitals are public or private.

4. Section 809.2 Should Be Construed in a Manner Consistent with Constitutional Due Process.

Dignity does not disagree with the proposition that statutes should be construed to preserve their constitutionality and to avoid a constitutional issue that would arise from a contrary construction. (AOB, p. 69.) Instead, it argues that constitutional due process does not apply to hospital hearings because of a lack of state action. (DAB, pp. 45-50.) Dignity's analysis of the constitutional issue is analytically extraordinarily incomplete. It does not even mention the fact that physicians in California have a fundamental vested property interest in their hospital privileges, a fundamental fact for any due process analysis. (*Anton,* 19 Cal.3d at 823-825.) It does not deny or even address the fact that the State has empowered private hospitals to take physicians' property interest for the public purpose of protecting the public health through official quasi-judicial hearings reviewable through a writ of mandate, like government agency decisions. Those undisputed facts, standing alone, make a prima facie case of state action.

Dignity also does not address the relationship between *Anton*'s holdings recognizing both physicians' property interest and their right to due process, described in the AOB, p. 70. It also fails to address or refute either the delegation or the entwinement theories of state action raised in the AOB, p. 72.

In support of its argument of no state action, Dignity relies most on *Pinsker II*, *supra,* 12 Cal.3d 541. (DAB pp. 45, 46, 48 and 50.) It especially relies on footnote 7 of *Pinsker II,* claiming that "*Pinsker* recognized the public nature of

private hospital peer review, yet explained it did not implicate constitutional due process." (DAB, p. 48.) However, *Pinsker II* does not support Dignity's argument.

First, its primary holding was that physicians are entitled to both procedural and substantive fairness when organizations seek to take actions that would impair their ability to practice. (*Id.,* 12 Cal.3d at 545.) *Pinsker II* was part of the evolution of California law that led to the holding in *Anton,* stating that "procedural fairness is an indispensable prerequisite" for such actions. (*Id.,* at 552-53.)

Second, although *Pinsker II* noted the common law foundation for its holding, it also held that "private hospitals are under similar constraints [as public hospitals] to protect against arbitrary exclusion from membership." (*Id.,* p. 554, n. 12.) Thus, well before *Anton,* this Court recognized that physicians working in public and private hospitals have similar protection against unfair denial of access to hospitals.

Third, and most importantly, *Pinsker II* preceded *Anton*, and therefore did not consider the impact of physicians' fundamental property interest in their hospital privileges first recognized in *Anton.*

None of the cases cited by Dignity analyzed a claim of constitutional due process based on the holdings in *Anton, Unnamed Physician v. Board of Trustees, supra,* 93 Cal.App.4th at 617, *Kibler,* and the passage of Section 809 et seq. in 1989, which was intended to give physicians due process rights, (AOB, pp. 69-

72.) "Cases are not authority . . . for issues not raised and resolved." (*San Diego Gas Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943.) There is no binding or even persuasive legal authority supporting Dignity's claim of a lack of state action.

Dignity does not dispute that it took away Dr. Natarajan's fundamental vested property interest when it terminated his hospital privileges. The State delegated to Dignity its power to do so through official quasi-judicial proceedings, under state laws intended to protect the public health while also providing physicians due process. (AOB, pp. 71-72.) There is ample support for this Court to conclude that hospital hearings are governed by constitutional due process.

This Court can resolve any potential conflict with the due process clause of the California Constitution by simply affirming the holding of *Applebaum, supra,* 104 Cal.App.3d at 657, and four other Court of Appeal decisions that the fair procedure/due process requirements applicable to hospital hearings provide the same extent of protection as constitutional due process. (AOB, p. 46-49, 72.)

Such a ruling would provide needed clarity to the law. Rather than using the nebulous, undefined, subjective standard of "fair procedure," the lower courts will have the benefit of the objective standards previously applied in due process cases, such as the *Haas* doctrine. They will have the benefit of over 200 years of court precedents analyzing the meaning and application of due process.

The due process clause of the Fifth Amendment of the U.S. Constitution was itself derived from the common law. (*The United States v. Betsey, C* (1808) 8

U.S. 443, 451.) Drawing a false distinction between common law due process and constitutional due process would serve no legal purpose and would enable hospitals to unfairly impair or destroy physicians' ability to practice their profession.

E. Hospitals Can Use Methods for the Appointment of Hearing Officers That Will Not Violate Due Process.

Dignity argues that if *Haas* applies here, hearing officers will be able to serve only once in their lives. (DAB, pp. 54-55.)[5] This is not true, but even if were true, it would not change the correct decision here. Hospital hearings are relatively infrequent. The 2008 study of California's peer review system found that "almost no entities had 809 hearings," based on responses by 210 entities. (6 CT 1701.)

There is no evidence that hospital hearings are any more common now than they were in 2008. Given the large number of neutrals available through JAMS, the American Arbitration Association and other private providers, there is no reason to believe, or any evidence, that there would be any difficulty finding hearing officers if this Court required hearing officers without an appearance of bias.

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[5] Dignity's argument asserts that medical staff leaders select hearing officers, without support in the record for that assertion. (DAB, p. 54.) As discussed below, it is likely that hospital attorneys actually select the hearing officers.

Dignity argues that only experienced hospital attorneys have the capacity to serve as hearing officers. (DAB, p. 56.) Nothing in the record supports this self-serving argument. Section 809 et seq. contains only six procedural statutes. Former judges and justices who have presided over far more complicated litigation certainly have the ability to preside over hospital hearings.

The essence of Dignity's argument is that having hearing officers without an appearance of bias would impose too great a burden on hospitals. However, as explained in *Haas,* 27 Cal.4th at 1035-1036, and the AOB, pp. 77-78, the Courts do not conduct a cost-benefit analysis when the issue is an impartial adjudicator, because it is an indispensable part of our system of justice. Dignity's argument is not only factually unsupported, it is legally irrelevant.

Appointment of truly neutral hearing officers is necessary to maintain the integrity of hospital hearings. "The state may not establish an adjudicatory tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another." (*American Motors, supra,* 69 Cal.App.3d at 991.)

Dignity's argument also ignores the fact that there are multiple ways that a hospital could appoint hearing officers without an appearance of bias.

The simplest method would be to allow the physician who is the subject of the hearing to recommend one or more persons to serve as the hearing officer. If "peer review hearing officers have virtually no ability to influence the outcome of a case," as claimed by Dignity (DAB, p. 50), hospitals should be willing to accept hearing officers proposed by the subject physician. Since hospitals or their

medical staffs choose the hearing panel, this method would provide useful balance to hospital hearings.

Hospitals could also adopt the method suggested by Dr. Natarajan in this case, having the hearing officer selected by mutual agreement or by a neutral third party. (1 PAR 216-219.) An important benefit of this approach is that individuals who are interested in serving repeatedly as hearing officers will have an incentive to develop a reputation as neutral and fair, rather than "hospital-friendly." This is the same approach used to select neutral arbitrators in civil actions. (Code of Civil Procedure, § 1281.6.) This Court could facilitate this method of selecting hearing officers by affirming that hospitals or physicians can petition superior courts to appoint hearing officers if the parties cannot agree, since Section 809.2 is silent on how hearing officers are chosen.

Another option for hospitals would be to use one of the providers of neutral arbitrators to select the hearing officer using one of its usual methods. Although this method would still favor hospitals to some extent because of "frequent litigator" bias (*Haas,* 27 Cal.4th at 1030), it might be sufficient to avoid the appearance of bias created by the unilateral selection of ad hoc hearing officers.

The theory that requiring hearing officers without an appearance of bias would cripple hospitals' ability to hold hearings is unsupported by any evidence. It is also contradicted by the fact that public hospitals have been held to due process standards for decades. (Business and Professions Code § 809.7.) There is no evidence that public hospitals have been unable to conduct adequate hearings

because they are required to provide hearing officers without an appearance of bias. There is no reason why private hospitals cannot do the same.

F. *Yaqub* Was Correctly Decided.

Dignity asserts that *Yaqub* was incorrectly decided because it applied *Haas* "without analysis" and failed to mention Section 809.2. (DAB, p. 62-66.) In fact, *Yaqub* applied *Haas* after analysis. (*Yaqub,* 122 Cal.App.4th at 484-486.) It correctly recognized that *Haas* applied to the ad hoc hearing officer in *Yaqub* for the same reason it applied in *Haas*: the hearing officer had a financial incentive to favor the hiring entity. (*Ibid.*) *Yaqub*'s lack of discussion of Section 809.2's "direct financial benefit" language is explained by the fact that it was not even mentioned until Dr. Yaqub's Reply Brief, so it was not a contested legal question in the appeal. (Petitioner's Third MJN, Exhibits 7 and 8; Exhibit 9, brief pp. 7-9, MJN pp. 172-174.)

Dignity's assertion that *Yaqub* was wrong because hospital hearing officers are not decision-makers is addressed above. Its argument that past employment of a hearing officer cannot be considered in determining an appearance of bias is addressed in the AOB, pp. 74-76.

G. Dignity's Arguments Against Application of the Rules of Statutory Construction Fail.

Dignity's argument that this Court should not engage in statutory construction of Section 809.2, subd. (b) because it is unambiguous has no merit, as discussed above.

Dignity argues that although the probability of bias/appearance of bias standard applies to hospital hearings, the Legislature intended to limit the application of that standard to cases of "direct financial benefit" as defined by Dignity. (DAB pp. 33-36.) In the AOB, p. 67, Petitioner asserted that under *Natarajan's* interpretation of Section 809.2, subd. (b), only direct competitors, bribes and bonuses based on the outcome of a hearing would be prohibited. Dignity does not dispute that interpretation of *Natarajan.*

Indeed, Dignity's interpretation of the statutory language is even more limited than *Natarajan*'s, since it would require the hearing officer to receive an *immediate* gain. Under Dignity's theory, even a competitor would likely not have a "direct" interest in the outcome, since a competitor would probably not receive increased income due to the termination of another physician's privileges until a later time.

Dignity argues that the "overarching" purpose of peer review and Section 809 et seq. is to protect the public, citing Section 809, subd. (a) and *Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 157. (DAB, p. 67.) As discussed in the AOB, pp. 60-62, while the primary purpose of peer review in general is to protect the public, the specific purpose of Section 809.2 is to protect physicians, and the statute should be construed to fulfill that purpose. Neither Section 809 nor *Cipriotti,* which antedated Section 809.2, negate the fact that the primary purpose of Section 809.2 is to protect physicians from unfair hearings. Moreover, allowing hearing officers with an appearance of bias does not protect the public health, it

endangers it. (AOB, p. 40.) Dignity does not dispute that if the purpose of Section 809.2 is to protect physicians from unfair hearings, the *Natarajan* decision would defeat that purpose.

Dignity also argues that Section 809.2 subd. (c), which requires impartiality, requires a physician to prove "bias in fact," or actual bias. (DAB, p. 68.) Dignity provides no authority for that argument. It is contradicted by Dignity's contention that the statute is "fully consistent with common law fair procedure" (DAB, pp. 41-45), since the common law, both before and after Section 809 et seq., applied the appearance of bias standard. Dignity fails to make any effort to interpret Section 809.2, subd. (b) in harmony with subd. (c).

Dignity also makes the argument that Code of Civil Procedure § 1094.5, subd. (b) would be "unnecessary if the mere possibility of future work were an automatic disqualifier." (DAB, p. 68.) The idea that judicial review of the fairness of administrative hearings, which has been in place since at least 1945, would be unnecessary if there was an "automatic disqualification" rule is irrational and absurd.

H. Dignity's Attempts to Avoid Responsibility for the Hiring of the Hearing Officer Have No Merit.

1. The Claim That Dignity Was Not the Hiring Entity Is Untrue and Does Not Negate the Hearing Officer's Financial Incentive to Favor Dignity.

Dignity also attempts to distinguish *Haas* by claiming that hospitals and their attorneys don't select hearing officers, but rather their "independent medical staffs." (DAB p. 71.) This factual allegation is unsupported by any reference to the record and contradicted by the evidence in this case. It is factually undisputed that Singer was initially contacted by a Dignity attorney, with a follow-up phone call with a Dignity administrator, after which Donald Wiley, a Dignity executive, formally appointed him hearing officer. (AOB, pp. 19-20.) There is no evidence that any member of the medical staff had any involvement with the selection of Singer as the hearing officer.

In any event, Dignity's argument is fundamentally irrelevant. Dignity does not deny that the hearing officer had a financial incentive to favor Dignity in order to get more work from Dignity, whoever had selected him nine times previously to work as a Dignity hospital hearing officer. At the time of his appointment, Singer knew that Dignity's counsel had contacted him about the job, that he had been approved by a hospital administrator, that he had been paid by Dignity in the past, that his contracts to work as a hearing officer were with Dignity, that he had been repeatedly asked to serve as a hearing officer at Dignity hospitals, and that Dignity

operated at least 10 hospitals and "presumably more." (AOB, pp. 19-24.) Any rational person would have concluded that Dignity's corporate attorneys were selecting or recommending him as the hearing officer for Dignity hospitals. It doesn't take a statistician to know that the odds of ten different medical staffs "independently" selecting the same person, without a common source of selection or recommendation, were astronomical.[6] At the time of the Natarajan hearing, the hearing officer therefore had a direct and powerful financial incentive to favor Dignity to continue to receive hearing officer work from it.

Dignity argues that Dr. Natarajan presented no evidence that a Dignity hospital would hire Singer again if there was a favorable outcome to the hospital in his case. (DAB, p. 76.) However, it is undisputed that Dignity *did* hire Singer to serve as a hearing officer at another hospital after the Natarajan hearing. (AAR 245-266.) Dignity's position is that *Haas* only applies if a hiring entity explicitly promises future employment to an ad hoc hearing officer. (DAB, p. 76.) That argument would effectively shield hospital hearings from the *Haas* doctrine and render it a dead letter. Realistically, hospitals would not promise future

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[6] Using basic rules of probability, if there were only 24 potential hearing officers in the entire state, there was a one in 24 chance of selecting Singer for the first of his Dignity hearings, or 4.2%. The chance of his being independently chosen from a 24-person list 9 more times after his initial selection is 0.000 000 000 000 379 per cent, or less than 4 out of ten trillion times (.042 X .042 nine times). Of course, if the pool of potential hearing officers were expanded to include the hundreds of neutrals that were available through JAMS and the American Arbitration Association, the odds of his independent selection would have been far less.

employment to hearing officers, just as they would not offer bribes or bonuses for favorable outcomes. They would have no need to, since the unstated possibility of future employment would be sufficient to provide a financial incentive to favor them, as recognized by *Haas*:

> A procedure holding out to the adjudicator, ***even implicitly***, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias.

(*Id.,* 27 Cal.4th at 1034, emphasis added.)

Dignity's theory that it was actually the medical staff that appointed Singer is based on the fact that the medical staff bylaws delegated to the president of the hospital the authority to appoint the hearing officer. (DAB, p. 75.) However, under *Haas,* who delegated the power to appoint is not significant in determining whether there is an appearance of bias. What is significant is who actually has the power to appoint, because that determines the entity that the hearing officer has a financial incentive to please. In *Haas,* the County's authority to appoint hearing officers had been delegated to it by the State. (Government Code § 27720.) However, because it was the County making the appointments, the hearing officer had an incentive to please the County, not the State. Likewise here, Dignity had the power to make the appointment, so it was Dignity the hearing officer had an incentive to please. Furthermore, the hospital had the legal responsibility and final authority to approve or not approve the medical staff bylaws. (Section 809, subd. (a)(8).) The hospital thus was the ultimate decision-maker that its executive would

appoint the hearing officer.

2. Dignity's Argument That the Hospital Is Not Dignity Is A Fiction.

Dignity also argues that the hospital is a different entity than its corporate owner because it is licensed by the state and has its own governing board. (DAB, pp. 73-75.) This argument is especially absurd and irrelevant to the question at issue here, because St. Joseph's Medical Center is only a fictitious business name of Dignity Health. (7 CT 1838.) A fictitious name lacks the capacity to appoint a hearing officer, whether or not a license has been issued in that name. An ad hoc hearing officer would not have a financial incentive to please a fictitious name, but would have an incentive to please the entity operating under that name.

Likewise, the fact that the hospital had a separate governing board that made the final decision to terminate Dr. Natarajan's privileges does not negate the hearing officer's incentive to please Dignity. There is no evidence that the hospital's governing board had any involvement in the appointment of the hearing officer, or that it did not share Dignity's interest in winning hearings against physicians, given that it was part of Dignity's corporate operations.

I. Dignity's Argument That This Court Should Assume That Hospitals Will Always Act Fairly and in Good Faith Is Not Factually Supported and It Is Contrary to California Law.

Dignity's theory (DAB, pp. 76-77) that hospitals will always act in good faith and fairly in their selection of hearing officers is both unrealistic and contrary

to California law. The requirement for hospital hearings was initiated and then strengthened to prevent arbitrary exclusions by hospitals. (*Wyatt v. Tahoe Forest Hospital* (1959) 174 Cal.App.2d 709, 714-715; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 629.) If hospitals could be trusted to always act fairly and in good faith, there would be no need for hospital hearings. Both the Legislature and this Court have recognized that peer review can be used to retaliate against whistleblower physicians. (AOB, p. 87.) There is no factual basis to assume that hospitals will never use the powerful tool of peer review to unfairly damage economic competitors or other targeted physicians. (AOB, pp. 78-80.) Even government entities are legally presumed to act in their own self-interest. (*Haas*, 27 Cal.4th at 1029.) That presumption applies with even greater force to private corporations competing in the highly competitive, and highly remunerative, health care industry.

The record in this case also refutes Dignity's argument. Undisputed facts demonstrate Dignity's intentional abuse of the peer review process to eliminate an economic competitor. The evidence that Dignity manipulated St. Joseph's medical staff to bring false charges against Dr. Natarajan is too voluminous to be detailed in this brief, but it is summarized in Dr. Natarajan's Answer to the Amicus Briefs of the California Hospital Association (CHA) and John Muir Health and other hospitals, filed in the Court of Appeal on January 3, 2019, pp. 20-31.

Dignity also advances the surprising theory that because hospitals have the final say whether to terminate a physician's privileges, they don't need biased

hearing officers to help them eliminate a doctor, and "hearing officers know this." (DAB, p. 74.) In effect, Dignity is arguing that the results of hospital hearings are not important enough for hospitals to bother influencing, because they can override a decision in a physician's favor. This argument ignores both California law and the realities of litigation between doctors and hospitals.

Section 809.05 states that a hospital governing body "shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." If a physician wins a hearing, but the governing board nonetheless terminates the physician's privileges, the hospital then must justify an adverse action contrary to the recommendation of the physician panel. In addition, if a hospital terminates a physician who has won a hearing, the hospital's exposure to liability for retaliation or wrongful termination of privileges increases exponentially. For example, in *Fahlen v. Sutter Central Valley Hospital* (2014) 58 Cal.4th 655, 663-664, the fact that Sutter terminated Dr. Fahlen's privileges even though he won his hospital hearing was important evidence supporting his claim of whistleblower retaliation.

On the other hand, if the physician loses the hearing, the hospital is provided with an important layer of legal protection. (AOB p. 80.) It can, as in this case, declare that it was only following the recommendation of the subject physician's peers, who purportedly determined that s/he "endangered" patients. (DAB, p. 83.)

J. The Court Should Hold That the Appearance of Bias Standard Applies Generally to the Selection of Hearing Officers.

Dignity also argues that the hearing officer did not know the hospital's attorney Shulman well enough to meet an "actual bias" standard. (DAB, pp. 79-80.) This argument demonstrates why this Court should hold that the appearance of bias standards applies generally to hearing officers, whether or not there is a financial conflict of interest. If a 30-year friendship with the hospital attorney is insufficient to disqualify a hearing officer, what if they were best friends? Or first cousins? Contrary to Dignity's repeated claims (DAB, p. 16, 56, 68, 70), the appearance of bias standard does not impose an "automatic disqualifier." It is an objective application of the standard to the facts, based on the following test:

> . . .whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.

(*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, quoted with approval in *Yaqub, supra,* 122 Cal.App.4th at 486.)

Adoption of this rule is especially important in hospital hearings, because experienced hospital attorneys often work as hearing officers and attorneys at the same time. The risk of hospital attorneys being chosen based on personal relationships is therefore high. Currently, hospital attorneys can effectively choose each other, or at least influence the selection of hearing officers, as this record shows. Courts should be permitted to examine the relationship of the

hearing officer to persons involved in the hearing, or other facts indicating bias, and then apply the appearance of bias test.

K. This Court Conducts an Independent Review of the Administrative Record to Determine the Fairness of the Hearing.

1. Conclusions of Law and Factual Determinations of the Superior Court Are Not Binding on This Court.

At various points in its brief, Dignity argues that conclusions set forth in the superior court's Statement of Decision, or by Dignity's internal appeal board, or in the decision written by the hearing officer, are binding on this Court. (See, e.g., DAB, pp. 26-27, 83.) Dignity is incorrect.

Under California law, this Court conducts an independent de novo review of the administrative record to determine if the administrative hearing was fair. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442-1443.) Dignity, however, claims that this Court only "reviews de novo *the superior court's legal conclusion* that Natarajan's hearing was fair," inaccurately citing *Rosenblit* as its authority. (DAB, p. 27, emphasis added.) It then argues that Dr. Natarajan is bound by the superior court's findings in the Statement of Decision because he did not challenge them. (*Ibid.*) Dignity's argument is both factually and legally incorrect.

In *Rosenblit,* Dr. Rosenblit contended his hearing was unfair but the superior court disagreed, as here, and made certain findings. On appeal, the hospital took the position that the superior court's factual findings supporting a

conclusion that the hearing had been fair had to be accepted if supported by substantial evidence, similar to Dignity's argument here. (*Id.,* 231 Cal.App.3d at 1442-1443.) The Court rejected that claim and held that whether the hearing was fair was a question of law that required de novo review on appeal. (*Ibid.*) It held that conclusions of the trial court based on undisputed facts should be independently evaluated by the appellate court based on the administrative record. (*Id.,* at 1444.) The Court then reviewed the facts in the administrative record, rejected most of the trial court's findings, and held that the hearing had been unfair. (*Id.,* at 1444-1449.)

Dignity also cites *Rael v. Davis* (2008) 166 Cal.App.4th 1608, and *City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1322-1323 for the proposition that an appellate court is bound by a superior court's factual findings. However, *Rael* and *City of Merced* address an entirely different situation, in which appelate courts gave deference to the superior court because there was a bench trial. In such cases, the superior court has the responsibility as the "trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." (*In re Conservatorship of the Person of O.B.* (2020) 9 Cal.5th 989, 1007-1008.)

When reviewing administrative proceedings, the superior court is not the trier of fact, and it is in no better position than an appellate court to evaluate the fairness of a hearing. There is no logical reason why its findings of facts or conclusions of law should be binding on a higher court conducting a de novo

review. In *Pomona Valley Hospital Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th 93, 101, the Court stated the correct standard: when the issue is the fairness of the hearing, the court renders its independent judgment based on the administrative record and any additional information admitted to augment the record.

Here, as in *Rosenblit,* all of the facts relevant to the claim of an unfair hearing are undisputed – the hearing officer's history with Dignity, how much he had been paid, what was in his original contract with Dignity, how it was amended, who selected him, and what was contained in the medical staff bylaws. Most importantly, Dr. Natarajan's contention that the hearing officer had a financial incentive to favor Dignity because of the possibility of being hired in the future at another one of its 33 hospitals is undisputed.

Dignity repeatedly asserts that this Court is bound to accept factual assertions in the Statement of Decision because it was "unchallenged" by Dr. Natarajan. (DAB, pp. 14, 26-28, 78.) That is untrue. Dignity drafted the Statement of Decision adopted by the Court. (9 CT 2325-2332, 2481.) Dr. Natarajan prepared a detailed objection to Dignity's proposed Statement of Decision, objecting to many of the proposed statement of facts and conclusions of law, including those cited in Dignity's brief, because they were not supported by competent evidence. (9 CT 2495-2507.)

Dignity did not rely at all upon the Statement of Decision in the Court of Appeal, only mentioning once that there had been one. (Dignity Brief in Court of

Appeal, p. 24.) Because appellate courts review the fairness of a hospital hearing de novo based on the administrative record, and Dignity did not rely on the Statement of Decision in any way, there was no reason for Dr. Natarajan to address it in his Court of Appeal briefs.

Furthermore, any factual findings of a superior court must be supported by substantial evidence. (*Rosenblit, supra,* 231 Cal.App.3d at 1443.) "Isolated evidence torn from the context of the entire record" is not substantial evidence. (*In re I.C.* (2018) 4 Cal.5th 869, 892, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 577.) Here, as in *Rosenblit*, many of the superior court's "facts" and conclusions of law are not supported by substantial evidence. The assertion that Singer was always appointed by Dignity medical staffs, for example, is not supported by substantial evidence, but only by Singer's testimony that "in my view, my appointments are *ultimately* by the medical staff." (DAB, p. 26, 9 CT 2515:20-21, 1 PAR 260:3-12, emphasis added.) That testimony is consistent with Singer's view that he was appointed by the medical staff in this case, even though no member of the medical staff had any involvement in his selection and appointment, and he was formally appointed by the President of the hospital, as provided in the bylaws, after being initially contacted by the hospital's corporate counsel. (AOB, pp. 19-22.)

Dignity admitted below that Singer's statement that he was appointed by medical staffs was simply his "understanding." (9 CT 2928.) Singer's opinion concerning who "ultimately" appointed him was a legal conclusion, without

foundation as to any facts supporting that conclusion. "Opinion testimony which is conjectural or speculative" is not substantial evidence. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

Dr. Natarajan objected to Singer's "understanding" of who appointed him as both irrelevant and lacking foundation. (9 CT 2397.) The superior court *sustained* that objection (9 CT 2481), but nonetheless signed a Statement of Decision that asserted Singer's opinion as fact, over Dr. Natarajan's objection. (9 CT 2497-2498, 9 CT 2515:20-23.)

Singer's opinion does not constitute substantial evidence, and it is certainly not binding on this Court, which is required to independently review the administrative record. Furthermore, as discussed above, whoever appointed Singer in the past, he had an undisputed financial incentive to favor Dignity at the time of his appointment.

2. This Court Is Not Required to Accept the Findings in the Hearing Decision or the Internal Appeal Decision.

Dignity also argues that this Court is required to accept as true findings of the hearing decision written by the hearing officer and Dignity's internal appeal decision, citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70. (DAB, pp. 14-15, 26, 78, 80.) *Johnson* does not apply here. In *Johnson,* the plaintiff failed to timely challenge an administrative decision through a writ of mandate. The findings of the administrative decision were therefore binding on the plaintiff in a later action under the Fair Employment and Housing Act. (*Id.,* at

76.) Here, unlike *Johnson,* Dr. Natarajan did file a timely petition for writ of mandate. The hospital's findings have therefore never become final and are not binding in any way on Dr. Natarajan or this Court.

L. Dignity's Economic Motivation to Terminate Dr. Natarajan Is Not Disproven by the Hearing Officer's Rulings or the Hearing Decision.

Dignity does not dispute that it was Dr. Natarajan's competitor and that its own hospitalist service was losing $600,000 a year. Instead, it asserts that this Court must accept (1) a statement in the hearing decision written by Singer that there was not "persuasive evidence" proving that the Medical Staff had been manipulated to investigate Dr. Natarajan and reach adverse conclusions; and (2) a ruling by him that there was no proof that Dignity had an economic motive for its actions. (DAB, pp. 78-79.) For the reasons stated just above, the hearing decision and the hearing officer's ruling are not binding on this Court.

The evidence Dignity cites illustrates how the hearing officer unfairly influenced the hearing events to favor and protect Dignity. The hearing officer *sua sponte* ruled that Dr. Natarajan could introduce only very limited information about Dignity's economic incentive to terminate his privileges, despite the fact that such information was admissible and probative. (22 PAR 5496-5501; 5694-5696.) He limited Dr. Natarajan to "one or two questions" to witnesses about economic motivations. (22 PAR 5696.) The hearing officer thus prevented Dr. Natarajan from producing or discovering evidence of Dignity's economic motivations, and

then ruled that Dr. Natarajan had been unable to produce evidence he had shielded from exposure.

Despite the hearing officer's ruling, there is ample undisputed evidence that the hospital's administrators and attorney manipulated the medical staff and the results of the investigation of Dr. Natarajan. (Petitioner's Answer to amicus briefs of CHA and John Muir, et al., in the Court of Appeal, pp. 20-31.) There was no reason for Dignity to manufacture a case against Dr. Natarajan other than an economic motive to damage a competitor.

M. An Adjudicator With an Appearance of Bias Is Not a Harmless Error.

Dignity argues that even if the hearing officer should have been disqualified, the hearing decision should be affirmed because Dr. Natarajan failed to challenge the substantiality of the evidence produced at the hearing. This theory has no support in the law. Dr. Natarajan did not argue the lack of substantial evidence because it was unnecessary to do so, given the unfairness of the hearing, and because it is always very difficult to prove that no substantial evidence supports a hospital's termination of a physician's privileges, as discussed in the AOB, pp. 82-83.

Code of Civil Procedure § 1094.5 subd. (b) does not require a petitioner to prove that an administrative hearing was both unfair and lacked substantial evidence:

> Abuse of discretion is established if the respondent has not 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.

(Emphasis added.)

In *Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133, 1140-41, the Court rejected an argument similar to Dignity's that substantial evidence supporting a decision outweighed a claim of an unfair hearing, holding that "[t]he threshold question of fairness is dispositive."

The reason a lack of substantial evidence finding is not needed to render a hearing decision invalid is obvious: evidence and findings cannot be relied upon if they are the fruit of an unfair hearing. In this case, the hearing officer wrote the findings, so the decision is analogous to a history of the American Revolution written by King George III.

Under Dignity's theory, any hospital could terminate any physician's privileges using an unfair hearing, as long as it could find a few witnesses to provide "substantial evidence" against the doctor. The requirement that the hearing be fair would become a nullity, since an unfair hearing would always be "harmless error."

Lacking any real legal authority in support of its harmless error argument, Dignity relies on *El-Attar*. However, *El-Attar* only held that a hospital's violation of bylaws in and of itself did not render the hearing unfair. (*Id*., 56 Cal.4th at 997.) It never came close to even hinting that a hearing officer with an appearance

of bias could be considered "harmless error."

"There is no value in affirming a finding based on an administrative record generated in a hearing that violated due process." (*Hall v. Superior Court of San Diego County* (2016) 3 Cal.App.5th 792, 811.) That holding is especially applicable when the unfair hearing was the result of an adjudicator with a financial incentive to favor the hiring entity, because of the fundamental importance of fair adjudicators described in *Haas,* 27 Cal.4th at 1025-1032.

N. Dignity's Claim That Dr. Natarajan Endangered Patients Is False.

Dignity claims that Dr. Natarajan "endangered patient safety." (DAB, pp. 13-14, 83.) Dignity's efforts to paint Dr. Natarajan as dangerous are based on the claim that he was almost delinquent in completing medical records. Dignity correctly observes that it had specific objective standards for medical record-keeping. (DAB, p. 19.) The medical record "suspensions" referenced by Dignity (DAB, p. 20) were not true suspensions; they were simply a marker that a physician had not fully completed a medical record within 14 days. (35 PAR 9427, n. 3.) The lack of clinical importance of these "suspensions" is demonstrated by the fact that Dr. Natarajan's 342 so-called "suspensions" for delinquent medical records in the years 2011 and 2012 resulted in only fines and a required meeting with the MEC. (5 PAR 973-974; 16 PAR 3767- 3769.) After that meeting, Dr. Natarajan's performance dramatically improved in regard to timely completion of records. From September 25, 2012 to November 27, 2013,

Dr. Natarajan had only one "suspension." (6 PAR 1395.) The MEC only slapped Dr. Natarajan's wrist for 342 "suspensions" in fourteen months. Dignity cut off his hands for one suspension in the same amount of time, when he was not subject to even a $250 fine under its rules governing medical record-keeping. (7 PAR 1676.)

The best evidence Dignity can find to support its "dangerous" claim is Dr. Natarajan's completing a lot of "deficiencies" quickly in order to meet the hospital's 14-day rule. (DAB, p. 20.) In this context, a "deficiency" simply means an incomplete record, usually an unchecked box finalizing a note or order. (13 PAR 3078, 3122-3130.) It does not mean that the physician has done anything wrong. (*Ibid.*) There is no evidence that Dr. Natarajan checked any boxes incorrectly or that his rapid box-checking had the slightest negative impact on the care of a single patient. (*Ibid*.)

In 2013 and 2014, Dr. Natarajan was performing far better than some of the doctors on the MEC in terms of completing his medical records. For example, Dr. Michael Herrera, the hospital's Chief of Staff, had 21 "suspensions" on May 8, 2014. (31 PAR 8174.) Dignity's hearing decision refused to apply the hospital's objective standards, however, on the ground that Dr. Natarajan's reliance on its rules was "unwarranted," without further explanation. (35 PAR 9460, n. 52.)

The fact that rapid box-checking, with no adverse impact on patient care, is the worst conduct Dignity can cite to justify Dr. Natarajan's termination demonstrates the depths to which it needed to descend to concoct a rationale for its

action. Even worse, Dr. Natarajan performed perfectly in his medical record-keeping during a 30-day trial period in December 2013-January 2014, when his record-keeping was supposedly being evaluated. Nonetheless, he was falsely accused of lying and not meeting a "zero-deficiency" standard imposed on him and no other member of the medical staff. (See Petitioner's Response to CHA and John Muir, et al. amicus briefs, pp. 25-28.)

The facts of this case demonstrate how a hospital can claim a physician is "dangerous" with no legitimate evidence, without proving the physician violated the standard of care in a single case, and yet still win a hearing with an experienced "hospital-friendly" hearing officer overseeing the process.

O. The Correct Remedy Is a Writ Overturning Dignity's Decision.

Dignity asserts that Dr. Natarajan's only remedy is another Dignity hearing. (DAB, p. 80-81.) In making that argument, it relies again on *Johnson v. City of Loma Linda*, *supra,* 24 Cal.4th at 69-70, for the proposition that administrative findings that are not overturned are binding. If Dr. Natarajan's Petition is granted, he will have succeeded in overturning the findings of the Dignity hearing, and *Johnson* will not apply.

Dignity also makes the irrational argument that Dr. Natarajan cannot have been injured by his exclusion from the medical staff that was caused by the unfair hearing, but only by the unfair hearing, and that he is not entitled to damages arising from an unfair hearing. (DAB, pp. 80-82.) In support of that theory, Dignity cites *Carlsbad Aquafarm v. State Dep't of Health Services* (2000) 83

Cal.App.4th 809, 822-823. *Carlsbad,* however, dealt with the question of whether a violation of California's constitutional due process clause gave a right to sue for money damages. It does not address a physician's right to pursue common law remedies for wrongful termination of hospital privileges or bad faith peer review.

Dignity's position is contrary to the more recent case of *Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147, 1161-1162, which held that if a hospital violates a physician's right to fair procedure through an unfair termination of privileges, s/he is entitled to money compensation for damages caused by the procedural violation, without having to prove that s/he would have prevailed in a fair hearing. It is also contrary to *Palm Medical Group v. State Comp. Ins.* (2008) 161 Cal.App.4th 206, 222-226, which recognized that a person who suffers economic losses caused by a legally-required hearing that is either procedurally *or* substantively unfair is entitled to monetary damages.

Palm Medical Group correctly states that:

> *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 478 . . . held that tort damages are available for the failure to provide fair procedure. The court explained, "When a hospital denies staff privileges to a doctor without affording him the basic procedural protection to which he is legally entitled, the hospital and parties acting in concert with the hospital can offer no convincing reason or justification why they should be insulated from an immediate tort suit for damages."

(*Id.,* 161 Cal.App.4th at 226.)

The holding in *Westlake* should be understood in the context of the evolution of the law governing hospital hearings. *Westlake* was addressing recent law that had developed requiring fair hearings before a doctor could be excluded from either a public or private hospital. (*Id.,* 17 Cal.3d at 468-469.) The Court adopted an exhaustion of remedies requirement, thereby limiting physicians' right to immediately file suit for tort damages based on bad faith peer review or related torts. It did so in large part to provide legal protection to those physicians who were participating in hearings, often without compensation. (*Id.,* at 484.) However, the Court made it clear that it was *not* providing immunity to those who participated in unfair peer review that damaged physicians:

> [O]nce the hospital's quasi-judicial decision has been found improper in a mandate action, an excluded doctor may proceed in tort against the hospital, its board or committee members or any others legally responsible for the denial of staff privileges.

(*Id.,* at 469.)

In *Kaiser v. Superior Court* (2005) 128 Cal.App.4th 85, 110-111, the Court held that a hearing officer's refusal to recuse himself cannot be challenged in court until the completion of a hearing, a ruling that presumably applies to other claims of unfair procedure as well. As a consequence, well-heeled hospital corporations can wage successful wars of attrition against physicians they want to terminate.

In this case, on August 20, 2013, Dr. Natarajan received a letter drafted by Shulman that falsely claimed that "routine monitoring" had led the medical staff to initiate an investigation of him. (11 PAR 2648-2652, 5 PAR 1007-1008.) Since

that letter, Dr. Natarajan has been engaged in a struggle to save his career. It took over six years for Dr. Natarajan to obtain a Court of Appeal decision on his claim of unfairness. Many or most physicians will not have the resources to fight a hospital for five or six years, especially if their ability to practice has been derailed by a termination of privileges and report to the Medical Board.

The *Westlake* doctrine only works as public policy if physicians are entitled to sue for tort damages when they are harmed by bad faith peer review. The possibility of tort damages provides the incentive for hospitals to comply with their obligation to provide fair hearings. Otherwise, they could ignore that requirement without fear of ever having to compensate physicians for damaging or destroying their careers. Dignity proposes that this Court overrule *Westlake* in a way that would forever insulate it from damages it caused Dr. Natarajan, forcing him to face a potentially endless round of hearings controlled by Dignity. No law supports that position. The correct remedy is overturning Dignity's decision to terminate Dr. Natarajan's privileges, thereby permitting him to sue for damages and reinstatement before a neutral judge and jury.

III. CONCLUSION

To protect both the public health and the careers of innocent physicians, and to maintain the integrity of state-mandated quasi-judicial hearings, this Court should rule that the appearance of bias standard applies to the selection of private hospital hearing officers. It is contrary to long-standing California law and irrational to allow hearing officers with a financial conflict of interest to serve in

private hospital hearings, while forbidding such hearing officers in public hospital hearings.

Dignity does not dispute that physicians in California have a right to hearings meeting currently prevailing standards of impartiality. *Haas* created a standard of impartiality that applies here. Physicians are entitled to a truly fair procedure before having their careers damaged or destroyed by hospital actions. This Court should also affirm that in California there is no difference between the common law due process applicable to private hospital hearings and constitutional due process. By doing so, it will provide clear guidance to hospitals, medical staffs and the courts below that will help to ensure that hospital hearings are truly fair, and not used as a tool to eliminate economic competitors or whistleblowers.

Dated: September 28, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.360, subd. (b)(1), I certify that the attached brief uses the 13 point Times New Roman font and contains 13,836 words.

Dated: September 28, 2020

By Stephen D. Schear

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Sundar Natarajan, M.D.

PROOF OF SERVICE

Re: *Natarajan v. Dignity Health,* California Supreme Court No. S259364

I, the undersigned, hereby declare:

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