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 MOTION TO STRIKE PORTIONS OF AMICUS BRIEF OF PATRICK K. MOORE, ET AL. MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STEPHEN D. SCHEAR IN SUPPORT; PROPOSED ORDER AND EXHIBIT.

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MOTION TO STRIKE PORTIONS OF AMICUS BRIEF

Pursuant to California Rule of Court (CRC) 8.204, Petitioner Sundar Natarajan, M.D., brings this motion to strike portions of the amicus curiae brief filed by Patrick K. Moore, Glenda M. Zarbock, Carlo Coppo, John D. Harwell and James R. Lahana (hereafter, "Moore, et al."). Specifically, Dr. Natarajan seeks to strike Moore et al.'s arguments numbered 1, 2, 4 and 5 (Moore et al., amicus brief ("MB") pages 11-22 and 26-31.) The grounds for this motion are that those four arguments are factual assertions supported only by alleged facts that are nowhere in the record, and the brief is an improper effort to augment the record by introducing purported facts by using amici curiae as witnesses. In addition, the portions of the brief Dr. Natarajan seeks to strike are not only improper, they are irrelevant to the legal issue before this Court.

Dated: December 28, 2020

Stephen D. Schear

Stephen D. Schear
Attorney for Petitioner
Sundar Natarajan, M.D.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The question presented in this case is whether Petitioner Sundar Natarajan, M.D. received a fair hearing before his hospital privileges were terminated by Respondent Dignity Health ("Dignity"). The issue upon which review was granted is whether the standard for hearing officer disqualification is actual bias or the appearance of bias.

The essence of Moore et al.'s amicus brief is that hospitals, medical staffs and hearing officers are all universally motivated only by a desire to be fair and protect patient safety; that requiring hearing officers without an appearance of bias and without a financial incentive to favor hospitals would lead to a shortage of "qualified" hearing officers; and that shortage would damage California's peer review system. However, those claims are not based on any facts in the record of this case. To the contrary, Moore et al. do not refer to any facts concerning the selection of Robert Singer as hearing officer in this case or anything that occurred during Dr. Natarajan's hearing, other than Mr. Singer's statement that he had offered not to work at the hospital for three years. (MB, p. 26.) Their other three citations to the record only refer to the hospital bylaws. (MB, pp. 13, 15 and 16.)

Rather than making legal arguments based on the record, Moore et al. assert that Dr. Natarajan's petition should be denied based on their personal "observations" of how wonderfully fair hospital hearings always

are in California. (MB, p. 9-10.) They request that this Court accept their assertions based on their collective 200 years of legal experience and the fact that they have presided over 230 peer review cases over the course of 30 years. (MB, p. 7.) They do not attempt to hide their expectation that this Court should accept their "observations" as the truth based on their long and purportedly honorable service as hearing officers. (MB, pp. 7-9.)

It is, of course, a fundamental rule that appeals must be decided based on facts in the record. The only mechanism for augmenting the appellate record is through a request for judicial notice or a motion pursuant to Code of Civil Procedure § 909. Apparently realizing that their purported facts do not qualify for judicial notice or augmentation of the record, Moore et al. have chosen to instead submit those facts in their amicus brief.

Although amici curiae have a recognized right to refer to authoritative studies, reports or academic literature, Moore et al. are attempting to import alleged facts into the record based on their alleged personal "observations." They are attempting to circumvent California law that requires evidence to be authenticated, based on personal knowledge with an adequate foundation, subject to cross-examination and part of the appellate record. Because most of their amicus brief is factual testimony that has not been subject to judicial review for accuracy and reliability, those portions of their brief should be stricken.

II. CALIFORNIA LAW MANDATES THAT CASES BE DECIDED ON THE APPELLATE RECORD.

To ensure that cases are decided on facts, not fiction, California law requires parties to argue cases based only on the appellate record.

> "The appellate court is . . . confined in its review to the proceedings which took place in the court below and are brought up for review in a properly prepared record on appeal." (9 Witkin, Cal. Procedure, op. cit. supra, Appeal, § 250, p. 256.) "Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal. [Citations.]" (*Knapp v. City of Newport Beach* (1960) 186 Cal.App.2d 669, 679 . . .; see also *Davis v. Thayer, supra,* 113 Cal.App.3d 892, 912.)

Kendall v. Barker (1988) 197 Cal.App.3d 619, 625.

There are only three exceptions to this fundamental rule.

With a proper showing, facts may be judicially noticed in an appellate court pursuant to Evidence Code §§ 451 et seq. Under exceptional circumstances, a party may request an appellate court to take evidence pursuant to Code of Civil Procedure § 909. (*Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, n.3; CRC 8.252.)[1]

An appellate court may also consider academic literature, reports or studies that it deems reliable, either on its own initiative or at the request of

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[1] Section 909 is not expressly limited to motions by a party. However CRC 8.252, subd. (b), which governs appellate motions to take evidence, is limited to parties. Whether non-parties can request appellate courts to take additional evidence is a moot question here, since Moore et al. have not made a Section 909 motion.

parties or amici curiae. It is not not uncommon for amici curiae to cite published research material, such as the California Medical Association has done in this case. (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 590, n. 20.)

In *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 648, n.7, the Court stated that it could consider facts submitted by the California Bankers Association in an amicus brief. Those facts were not published academic materials, research reports or studies. The only case *Puentes* cited in support of its consideration of the amicus evidence was *Rivera, supra,* 265 Cal.App.2d at 590, n. 20. However, *Rivera* only stated that published research materials could be considered in an appeal. *Puentes* did not explain or analyze its extension of the *Rivera* holding to alleged facts submitted by an amicus curiae.

Puentes' statement was incorrect, because the facts provided by the California Bankers Association were not admissible evidence nor facts subject to judicial notice. The law is clear that appellate cases must be decided on the appellate record. (*Vons Companies, Inc. v. Seabest Foods, Inc*., supra, 14 Cal.4th at 444, n.3.)

In *Puentes,* the Bankers Association at least apparently had direct knowledge of the facts it was asserting. As will be discussed below, Moore et al. are asserting as "facts" information that they could not possibly know, such as the conduct and motivations of all other hospital hearing officers,

and all hospitals and medical staffs. Furthermore, the Court in *Puentes* stated that it was not relying for its holding on any amicus brief, so its statement that amicus facts could be considered by the court was dicta. No case has followed *Puentes* on this point.

In *Professional Engineers v. Kempton* (2007) 40 Cal.4th 1016, 1048, n.12, this Court held that "[I]t is the general rule that an amicus curiae accepts the case as he finds it and may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record. . . .'", quoting *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143. An appellate court is not a proper forum for the development of an additional factual record. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207.) The California Supreme Court's policy is not to review issues that are dependent upon the development of a factual record if those issues were not timely raised in the Court of Appeal or not reached in that court, when the latter omission was not brought to the attention of the Court of Appeal by petition for rehearing. (*Id.,* 17 Cal.4th at 1205.)

California's Evidence Code applies to every action before this Court, the courts of appeal and the superior courts. (Evidence Code § 300.) Allowing amici curiae to augment the record with facts in their briefs would permit them to circumvent all of the established safeguards that California law has implemented to help ensure that evidence is authentic, reliable, credible and otherwise trustworthy. (Evidence Code §§ 310 through 1605.)

There is no valid ground for allowing amici, who are not even parties to the action, to avoid the requirements of the Evidence Code by having their purported "observations" considered as evidence in this action.

When parts of a brief are based on facts that have no support in the record on appeal, a motion to strike those portions of the brief may be granted. (*C.J.A. Corporation v. Trans-Action Financial* (2001) 86 Cal.App.4th 664, 67; CRC 8.204, subd. (e)(2.)

III. MOORE ET AL.'S BRIEF ASSERTS NUMEROUS UNPROVEN FACTS OUTSIDE THE RECORD.

The amicus brief of Moore, et al. attempts to covertly augment the record by asserting purported facts in its brief. The fact that the attorneys are attempting to present facts about the hospital hearing system cannot realistically be disputed. At the end of their Application, MB pp. 9-10, they unabashedly write:

> The proposed brief addresses some of our observations directly relevant to this appeal borne from our experience serving as hearing officers:
>
> 1. The knowledge and judgment of an experienced peer review hearing officer are unique and necessary to conduct a peer review hearing competently.
>
> 2. We among other hearing officers have volunteered our time to expand the pool of qualified hearing officers through an extensive education and training program under the auspices of the California Society for Healthcare Attorneys.
>
> 3. A hearing officer's impartiality is not affected by time-based compensation from whatever source.

> 4. An unqualified reputation for integrity is of paramount importance to hearing officers.
>
> 5. The PRB, practitioner and health facility where he/she practices have a common interest in a fairly conducted hearing.

The Table of Contents of Moore et al.'s brief also shows that the four arguments at issue (1, 2, 4 and 5) are factual claims, not legal arguments. (MB, p. 3.)

Moore et al. assert a multitude of general and specific alleged facts in support of their broad factual generalizations, purportedly based on their personal experiences, about:

1. The complexity of hospital hearings (MB pp. 14-16);

2. The length of those hearings (MB pp. 7, 8, 19, 31);

3. The number of those hearings (MB p. 7);

4. The logistical difficulty of arranging hearings (MB pp. 18-19);

5. The content of hospital bylaws and fair hearing plans other than Dignity's bylaws in this action (MB pp. 12, 13, 17);

6. The pre-existing knowledge required to preside over hospital hearings (MB p. 12, 14-16, 19);

7. The lack of knowledge, judgment, experience and qualifications of retired judges and justices affiliated with alternative dispute resolution providers (MB pp. 11, 14, 16-18);

8. Physicians' inability to write a hearing decision that includes factual findings and a connection between those findings and the decision (MB pp. 16-17);

9. The motives of peer review bodies in authorizing hearing officers to deliberate with hearing panels (MB p. 17);

10. The benign motives of peer review bodies when they select hearing officers and when they select the same hearing officer multiple times (MB p. 19);

11. The motives of hearing officers when deliberating with hearing panels (MB p. 17);

12. Parties appearing in "pro per" (MB p. 17);

13. The indispensable nature of experienced attorneys such as themselves to preside over those hearings (MB, pp. 12-19, 30-31);

14. The difficulty peer review bodies have in finding attorneys with "the requisite expertise" (MB p. 19);

15. The insufficient number of "qualified" hearing officers (MB pp. 21-22, 24, 26);

16. Actions of the California Society for Healthcare Attorneys (CSHA) to screen, train and list attorneys who are "qualified" to serve as hospital officers (MB pp. 7-8, 19-21);

17. The motives of members of the CSHA's Hearing Officer Committee (MB pp. 20-21);

18. The impact on peer review of requiring hearing officers without an appearance of bias on the pool of "qualified" hearing officers (MB p. 22);

19. The importance of a hearing officer's reputation for impartiality to peer review bodies, and how peer review bodies would find a hearing officer that favored them unacceptable (MB p. 26);

20. The motive of all peer review bodies, practitioners, hearing panels, hearing officers, hospitals and medical staff to have fair procedures (MB p. 27).

For example, Moore et al. present as a fact that:

> PRB's [peer review bodies] authorize the hearing officer to attend the panel's deliberations to understand their findings and conclusions and draft a decision conforming to the statutory requirements for the panel's consideration. The hearing officer is also present to dissuade the panel from reaching findings unsupported by substantial evidence or conclusions unconnected to the proverbial analytical bridge.

(MB at p. 17.) California has 492 hospitals.[2] In the first sentence quoted here, Moore et al. purport to know, without any conceivable foundation, the motivations of the members of the governing bodies of each of California's hospitals that approved bylaws permitting the hearing officer to deliberate

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[2] The 492 hospitals number is taken from the most recent available data of the State's Office of Statewide Healthcare Planning and Development (OSHPD), located on its website at https://data.chhs.ca.gov/dataset/hospital-annual-utilization-report/resource/69b3e5b9-6e48-4598-af9e-72cdf4d34134. Dr. Natarajan intends to file a Motion for Judicial Notice of that information. Hospital governing bodies are required to approve the bylaws governing hospital hearings. (Business and Professions Code § 809, subd. (a)(8).)

with the hearing panel. They likewise purport to know the motives of every hearing officer who deliberates with hearing panels, which is obviously absurd. These factual assertions are obviously untrustworthy speculation not based on the personal knowledge of Moore et al.

All of Moore et al.'s factual assertions are bolstered by other facts outside the record concerning their collective 200 years of experience as hearing officers and health law attorneys. (MB p. 7.) Dr. Natarajan has attached a copy of their brief to this Motion to Strike as Exhibit A to the Declaration of Stephen D. Schear. Exhibit A highlights the factual statements not based on the record and arguments that rely entirely on facts outside the record.

IV. THE EVIDENCE SUBMITTED BY MOORE ET AL. SHOULD NOT BE CONSIDERED IN THIS APPEAL BECAUSE IT IS NEITHER RELIABLE NOR IN THE RECORD.

A. Moore et al.'s Observations about Hospital Hearings Are Procedurally Improper and Lack Foundation.

The gist of Moore et al.'s brief is that because of their great (in both senses of the word) experience as hearing officers, they know that all hearing officers and hospitals can always be trusted to act with integrity, honor and competence. Therefore, there is absolutely no risk of unfair treatment of any physician if hospitals are allowed to continue to unilaterally select hearing officers with past and/or potential future financial

relationships with the hiring entity, or who otherwise appear to be biased.

Dr. Natarajan seeks only to strike the four arguments that are almost entirely factual submissions rather than legal arguments. Moore et al.'s third argument, that "[b]ias is not established by time-based compensation" (MB pp. 22-26), is a legal argument that only contains one factual assertion outside the record. (Schear Decl., Exh. A, p. 24.) The Court could properly consider this argument, if not the factual assertion.[3]

There are obvious legal problems with the purported facts presented by the five attorneys.

Moore et al. are acting as witnesses to what has occurred in the past, but because their evidence was not introduced in the trial court, none of the usual Evidence Code requirements to admit evidence have been met.

In effect, Moore et al. present themselves as expert witnesses on the questions of how hospital hearings are conducted and what will happen if this Court holds that hearing officers cannot have a financial incentive to favor the entity that appoints them, without the consent of the physician who is the subject of the hearing. However, Dr. Natarajan's counsel will have no opportunity to cross-examine Moore et al. about the factual foundations of their "observations"; their conduct of past and current hearings; how often they have been repetitively hired by the same hospital

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[3] As Moore et al. admit (MB p. 22), Dr. Natarajan does not contend that bias is established by time-based compensation, so their legal argument on this issue is irrelevant, whether or not it is subject to a motion to strike.

system; their financial ties to hospitals, including how much they have been paid by hospitals in the past, and what percentage of their earnings has come from hospital entities; how much legal work they have performed for hospitals or medical staffs as attorneys in addition to hearing officer work; how much they and their clients benefit financially and otherwise due to the current system; how often they have been challenged by physicians for bias, and how often (if ever) any such objection was granted; or how often physicians have prevailed in hearings in which they were hearing officers. The answers to those questions would affect the credibility of their factual assertions.

In addition, it would be entirely unfair for Moore et al. to be allowed to present evidence how hospital hearings operate in practice, because Dr. Natarajan is not permitted the same opportunity. It would be obviously improper for his counsel to present his own experience representing whistleblower physicians and other doctors in hospital hearings over the course of 30 years, given the law set forth in Section II, above.

Moore et al.'s asserted facts are mostly lacking in any specifics or documentary support, so they are alleging unprovable generalizations. Their factual assertions are equivalent to a defense attorney in a civil appeal or the Attorney General in a criminal appeal claiming that our judicial system works well as it is, so there is no need for this Court to address any claimed injustice or violations of law that transpired below.

This Court has held that evidence outside the record cannot be used to support a claim of systemic conduct. In *People v. Peevy, supra,* the question was whether a defendant's admission could be used for impeachment purposes when it was deliberately obtained by the San Bernardino Sheriff's Department after refusing the defendant's request for counsel, with the objective of using any admissions for impeachment purposes. (*Id.,* 17 Cal.4th at 1188.)

In support of reversal of his conviction, the defendant argued that the trial court and the Court of Appeal had thwarted his efforts to prove that his interrogation had been the result of a widespread police department practice of disregarding suspects' requests for counsel. (*Id.,* at 1205.) The defendant did not offer evidence of any widespread police misconduct in the trial court. (*Id.,* at 1206.)

In the Court of Appeal, the defendant did try to introduce evidence of widespread police misconduct by requesting judicial notice of a lawsuit that said such practices were widespread in Los Angeles and Santa Monica, and a couple of newspaper articles. The Court of Appeal held that the proffered evidence was irrelevant, because it did not concern the police department that interrogated the defendant. (*Id.* at 1206-1207.) This Court agreed with the Court of Appeal on that issue. (*Id.* at 1207.)

After his reply brief, the defendant attempted through a motion to introduce additional evidence of the alleged systemic police conduct at

issue, including one transcript from a trial in San Bernardino County. The Court of Appeal summarily denied defendant's motion. (*Ibid.*)

This Court agreed with the Court of Appeal's decision for four reasons:

1. The defendant's motion contravened the rule that an appellate court is not the forum to develop an additional factual record;

2. The defendant's motion was late in the proceedings;

3. The defendant failed to show that the evidence could not have been presented at trial; and,

4. The defendant failed to show that the evidence concerned the police department that had interrogated him. (*Id.* at 1207-1208.)

In the California Supreme Court, amici curiae supporting the defendant attempted to introduce similar evidence of systemic police misconduct through requests for judicial notice. This Court rejected those requests for the same reasons that supported the Court of Appeal's denial. It added that the evidence was of limited relevance because it did not concern the agency that had interrogated the defendant. (*Id.* at 1208, n. 4.)

As in *Peevy*, Moore et al. are attempting to introduce evidence of systemic conduct outside the trial court record. Although Moore et al. are attempting to prove benign rather than malign systemic conduct, analytically the issues are the same. Here, the grounds for excluding the evidence at issue are far stronger than in *Peevy*. All four of the factors

relied upon by the Court of Appeal and this Court are present here. Dignity made no effort to introduce in the trial court any evidence that requiring hearing officers without an appearance of bias would impair hospitals' ability to hire hearing officers. The amicus brief at issue here was filed late in these proceedings. Neither Dignity nor Moore et al. made an effort to introduce the evidence at issue in the Court of Appeal through a request for judicial notice or a motion pursuant to Code of Civil Procedure § 909. The Court of Appeal's decision at issue here did not reference any contention that an actual bias standard was necessary to prevent a shortage of hearing officers. Dignity did not request a rehearing on the decision. (*Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383.)

Moreover, the amici curiae in *Peevy* sought introduction of the evidence into the appellate record using an available procedural mechanism, requests for judicial notice. Here, Moore et al. have circumvented the procedural requirements for the introduction of evidence in an appeal by simply asserting new purported facts in their amicus brief. In addition, the amici in *Peevy* sought the introduction of documents and a training video which the Court could reasonably evaluate for authenticity, reliability and relevance. Moore et al. ask this Court to accept their unproven general and specific allegations without any proof of authenticity, reliability or relevance to the issue before this Court.

The proceedings and records of hospital hearings in California are ordinarily kept confidential. (Schear Declaration, ¶ 2; see also, e.g., PAR 55, 227, 477; Evidence Code § 1157.)[4] Since Moore et al. have not conducted all the hearings in California, their "observations" cannot be based on their personal knowledge as to what happens in hearings with other hearing officers. They were not witnesses to the performance or motive of the hearing officer in this case or in any of the ten other cases that Dignity paid Singer to be the hearing officer. (AAR 318.) Nonetheless, they present "observations" that every attorney who has served as a hospital hearing officer has the same utmost integrity, honor and fairness that they ascribe to themselves, that every hospital and medical staff involved in hospital hearings acts fairly and with integrity, and they predict that they will always continue to do so in the future. (MB 27.) Whether or not Moore et al. have always acted as impeccably fair hearing officers, their claims about how all other hospital hearings are conducted is pure speculation untethered to any factual foundation.[5] Their claims of knowledge of the motives of others is even more far-fetched.

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[4] "PAR" refers to Administrative Record on file in this Court, and "AAR" refers to the Augmented Administrative Record.

[5] If Moore et al. were to contend that they received reliable information from others about how hospital hearings were conducted, that evidence would constitute inadmissible hearsay.

B. The Observations of Moore et al. Are Irrelevant to the Issue upon Which Review Was Granted.

As stated above, in *Peevy* this Court decided that the evidence submitted by amici curiae on behalf of defendant should not be admitted in part because it lacked relevance to the issue presented. Likewise here, the observations of Moore et al. at issue here are irrelevant to the issue upon which review was granted, i.e., whether the correct standard for disqualification of a hearing officer is actual bias or the appearance of bias. It is also irrelevant to the more specific question before this Court, i.e., whether Dignity provided Dr. Natarajan with a fair hearing before terminating his hospital privileges.

As discussed in both Dr. Natarajan's Opening Brief, pp. 77-78, and in his Reply, p. 38, this Court has held that the fiscal and administrative burdens of providing a procedural safeguard is not considered when the issue is the impartiality of adjudicators, because neutral decision-makers are so fundamental to our system of justice. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1035-1036.) On that issue, this Court stated:

> [S]peculation about the possible outcome of hypothetical cases cannot justify tolerating a practice that we have considered and found to create a constitutionally unacceptable risk of bias. (*Haas.,* at 1036.)

Moore et al. completely fail to address the law that a cost-benefit analysis does not apply here, despite Dr. Natarajan's presenting it in both of his briefs. Their argument that requiring a hearing officer without an appearance of bias would cause a shortage of "qualified" hearing officers that would be difficult to remedy is irrelevant as a matter of law.[6]

The "observations" of Moore et al. are also irrelevant because they do not concern the events that occurred in this case, i.e, the hearing of Dr. Natarajan, or how Dignity Health holds hearings at the 39 hospitals it owns. (Dignity Answer Brief, p. 18.) Moore et al. do not assert that they have ever been selected as a hearing officer for Dignity, or hired as a lawyer by Dignity, or have any personal knowledge how Dignity hospitals conduct their hearings. Like the evidence in *Peevy*, Moore et al.'s observations are irrelevant here, since this Court is required to render a decision based on the facts of this case.

Furthermore, this petition for a writ presents the question of whether hospital hearing officers might be affected by their past and/or potential future economic relationship to hospitals. Nonetheless, Moore et al. provide no information about how much they have earned individually or collectively from their work as hearing officers and attorneys for medical

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[6] The inaccuracy of Moore et al.'s contention that granting Dr. Natarajan's writ would cause significant practical problems will be addressed in Dr. Natarajan's Consolidated Answer to the amicus briefs filed by the California Hospital Associations, nine hospital systems, and Moore et al., not here.

staffs and hospitals, whether they were selected as hearing officers by hospital attorneys or whether they personally knew the hospital attorneys who recommended or appointed them. Their brief is also irrelevant because it does not address the central question of hospital hearing officers' financial relationships to the entities who appoint and pay them.

C. Moore et al.'s Brief Lacks Credibility.

The facts asserted by Moore et al. lack credibility for several reasons in addition to the lack of personal knowledge described above.

One glaring example of Moore et al.'s claims that is not credible is their claim that retired judges and justices do "not have the knowledge and judgment necessary" to perform competently as hearing officers. (MB, p. 16.) According to Moore et al., only experienced hearing officers such as themselves, and not retired judges and justices, are capable of deciding reasonable voir dire (MB p. 12), ensuring that panel members do not have a financial interest that would render them biased (p. 13), ruling on relevance of information (p. 13), balancing fairness to the physician and protecting patients (p. 14), deciding privilege and immunities issues (p. 14), reviewing a practitioner's education, training, etc. (p. 15), reviewing medical records as competent evidence (p. 15), understanding performance evaluations of a practitioner (p. 15), considering expert reports (p. 15), understanding highly technical information (p. 15), understanding objections to admissions of evidence and motions (p. 16), dissuading panels from reaching findings

unsupported by substantial evidence (p. 17), dealing with in pro per physicians (p. 18) earning the respect of the parties (p. 18), or arranging hearing logistics (because they often have to happen in the evenings) (p. 18).

Moore et al. provide no evidence for the claimed lack of competence of retired judges and justices to preside over hospital hearings. Each of the tasks set forth above would be familiar to every judge or justice, because the same issues frequently arise in law and motion practice and bench and jury trials. Moore et al.'s argument that only experienced hearing officers who repeatedly work for hospitals and medical staff have the ability to preside over hospital hearings is not credible given the training, intelligence and experience of retired California judges and justices now serving as neutrals.

Moore et al. acknowledge that they are concerned that a decision requiring hearing officers without an appearance of bias "would be an unwarranted penalty on neutral hearing officers." (MB p. 9.) The "penalty" imposed on hearing officers popular with hospitals and their medical staffs, such as Moore et al., would be the possible loss of lucrative hearing officer engagements, if physicians did not consent to their service.

The amount of money earned by Robert Singer as a hearing officer for Dignity demonstrates the extent of the financial interest at stake for Moore et al. in the outcome of this case. Singer earned $99,280.64 for the

hearing that led to the termination of Dr. Natarajan's privileges. (AAR 318.) Dr. Natarajan's hearing took 19 evidentiary sessions. (Dignity Answer Brief, p. 14.) Moore et al. refer to a hearing where amicus curiae Carlo Coppo presided over 43 sessions. (MB p. 19, n. 11; *Sadeghi v. Sharp Memorial Medical Center of Chula Vista* (2013) 221 Cal.App.4th 598.) Given that Mr. Coppo has been practicing law for over 50 years, and was a lead counsel in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, he likely charged at least as much as Mr. Singer's rate in *Natarajan.* (Schear Decl., ¶ 3.) He therefore likely earned well over $200,000 for a single hearing. Given the number of hearings that Moore et al. have done, and are currently doing, they have a large financial interest in the outcome of this case.

The amicus brief filed in this matter by the California Medical Association (CMA) discusses how hearing officers may be subject to unconscious biases that influence their thoughts. It discusses how "cognitive biases work without awareness, so biased experts may think and be incorrectly convinced that they are objective, and be unjustifiably confident in their conclusions." (CMA amicus brief, p. 21, citing Dror et al., Cognitive Bias and Its Impact on Expert Witnesses and the Court (2015) 54 JUDGES' J. 9.) Giving Moore et al. the benefit of the doubt, it is perhaps possible they have persuaded themselves that they can authoritatively assert the benign motivations of every hospital, medical staff

and hearing officer involved in hospital hearings, and the impeccably fair conduct of all hearing officers with a financial incentive to favor the entity that appointed them. The other possibility is these highly experienced and accomplished attorneys have filed a brief asserting that no participant in hospital hearings in California ever lets financial or improper considerations affect their actions, knowing that the claim is not factually based. In any event, Moore et al.'s factual assertions are not credible.

V. CONCLUSION

If one has a very, very, very good imagination, one might be able to imagine a world in which every hospital, including for-profit hospitals, every medical staff, and every hearing officer appointed by hospitals or medical staffs, function without regard to their own rational self-interest or financial considerations. However, under California law, cases must be decided on the facts in the records, not on fantasies, or unauthenticated, untested and unverified claims by amici curiae with financial interests in the outcome.

The three amici curiae briefs of the California Hospital Association, Scripps Health and the University of California, and Adventist Health, et al., hospital systems also rely heavily on purported facts not in the record, in violation of the law governing appellate briefs cited in Section II, above. However, the authors of those briefs do not claim to be witnesses to the facts outside the record that they cite. This Motion to Strike was brought

because Moore et al. crossed the line between advocacy and testimony. In the guise of advocacy, they are attempting to be witnesses to the perfect integrity and fairness of a peer review system that has resulted in their being chosen as hearing officers with great frequency, with a concomitant financial benefit to them and their families.

It is indisputable that virtually all of the facts Moore et al. allege in their brief are not in the appellate record. Given the extensive appellate litigation experience of Moore et al., the decision to make their brief primarily an assertion of facts outside the record must have been intentional. The four arguments in their brief that are assertions of facts outside the record should be struck.

Dated: December 28, 2020

Respectfully submitted,

Stephen D. Schear

Stephen D. Schear
Attorney for Petitioner
Sundar Natarajan, M.D.

DECLARATION OF STEPHEN D. SCHEAR

I, Stephen D. Schear, declare:

1. I am the lead counsel for Petitioner Sundar Natarajan, M.D.

2. For the past 30 years, I have specialized in representing physicians and other health care practitioners in whistleblower and retaliation cases and related hospital and medical board proceedings. I have participated as counsel for physicians in medical staff hearings and also conducted civil litigation related to such hearings, including both petitions for writ of mandate and civil actions for reinstatement and damages. In my experience, the proceedings of most medical staff and hospital hearings are kept confidential.

3. I am informed and believe that Carlo Coppo has practiced law for more than 50 years based on his resume that is posted on the website of the California Society of Healthcare Attorneys, and because of his very low State Bar Number (34226).

4. Exhibit A, attached following the Proposed Order below, is a true and correct copy of the amicus curiae brief filed by Patrick Moore and four other attorneys. I have highlighted those parts of the brief that make factual assertions and those sentences that incorporate those factual assertions in arguments.

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

executed on December 28, 2020, at Oakland, California.

Stephen D. Schear

Stephen D. Schear

[PROPOSED] ORDER

Good cause appearing, IT IS HEREBY ORDERED that the Court strikes arguments numbered 1, 2, 4 and 5, located on pages 11-22 and 26-31, from the amicus curiae brief filed by Patrick K. Moore, Glenda M. Zarbock, Carlo Coppo, John D. Harwell and James R. Lahana.

DATED: _____

_____

JUSTICE OF THE SUPREME COURT

EXHIBIT A

S259364

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.

Plaintiff and Appellant,

v.

DIGNITY HEALTH

Defendant and Respondent.

After A Decision By The Court Of Appeal,
Third Appellate District
Case No. C085906

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT DIGNITY HEALTH

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

SUPREME COURT OF THE STATE OF CALIFORNIA

Sundar Natarajan, M.D. v. Dignity Health
Supreme Court Case No. S259364

There are no interested entities or parties that must be listed in this certificate under California Rules of Court, rule 8.208(d)(1).

DATED: November 30, 2020 Respectfully submitted,

/s/ Glenda M. Zarbock
GLENDA M. ZARBOCK

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Amici are healthcare specialty lawyers whose careers span over 200 years, the vast majority of which involved practitioner peer review. Our experience ranges from counseling peer review bodies ("PRBs") and practitioners on credentialing and privileging issues to representing parties in the hearings that are the subject of this appeal. Whether our clients predominantly have been PRBs or practitioners, this appeal has moved us collectively to submit this brief in support of affirmance of the judgment.[1]

More to the point of this appeal, all amici serve as hearing officers in the type of hearing that is the subject of this appeal. Some of us have served in this capacity more than 30 years. Collectively, we have presided in more than 230 peer review cases. This year alone, we have been engaged to preside in 17 peer review hearings.[2]

We all have served as organizers and faculty in the training programs offered by the California Society for Healthcare Attorneys ("CSHA") for its members seeking to assume the important role of hearing officer. (See https://www.csha.info/find-

[1] Three amici submitted a brief in the Court of Appeal.

[2] The 2008 data cited by Petitioner and Appellant (CT 1701) that "almost no entities had 809 hearings" (Petitioner and Appellant's Reply Brief ("ARB"), p. 37) may have been true 12 or more years ago. However, it is misleading to imply that it is true now, as the current engagements of only five hearing officers show.

hearing-officer.) Through our professional association, we continue to expand the pool of qualified hearing officers.

In accordance with California Rules of Court, rule 8.520, subdivision (f)(3), amici explain their interest in the appeal and how this brief will assist this Court in deciding the matter as follows.

Because amici regularly serve as hearing officers, we have significant interests affected by this appeal. Amici are charged with conducting fair hearings that meet the dual goals of protecting ***practitioners*** from arbitrary or discriminatory adverse peer review actions and protecting ***patients*** from harm from practitioners who are unqualified or engage in misconduct. (*El-Attar v. Hollywood Presbyterian Medical Ctr.* (2013) 56 Cal.4th 976, 988, quoting *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 1268.) An extraordinary and ill-defined judicial restriction on the statutorily-authorized selection of hearing officers, as proposed by Petitioner and Appellant ("Appellant"), poses a significant risk to fair peer review hearings[3] – fairness that we have pledged to ensure.

If the judgment is reversed, amici will be compelled to make decisions about their service as hearing officers for which Appellant proposes no ascertainable standard. For example, must we withdraw in a pending proceeding, throwing the hearing (which may already consumed dozens of evidentiary sessions) into disarray? How can we decide whether it would be proper to

[3] Respondent and other amici have described this point in more detail. We need not echo their briefing.

serve in a subsequent case arising at the same or other organizationally related PRB without precise guidance tailored to the unique setting of peer review hearings – a legislative task that is ill-suited to judicial intervention on this record? Broadly disqualifying the most experienced would undermine effective, efficient peer review hearings and be an unprecedented and unwarranted penalty on neutral hearing officers who honorably and capably conduct these important proceedings.

By presenting the perspective of experienced hearing officers on some of the issues presented by the parties, amici endeavor to assist this Court in understanding more completely the implications of its decision on the appeal. Neither Dr. Natarajan nor Dignity Health is in a position to address our viewpoint from first-hand experience.

With this application, amici present a proposed brief in support of affirmance of the judgment below. The proposed brief addresses some of our observations directly relevant to this appeal borne from our experience serving as hearing officers:

1. The knowledge and judgment of an experienced peer review hearing officer are unique and necessary to conduct a peer review hearing competently.

2. We among other hearing officers have volunteered our time to expand the pool of qualified hearing officers through an extensive education and training program under the auspices of the California Society for Healthcare Attorneys.

3. A hearing officer's impartiality is not affected by time-based compensation from whatever source.

4. An unqualified reputation for integrity is of paramount importance to hearing officers.

5. The PRB, practitioner and health facility where he/she practices have a common interest in a fairly conducted hearing.

Dated: November 30, 2020

Respectfully submitted,

/s/ Carlo Coppo
CARLO COPPO

/s/ Patrick K. Moore
PATRICK K. MOORE

/s/ Glenda M. Zarbock
GLENDA M. ZARBOCK

/s/ John D. Harwell
JOHN D. HARWELL

/s/ James R. Lahana
JAMES R. LAHANA

PROPOSED AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT DIGNITY HEALTH

INTRODUCTION

Amici respectfully submit this brief for the Court's consideration in this appeal.

ARGUMENT

1. The knowledge and judgment of an experienced peer review hearing officer are unique qualities among neutrals, retired judges and lawyers and are necessary to conduct a peer review hearing competently.

Appellant's unsubstantiated proclamation that any alternative dispute resolution ("ADR") neutral or retired judge or justice affiliated with an ADR provider is qualified to preside over a peer review hearing ignores the background and skills essential to conducting the proceeding competently. (Appellant's Reply Brief ("ARB"), pp. 37-38.) While amici have great respect for ADR professionals,[4] they do not have the knowledge, judgment and experience necessary to preside over a peer review hearing competently.

A peer review hearing officer must have a fund of uncommon, if not unique, knowledge, judgment and experience to preside competently over a peer review hearing. We invite the Court's attention to several aspects of a peer review hearing to illustrate the point.

[4] Indeed, some qualified hearing officers are associated with ADR providers. (See https://www.csha.info/find-hearing-officer.)

A hearing officer must be conversant with the statutory and case law governing peer review hearings, as well as the PRB's governing bylaws or fair hearing plan. This knowledge is essential to guarantee the practitioner and PRB a hearing conforming to the legal precepts of fair procedure and, in the governmental peer review setting, due process. Simply reading the Business and Professions Code sections 809 *et seq*., the extensive body of case law in the Court of Appeal and this Court, and the PRB's bylaws or fair hearing plan does not qualify one to preside over a peer review hearing.

The statute is at best an incomplete outline of procedures required to conduct a fair hearing.[5] The gaps must be filled by the hearing officer's broad and deep fund of knowledge and sound judgment borne of experience in the peer review subspecialty of healthcare law. Here are but a few examples:

- The hearing officer must be equipped to decide the extent of "reasonable voir dire" of the panel members. (Bus. & Prof. Code §809.2(a), (c).) The statute is, and bylaws and fair hearing plans frequently are, silent on a more objective standard.

[5] Considering the extensive case law on peer review hearings, there is a surprising paucity of authority on the recurring issues of the hearing officer's job – e.g., determining potential bias of panel members, determining the relevance of information that must be disclosed before the evidentiary hearing begins and proffered evidence during the hearing, and applying the atypical standards of the panel's review of the PRB's action or recommendation as to the practitioner.

- The hearing officer must be familiar with the areas of potential bias of panel members in the peer review setting to rule on a challenge of a panel member. The statute simply requires an "unbiased" panel member (besides the objective standards of (1) gaining no direct financial benefit from the outcome and (2) not having acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter). (Bus. & Prof. Code §809.2(a).)
- When a hearing officer must rule on a dispute on prehearing access to information, the statute lists "factors" for the hearing officer to consider. However, it provides no guidance on how the hearing officer should weigh those factors in making a decision. A seasoned hearing officer can navigate the relative significance of the statutory and other factors in the unique setting of a peer review hearing. (See Bus. & Prof. Code §809.2(e).)
- The statute authorizes the hearing officer to rule on the relevance of information to be produced before and during the hearing. (Bus. & Prof. Code §§809.2(e), 809.3, subd. (a)(4).) The statute does not define "relevant to the charges" or "relevant evidence" at the hearing.[6] Many PRB bylaws and fair hearing plans, like Dignity Health's (PAR01620, §9.10), adopt the definition "the sort of evidence on which responsible people are accustomed to rely in the conduct of serious affairs, *regardless of the*

[6] Nor does the statute incorporate the definition of "relevant evidence" for judicial proceedings in Evidence Code section 210.

admissibility in a court of law." (Emphasis added.) To have the perspective of a "responsible person" expressly untethered to the Evidence Code, the hearing officer must be conversant with:

- How the potentially conflicting dual goals of peer review – fairness to the practitioner and protecting patients from unsafe care or other practitioner misconduct – are implemented;
- The clinical, procedural and other evidence that is (1) "relevant to the charges" and must be disclosed before the hearing (Bus. & Prof. Code §809.2(d)), and (2) "relevant" to the panel's ultimate finding whether the PRB's action is "reasonable and warranted" (Bus. & Prof. Code §809.3, subd. (b)(3));
- The privileges and immunities that affect documentary and testimonial evidence in the peer review hearing context; and
- In cases of a summary or immediate action, the application of the standard of "failure to take that action may result in an imminent danger to the health of any individual" (Bus. & Prof. Code §809.5, subd. (a)).

The evidence submitted in peer review hearings is highly technical and understandably unfamiliar to neutrals, retired judges and lawyers uninitiated to peer review. A hearing involves the multi-layered procedures to identify, report and take

action on an allegedly errant practitioner's qualifications and/or conduct. Some examples:

- The practitioner's professional history, including, among others, education, training, licensure, certifications, other provider affiliations etc. (See PAR01593-01595.)
- Medical records, imaging and related information on patients who suffered unexpected care or outcomes (e.g., death, complications).
- Clinical or behavioral variance data, performance reports, unusual occurrence or behavioral reports.
- Evaluations of potential patterns and trends of substandard care or misconduct.
- The outcome of additional education or training required of or undertaken by the practitioner.
- The results of detailed focused practitioner performance evaluations.
- In-depth evaluations of the practitioner's care by exceptionally qualified practitioners not affiliated with the PRB – so-called "outside expert" reports.
- The inter-relationships among various levels of peer review and quality improvement committees within the PRB, medical staff officers, and clinical department leaders, and their roles and responsibilities for addressing substandard care or conduct.

The hearing officer must be able understand and evaluate the significance of this highly technical information to rule competently on requests for information, objections to admission

of evidence and various motions (e.g., preemptive exclusion of evidence, limiting instructions on the use of evidence, striking testimony). Despite his/her other professional capabilities, a neutral, retired judge or lawyer not experienced in peer review does not have the knowledge and judgment necessary to perform these tasks competently.

Besides knowledge and experience, a neutral, retired judge or lawyer inexperienced in peer review would be unqualified for other reasons. Some examples related to typical provisions in PRB bylaws and fair hearing plans are:

- A hearing officer typically is charged with acting as "legal adviser" to the panel.[7] (See PAR01616-01617.) In this role, the hearing officer must be competent to provide that advice. (California Rules of Professional Conduct, rule 1.1.) A lawyer not conversant with the law and practice of peer review and related hearings cannot meet this ethical requirement.
- The panel is obliged to render a " . . . written decision . . . including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached." (Bus. & Prof. Code §809.4, subd. (a)(1).) This task would be daunting for practitioners

[7] Although the hearing officer attends the panel's deliberations and is available to provide advice on legal matters as requested by the panel, our uniform experience is that hearing officers conscientiously comply with the panel's exclusive authority to decide the case. Undoubtedly, practitioner panels would resist any lay person's intrusion into their exclusive authority.

comprising a panel, who are untrained in the law, and inevitably would lead to reversals in appeals to the governing board or on a petition for writ of administrative mandate (Code Civ. Proc. §1094.5). Consequently, PRBs authorize the hearing officer to attend the panel's deliberations to understand their findings and conclusions and draft a decision conforming to the statutory requirements for the panel's consideration.[8] The hearing officer is also present to dissuade the panel from reaching findings unsupported by substantial evidence or conclusions unconnected to the proverbial analytical bridge.

- Because the parties are not required to be represented by counsel (see Bus. & Prof. Code §809.3, subd. (c); PAR01617, §9.4.G), they sometimes act in "pro per."[9] In those cases, the hearing officer must conduct a fair, orderly hearing despite the practitioners' utter unfamiliarity with the procedural aspects of a statutory quasi-judicial proceeding.

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[8] Dr. Natarajan's sinister implication from the hearing officer attending the panel's deliberations is admittedly unsubstantiated. (See Appellant's Opening Brief ("AOB"), p. 25; ARB, pp. 21-22.) More important to this brief, he ignores the necessity of the hearing officer fully understanding and articulating the panel's detailed findings and resulting conclusions – which can only be achieved by being present when the panel makes its findings and conclusions.

[9] When the practitioner chooses not to be represented by counsel, the PRB appoints a practitioner who is not a lawyer to present its case. (See PAR01617, §9.4.G.)

Neutrals, retired judges and lawyers are accustomed to lawyers, not clients, presenting the case.[10]

- Unlike other judicial, administrative and arbitration proceedings, the hearing officer lacks the powers to enforce compliance with his/her prehearing disclosure and other orders within his/her limited jurisdiction. Subpoenas and meaningful sanctions are missing from the hearing officer's toolbox. (See *Mileikowsky v. West Hills Hosp. & Med. Ctr.*, *supra,* 45 Cal.4th at pp. 1270, 1279 fn. 4.) Consequently, the hearing officer must earn the respect of the parties to influence their and their counsel's conduct before and during the hearing. Respect emerges from a hearing officer's earned reputation in the peer review subspecialty, superior knowledge of the substantive and procedural rules and a confident, even-handed temperament.
- In many cases, the hearing officer is responsible for arranging the scheduling logistics of the hearing. Peer review hearings often are conducted in the evenings. The unusual time is necessary to accommodate the patient care

[10] Although a small claims judge may be accustomed to unrepresented parties, he/she has far more discretion than a hearing officer, who is responsible for implementing the procedures and standards in the statutory, PRB bylaws or fair hearing plan and other law governing peer review hearings. Moreover, the consequences of a small claims proceeding – a money judgment – pale in comparison to a peer review hearing, which may impact a practitioner's professional licensure and livelihood. (*El-Attar v. Hollywood Presbyterian Medical Center*, *supra*, 56 Cal.4th at p. 983; *Mileikowsky v. West Hills Hosp. & Med. Ctr.*, *supra*, 45 Cal.4th at p. 1268.)

obligations of practitioners comprising the panel. Because of the difficulty in coordinating the calendars of a large number of busy professionals – panel members, parties, attorneys (if any), hearing officer, witnesses – hearing sessions take place over an extended time.[11] A hearing officer who comes from the peer review community understands the difficulty of scheduling as well as the importance of a prompt hearing, particularly in the case of a suspended practitioner. (See Bus. & Prof. Code §809.2(h).)

For these among other reasons, PRBs choose hearing officers with the requisite knowledge, judgment and experience to preside competently and effectively over their hearings. It is understandable, not suspicious, that parties seek out well-qualified hearing officers, even if that means that a hearing officer is engaged multiple times by the same PRB.

2. Experienced hearing officers promote the expansion of the pool of qualified hearing officers through formal education and training programs.

While PRBs are motivated to engage knowledgeable and experienced hearing officers capable of fulfilling their role of ensuring a fair hearing and sound result, identifying attorneys with the requisite expertise has historically been challenging. In 2009, experienced peer review attorneys and hearing officers

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[11] For example, the hearing in *Sadeghi v. Sharp Memorial Medical Center of Chula Vista* (2013) 221 Cal.App.4th 598, consumed 43 sessions over a two and one-half year period. Amicus Carlo Coppo, a veteran of 70 hearings over 22-year span, was the hearing officer in that proceeding.

initiated the formation of a Hearing Officer Committee under the auspices of the California Society for Healthcare Attorneys ("CSHA"). The purpose of the committee was, and is, to expand the pool of attorneys with the knowledge, judgment and experience to preside over peer review hearings and to develop a tool to assist PRBs to identify qualified hearing officers.

As to the latter objective, the CSHA Hearing Officer Committee instituted a listing of available hearing officers on the CSHA website and developed qualifications for eligibility to participate on the listings.[12] To meet the threshold criteria for the "General" list, an attorney must have practiced health law for at least five years, attest to being familiar with the current statutes, regulations, cases, common bylaws and other provisions governing peer review in California, have attended multiple hearing education and training programs offered by CSHA and be a CSHA member. (See https://www.csha.info/hearing-officer-requirements.) To be included in the "Completed Hearings" list, the attorney must also attest to having served as a hearing officer or been lead counsel in at least five completed adversarial evidentiary hearings before a peer review hearing committee in

[12] As stated on its website, CSHA does not warrant or verify the qualifications or experience of any listed individuals, nor endorse the use of any individuals on the listings. (https://www.csha.info/find-hearing-officer.) The Hearing Officer Committee does, however, screen all requests for inclusion on the listings to assess whether the applicant meets the established criteria. If the applicant satisfies the qualifications and submits the required attestation, a resume, and $50 fee, he or she is added to the listings. No one is excluded from the listing based on the types of clients he or she typically represents.

California. (*Ibid.*) While knowledge of the laws governing peer review in California is fundamental to competently fulfilling the hearing officer role, the CSHA Hearing Officer Committee concluded that focused training about the multiple hearing officer duties was also essential.

Toward this end, the CSHA Hearing Officer Committee has sponsored five education and training seminars covering key aspects of hearing officer's role. At these programs, seasoned hearing officers, including amici, have presented sessions on the legal standards and precedents, as well as strategies and practical guidance for competently fulfilling the range of hearing officer responsibilities. The training programs have addressed presiding over voir dire of the hearing officer and hearing panel and ruling on related challenges, ruling on issues involving procedure, discovery and evidence that arise during hearings, conducting the evidentiary hearing efficiently and in a manner that respects each party's rights, participating in hearing panel deliberations and drafting the decision of the panel. These sessions are open to all CSHA members.

Although the number of trained hearing officers on CSHA's listings has increased over time, at present only 23 peer review attorneys are listed on the "Completed Hearings" list and 14 attorneys, neutrals and retired jurists are on the "General" list. (https://www.csha.info/csha-hearing-officers [as of November 23, 2020].)

Amici do not suggest that ***only*** those listed on CSHA's website are qualified to serve as hearing officers. However, the

CSHA hearing officer training programs these attorneys have attended provide a solid foundation for functioning in this complicated role. Amici are unaware of any other organization that offers similar training. Further, the knowledge and experience needed to qualify for the "Completed Hearings" list are uncommon even among health care attorneys. The listings serve as a valuable resource to PRBs seeking to identify attorneys with the requisite knowledge and experience to serve as competent hearing officers.

Were the Court to adopt Appellant's position that hearing officers who have served or may in the future serve in a PRB hearing at a single hospital or another affiliated hospital are presumptively biased, then the experienced, knowledgeable attorneys on CSHA's hearing officer lists – as well as those attorneys who are not listed – would be disqualified from many potential engagements. With over 300 hospitals in California, many of which are part of consolidated health systems, and each of which has statutory obligations to afford peer review hearings to practitioners when certain adverse actions are taken or recommended, the drastic approach advanced by Appellant would serve to minimize rather than expand the pool of qualified hearing officers.

3. Bias is not established by time-based compensation.

Although Appellant has not directly asserted that time-based compensation of peer review hearing officers biases them, it bears noting that the applicable precedents preclude any

inference from Appellant's argument that bias may arise from a hearing officer being compensated for his/her time, regardless of the source.

> "Unless they have a financial interest in the outcome (see *Haas v. County of San Bernardino, supra,* 27 Cal.4th at p. 1025), adjudicators are presumed to be impartial (Withrow v. Larkin, supra, 421 U.S. 35, 47)." (*Morongo Band of Mission Indians v. State Water Resources Control Bd*. (2009) 45 Cal.4th 731, 737.)

A legion of cases have considered the compensation of hearing officers, including cases decided by this Court:

> "Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person's right to a hearing. (*California Teachers Assn. v. State of California* (1999) 20 Cal. 4th 327, 337-357 [84 Cal. Rptr. 2d 425, 975 P.2d 622].) Furthermore, no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator. Haas does not argue to the contrary. Neither payment nor selection, considered in isolation, is the problem." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1031.)

The "problem" in *Haas* was the prospect of future employment based on the outcome of the case currently at bar:

> "'Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in

> such cases to avoid burdening the affected person's right to a hearing.' (*Haas*, *supra*, 27 Cal.4th at p. 1031.) ***Nothing in the purported contract <u>on its face</u> suggests that the District was holding out the promise of future employment***, which is the problem identified by Haas." (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 189-190 (emphasis added).)

Even immediately following *Haas*, courts distinguished the holding even in cases of hearing officers unilaterally selected and paid for by "aligned" parties (akin to the suggestion that the hospital paying for the medical staff's hearing officer creates bias):

> A state agency may also employ a hearing officer that it unilaterally selects, as long as it offers the hearing officer protection from arbitrary or retaliatory dismissals; a perception of bias in an adjudicator is reasonably present (the subjective concern of a particular litigant not being relevant) only if the prospects of future employment with the opponent can be seen as resting on decisions favorable to the opponent. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1030-1031, 1034)." (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 591-592.)

As discussed elsewhere here and in the briefs of the parties and other amici, there is a small body of hearing officers experienced in peer review matters. The small number of hearing officers suggests the prospect of "repeat customers." Appellant's "due process" argument in respect to repeat engagements has surfaced in connection with the Office of Administrative Hearings, a state agency, and has been rejected:

> Citing [Citation], plaintiff Imagistics contends it is a violation of due process to have a small body of OAH hearing officers hear its protest, because defendant DGS is a "repeat player." Once again, the case is not apposite to plaintiff's situation. . . . However, the court noted that the advantage of being a repeat player would not of itself be sufficient to render an arbitration agreement unconscionable. [Citation]. Assuming that the unconscionability of the procedures in an administrative remedy would allow a plaintiff to bypass it [Citation] we do not find the status of defendant DGS as a repeat player before a small cadre of OAH hearing officers on the relatively technical and objective issues presented in bid protests to shock our consciences." (*Imagistics Internat., Inc. v. Department of General Services, supra*, 150 Cal.App.4th at pp. 591-592.)

The lesson from *Haas* and its progeny is that bias may not be inferred from compensating a hearing officer for his/her professional services, and as discussed below, even if the party appointing the hearing officer is a "repeat customer."[13]

Bias may only be inferred if there is a financial interest in the ***outcome*** of the hearing, either directly or only if the prospects of future employment with the opponent can be seen as resting on decisions favorable to the appointing party. As the cases show, even the "inferring" of future employment must be demonstrated by some concrete means, whether contractual or other means that "shocks the conscience." Appellant cited no such conscience-shocking evidence of the hearing officer being

[13] Despite Appellant's misleading conflation of the PRB at the hospital and Dignity Health, the hospital's "parent" corporation, the "customer" in this case, as in any other medical staff peer review hearing, is the PRB. (See section 5, *post*.)

motivated to curry favor with the PRB for ***potential*** future engagements. To the contrary, the hearing officer in this case agreed that he would be ***precluded*** from future engagements by the hospital for a three-year period. (PAR00248.)

4. The crucial importance of a reputation for impartiality, especially in a small pool of hearing officers, would deter anyone who seeks future engagements from acting in a biased manner.

Especially in a small body of hearing officers, a reputation for impartiality is essential. A hearing officer known to favor ***a*** PRB would render that hearing officer unacceptable to ***all*** PRBs. Further, such conduct would erode the trust necessary for the peer review system to function as statutorily intended (see Bus. & Prof. Code §809, subd. (a)) – just as it would in the judicial system:

> "'We scrupulously guard against bias and prejudice, actual or reasonably perceived, not only to prevent improper factors from influencing the fact finder's deliberations, but to vindicate the reputation of the court itself. … 'We must also keep in mind … that the source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had.'" (*Hernandez v. Paicius*, supra, 109 Cal.App.4th at p. 462; see Cal. Code Jud. Ethics, canon 2A ["A judge … shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"].) (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1008; see *Pinter-Brown v. Regents of University of California* (2020) 48 Cal.App.5th 55, 87.)

Appellant's speculation that a hearing officer has a motive to please PRBs for the potential financial benefit of future engagements is an implausible basis for disqualification.

5. All constituents of a peer review hearing have a common interest in a fair proceeding.

All constituents of a peer review hearing – PRB, practitioner, hearing panel, hearing officer and, in the case of a medical staff hearing, the hospital – all have an overriding interest in a fair procedure overseen by an impartial hearing officer. This is true of hospital medical staffs.

Hospital medical staffs, which are by law self-governing separate legal entities, have an independent duty "for policing its member physicians." (*Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1130, fn. 2.) This duty is statutory:

> The medical staff's right of self-governance shall include, but not be limited to, all of the following:
>
> (1) Establishing, in medical staff bylaws, rules, or regulations, criteria and standards, consistent with Article 11 (commencing with Section 800) of Chapter 1 of Division 2, for medical staff membership and privileges, and enforcing those criteria and standards.
>
> (2) Establishing, in medical staff bylaws, rules, or regulations, clinical criteria and standards to oversee and manage quality assurance, utilization review, and other medical staff activities . . . . " (Bus. & Prof. Code § 2282.5, subd. (a); see 22 Cal. Code Regs., §70703.)

The medical staff's responsibility to oversee the quality of care and the conduct of member practitioners is a requirement to obtain and maintain licensure as a hospital:

> Provision that the medical staff shall be self-governing with respect to the professional work performed in the hospital; that the medical staff shall meet periodically and review and analyze at regular intervals their clinical experience; and the medical records of patients shall be the basis for such review and analysis." (Bus. & Prof. Code § 2282(c).)

Hospitals, in order to maintain licensure, must provide for medical staff process for hearings (22 Cal. Code Regs., §70701.) A hospital must oversee the peer review process or face liability for "negligently failing to ensure the competency of its medical staff." (*Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, 338, 341-342, 347.)

Hospital governing bodies have the ultimate responsibility for ensuring a fair hearing:

> In essence, Dr. Hongsathavij's position is that if the governing body believes an action against a physician is necessary, and if the medical staff disagrees, then the medical staff gets to make the final decision, since the governing body is tainted by its initial position on the matter. Such a proposition establishing medical staff sovereignty is untenable. Ultimate responsibility is not with the medical staff, but with the governing body of the hospital. (*Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at pp. 1142-1143.)

This Court recently reaffirmed that both the medical staff and the governing body are responsible for fairness in peer review hearings:

> We take judicial notice of the extensive legislative history materials submitted by Hospital, which indicate that the assignment of primary responsibility for peer review to the medical staff was part of the reason that multiple doctors' associations, including the CMA and the Union of American Physicians and Dentists, supported the statute. [¶] At the same time, however, the statute does not contemplate a strict separation between the medical staff and the governing body as a prerequisite for a fair peer review system. (*El-Attar v. Hollywood Presbyterian Medical Center*, *supra*, 56 Cal.4th at pp. 992-993.)

Hospitals also have a duty to their physicians to ensure fair peer review and hearings and face significant liability for failing to do so. Trying to "fix the game" is hazardous to hospitals and their medical staffs. In a recent case, a hospital was assessed nearly $3 million in damages for trying to block a physician's fair hearing rights[14]:

> The hospital admittedly did not provide notice or a hearing. The hospital does not, and cannot, claim that the review conducted by the anesthesiologist department's peer review committee was sufficient. Under the hospital's medical staff bylaws, the only entity with the ability to restrict or terminate plaintiff's medical staff privileges was the medical executive committee and it is undisputed that this committee failed to act in this instance. Contrary to the hospital's argument, the trial court's conclusion does not impute to the hospital actions subsequently taken by East Bay Group but holds the hospital responsible for its own actions and failures to act.

[14] In an analog, a hospital was found liable for $4.7 million in a matter that touched on peer review issues where no hearing was provided. (*Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 992.)

(*Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App.5th 1147, 1159.)

Of course, this Court, more than a decade ago, emphasized the importance of a fair hearing and the limited authority of hearing officers:

> The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism "those healing arts practitioners who provide substandard care or who engage in professional misconduct." (§ 809, subd. (a)(6).) This purpose also serves the interest of California's acute care facilities by providing a means of removing incompetent physicians from a hospital's staff to reduce exposure to possible malpractice liability. [Citations] [¶] Another purpose, also if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons. (*Mileikowsky v. West Hills Hospital & Medical Center*, *supra*, 45 Cal.4th at p. 1267.)

There is simply no motivation – and indeed there are strong financial and other deterrents – for a PRB or hospital to promote a peer review hearing that is overseen by a biased hearing officer.

CONCLUSION

Disqualifying previously retained hearing officers, who are trained and experienced in peer review hearings, would undermine the fairness of the statutory PRB hearing system and cause disruptive uncertainty in existing proceedings.

The unique experiences and qualifications of hearing officers in representing both practitioners and PRBs allow for an

objective and impartial individual to guide the members of the decision-making panel through the often-uncharted procedural issues that arise during each hearing. Also, experience in dealing with practitioners enables qualified hearing officers to have the credibility necessary to continually encourage the volunteer members of a panel to remain committed to the completion of what may become an arduous and lengthy proceeding.

Dated: November 30, 2020

Respectfully submitted,

/s/ Carlo Coppo
CARLO COPPO

/s/ Patrick K. Moore
PATRICK K. MOORE

/s/ Glenda M. Zarbock
GLENDA M. ZARBOCK

/s/ John D. Harwell
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/s/ James R. Lahana
JAMES R. LAHANA

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c), the undersigned certifies that the text of this Application to Submit Amici Curiae Brief and Proposed Amici Curiae Brief, including footnotes (and excluding caption, certificate of interested entities or persons, tables, signature blocks, and this Certificate of Word Count) consists of 5,604 words in 13-point Century Schoolbook type as counted by the Microsoft Word program used to generate the text.

DATED: November 30, 2020 Respectfully submitted,

/s/ Glenda M. Zarbock
GLENDA M. ZARBOCK

PROOF OF SERVICE

Sundar Natarajan, M.D. v. Dignity Health
Supreme Court Case No. S259364

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 Contra Costa, State of California. My business address is 1676 N. California Blvd., Suite 620, Walnut Creek, CA 94596.

On November 30, 2020, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT DIGNITY HEALTH AND PROPOSED AMICI CURIAE BRIEF

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE (as indicated): I served the document(s) on the person(s) listed in the Service List by submitting an electronic version of the document(s) to the Court's Electronic Filing System (EFS) operated by ImageSoft True Filing (True Filing) as indicated on the attached service list.

BY MAIL (as indicated): 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 Hanson Bridgett LLP's practice for collecting and processing correspondence for mailing. On the same day that 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 November 30, 2020, at Vallejo, California.

/s/ Melinda S. Less
Melinda S. Less

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The Honorable Barbara A. Kronlund c/o Clerk of the Court San Joaquin Superior Court 180 E. Weber Avenue Stockton, CA 95202	Via U.S. Mail
California Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814	Via Electronic Service - True Filing (pursuant to California Rules of Court)

PROOF OF SERVICE

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

I, the undersigned, hereby declare:

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

On December 28, 2020, I served this Motion to Strike Portions of Amicus Brief on the following persons/parties by electronically mailing a true and correct copy through the True Filing filing and service electronic mail system to the e-mail addresses, as stated below, and the transmission was reported as complete and no error was reported.

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I declare under penalty of perjury the foregoing is true and correct.

Date: December 28, 2020
Oakland, California

Stephen D. Schear

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NATARAJAN v. DIGNITY HEALTH**
Case Number: **S259364**
Lower Court Case Number: **C085906**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

12/28/2020

Date

/s/Stephen Schear

Signature

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Last Name, First Name (PNum)

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