

No. S232197

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIRK KING, et al.,
Plaintiffs, Appellants and Respondents

vs.

COMPPARTNERS, INC., et al.,
Defendants, Respondents and Petitioners.

SUPREME COURT
FILED

MAR 02 2017

Jorge Navarrete Clerk

Deputy

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two (No. E063527)

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

MUNGER, TOLLES & OLSON LLP
Fred A. Rowley, Jr. (SBN 192298)
Jeffrey Y. Wu (SBN 248784)
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071-3426
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

MUNGER, TOLLES & OLSON LLP
Joshua S. Meltzer (SBN 291641)
560 Mission Street, 27th Floor
San Francisco, CA 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

Attorneys for Defendant, Respondent
and Petitioner
COMPPARTNERS, INC.

MURCHISON & CUMMING, LLP
William D. Naeve (SBN 92270)
Terry L. Kesinger (SBN 158576)
David A. Winkle (SBN 123441)
18201 Von Karman Avenue
Irvine, California 92612-1077
Telephone: (714) 972-9977
Facsimile: (714) 972-1404

Attorneys for Defendants,
Respondents and Petitioners
COMPPARTNERS, INC. and
NARESH SHARMA, M.D.

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CLERK SUPREME COURT

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

Defendants CompPartners, Inc. and Dr. Naresh Sharma, M.D., respectfully submit this Opposition to Plaintiffs' Request for Judicial Notice ("RJN"), which concerns an Accusation against Dr. Sharma filed by the Executive Director of the Medical Board of California in February 2016 in an administrative proceeding.

Plaintiffs seek judicial notice of the Accusation for the purpose of "support[ing]" their negligence allegations against Dr. Sharma, and to "show[]" the Medical Board's view on whether utilization review constitutes the practice of medicine in the professional discipline context. (RJN at p. 2.) The request is meritless, for three independent reasons.

First, the Accusation is not subject to judicial notice under governing law. Tellingly, the RJN contains no citation to the Evidence Code or any other authority. Judicial notice on appeal is governed by Evidence Code section 459(a), under which an appellate court "shall" take judicial notice of matters covered by Evidence Code Section 451, and "may" take judicial notice of matters specified in Evidence Code Section 452. Section 451, which concerns statutes and rules for the legal profession, is obviously inapplicable. Nor does the Accusation fall within any category of materials of which judicial notice may be taken under Section 452. The Accusation is *not* a record of "any court of this state." (Evid. Code, § 452, subd. (d).) Further, the allegations therein are not judicially noticeable as "[f]acts or propositions that are not reasonably subject to dispute." (*Id.*, § 452, subd. (h).) Allegations about Dr. Sharma's conduct are of course subject to dispute. Plaintiffs do not and cannot contend otherwise.

Second, the Accusation is not relevant to any issue in this appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544 n.4 [judicial notice

is not appropriate where the moving party “fail[s] to demonstrate the relevance of [the] material”]; see also *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089 n.4; Cal. Rule Ct. 8.252(a)(2)(A).) The underlying complaint already alleges that Dr. Sharma acted negligently in decertifying Klonopin without a weaning regimen. Another set of similar, unproven allegations against Dr. Sharma adds nothing. (See *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743 [declining to take judicial notice of a complaint because “the fact that defendant filed a complaint against the plaintiff in another court is not relevant to our analysis here.”].) Plaintiffs make no effort to explain how the Accusation bears on the scope of preemption under the Workers’ Compensation Act or whether a utilization reviewer has a duty to render medical advice.

It makes no difference that Plaintiffs argue that the Accusation “shows” that the Medical Board “considers utilization review to be the practice of medicine.” (RJN at p. 2.) As an initial matter, the Accusation does not address whether utilization review constitutes the practice of medicine. Moreover, Plaintiffs did not even brief what constitutes the practice of medicine, and do not explain how the Medical Board’s view on that question in the context of a disciplinary proceeding has any bearing on the issues before this Court. That is especially so because the Board’s final determination in that proceeding is itself subject to judicial review. (See Code Civ. Proc., § 1094.5; Bus. & Prof. Code, § 2337.)

Lastly, the RJN is untimely, as the parties’ principal briefing was completed months ago. (Cf. *People v. Preslie* (1977) 70 Cal.App.3d 486, 494 [“it is desirable in the interest of orderly judicial procedure” for a request for judicial notice to be made before the briefs are filed].) Plaintiffs do not claim that the Accusation, a public document, was unavailable to them previously.

In sum, for all of the foregoing reasons, the RJN should be denied.

Dated: March 2, 2017

Respectfully submitted,

MURCHISON & CUMMING, LLP MUNGER, TOLLES & OLSON LLP

/s/ William D. Naeve
William D. Naeve

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

*Attorney for Defendants,
Respondents and Petitioners
COMPPARTNERS, INC. and
NARESH SHARMA, M.D.*

*Attorney for Defendant, Respondent
and Petitioner
COMPPARTNERS, INC.*

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[PROPOSED] ORDER

FOR GOOD CAUSE SHOWN, IT IS ORDERED that Respondents' request for judicial notice is DENIED.

Dated: _____

Tani Gorre Cantil-Sakaue
Chief Justice

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94105.

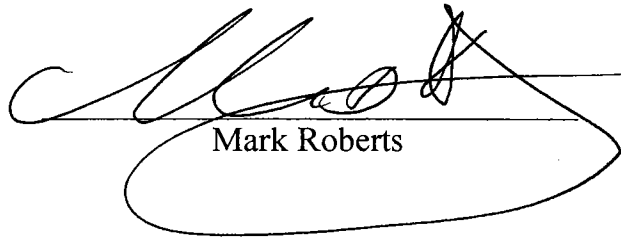
On March 2, 2017, I served true copies of the following document(s) described as **OPPOSITION TO REQUEST FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on March 2, 2017 at San Francisco, California.


Mark Roberts

SERVICE LIST
Case No. S232197

ATTORNEY/FIRM ADDRESS	PARTY
Jonathan A. Falcioni Law Offices of Patricia A. Law 19837 Laurel St. Ste 101 Rancho Cucamonga CA 91730 (951) 683-8320 Jon@patriciaalaw.com	Counsel for Plaintiffs, Appellants and Respondents KIRK KING and SARA KING
Bernhard Daniel Baltaxe Smith & Baltaxe, LLP 825 Van Ness Avenue, Suite 502 San Francisco, CA 94109	California Applicant Attorneys' Association: Amicus curiae
Ellen Sims Langille, Esq. Randall G. Poppy, Esq. Finnegan, Marks, Theofel & Desmond P.O. Box 478011 San Francisco, CA 94147	California Chamber of Commerce: Amicus curiae California Association of Joint Powers Authorities: Amicus curiae
Raul L. Martinez, Esq. Lewis Brisbois Bisgaard & Smith, LLP 633 West 5 th Street, Suite 4000 Los Angeles, CA 90071	National Association of Independent Review Organizations: Amicus curiae Exam Works, Inc.: Amicus curiae
David Didier Johnson, Esq. Crowell & Moring LLP Three Embarcadero Center Suite 2600 San Francisco, CA 94111	Coventry Health Care Workers Compensation, Inc.: Amicus curiae
Derrick M. Au, Esq. Office of the County Counsel County of Los Angeles 350 S. Figueroa Street, Suite 601 Los Angeles, CA 90071	County of Los Angeles: Amicus curiae

ATTORNEY/FIRM ADDRESS	PARTY
<p>Michael A. Marks, Esq. Law Offices of Allweiss & McMurtry 18321 Ventura Blvd., Suite 500 Tarzana, CA 91356</p>	<p>California Workers' Compensation Institute: Amicus curiae</p> <p>American Insurance Association: Amicus curiae</p>
<p>Randall G. Poppy, Esq. Finnegan, Marks, Theofel & Desmond P.O. Box 478011 San Francisco, CA 94147</p>	<p>The National Council of Self- Insurers: Amicus curiae</p> <p>Property Casualty Insurers Association of America (PCI): Amicus curiae</p>
<p>Fred J. Hiestand, Esq. Attorney at Law 3418 Third Avenue, Suite 1 Sacramento, CA 95817</p>	<p>The Civil Justice Association of California: Amicus curiae</p>
<p>Long Xuan Do, Esq. Center for Legal Affairs California Medical Association 1201 J. Street, Suite 200 Sacramento, CA 95814</p>	<p>California Medical Association: Amicus curiae</p>
<p>Clerk of the Court Riverside Superior Court Civil Courthouse 4050 Main Street – Dept 3 Riverside, CA 92501</p>	
<p>Clerk of the Court Court of Appeal – 4th Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501 Re: Case No. E0653527</p>	