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Supreme Court of California
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No. S259364

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.,

Petitioner and Appellant,

vs.

DIGNITY HEALTH,

Respondent.

After a Decision of the Court of Appeal
Third Appellate District, No. C085906

San Joaquin County Superior Court
No. STK-CV-UWM-2-16-4821

RESPONDENT'S OPPOSITION TO NATARAJAN'S FOURTH MOTION FOR JUDICIAL NOTICE

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A. Preliminary statement

Defendant and Respondent Dignity Health opposes Sundar Natarajan's Fourth Motion for Judicial Notice (Fourth MJN).[1] The materials of which Natarajan requests judicial notice are irrelevant to the issue in this case that concerns the standard for disqualifying a peer review hearing officer for financial bias. The motion for judicial notice should be denied.

B. The proffered evidence is irrelevant.

1. The numbers of public and for-profit hospitals in California are irrelevant.

The evidence submitted with any request for judicial notice must be relevant. (Cal Rules of Court, rule 8.252(a)(2)(A); *People v. Payton* (1992) 3 Cal.4th 1050, 1073 ["Even if a matter is a proper subject of judicial notice, it must still be *relevant*."] [emphasis in original].) Natarajan seeks judicial notice of data obtained from the Office of Statewide Health Planning and Development (OSHPD) showing the ownership of California hospitals in 2019 (Ex. 10). Natarajan asserts this data is relevant for two reasons. He is wrong as to both.

First, Natarajan says that the number of public hospitals is relevant to respond to the assertion made by amici that "requiring private hospitals to provide the same due process provided by public hospitals, including hearing officers without financial incentives to favor the hospitals, will significantly

[1] Dignity Health did not oppose Natarajan's first and second motions for judicial notice; it did oppose his third.

impair California's peer review system."[2] (Fourth MJN, p. 3.) He says this purported argument of amici is "not accurate" because public hospitals that are subject to constitutional due process requirements "continue to function without evidence of problems arising from those requirements." (*Id.*, pp. 3-4.) Natarajan's Answer to Amicus Curiae Briefs (Amicus Answer) elaborates on this assertion, arguing "there is no evidence that any public hospital has faced any problem finding 'qualified' hearing officers to conduct hospital hearings. Given the 81 public hospitals in the State, if there were any practical problems with providing constitutional due process, including hearing officers without an appearance of bias, they would surely have come to light by now." (Amicus Answer, p. 63.)

This evidence is irrelevant. There is no dispute that public hospitals exist in California or that they are subject to constitutional due process requirements. Data on the number of such hospitals therefore are not useful or otherwise relevant.

More importantly, Natarajan's assertion is meaningless and self-defeating. As Natarajan himself notes, public and private hospitals "rely on the same pool of qualified hearing officers to preside over peer review hearings." (Amicus Answer, p. 63 [quoting Amicus Curiae Brief of Scripps Health and Regents of the University of California (Scripps/Regents Brief), p. 6].) The crux of Natarajan's argument in this case is that *any* hearing

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[2] No amicus argued that hospitals are or should be permitted to use hearing officers that have financial incentives to favor hospitals.

officer who believes that he or she improves his or her prospects for future hearing officer work by endeavoring to influence a decision favoring the hospital and medical staff is inherently biased. If that were true (it is not, for the reasons explained in Dignity Health's Answer Brief), then it would be just as true for a hearing officer engaged and paid to preside over a peer review hearing at a public hospital as at a private hospital.[3]

The fact that no "problems" have arisen by public hospitals' use of and payment to the *same pool of hearing officers* as private hospitals is not evidence that public hospitals are doing something right that private hospitals are doing wrong. Rather, it is evidence that the pool of experienced hearing officers is *not* inherently biased by the potential for future hearing officer work at the same or related hospitals. Moreover, the fact that public hospitals are subject to due process, unlike private hospitals, is also irrelevant, as Natarajan's argument here is about the selection of hearing officers and the supposed appearance of bias based on their expectations of future engagements by any hospital, public or private.

Second, Natarajan asserts that the number of for-profit,

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[3] It also makes no sense to assert that physicians will evaluate hearing officer impartiality on a case-by-case basis and sometimes refrain from challenging the impartiality of a hearing officer who potentially could be hired for future work at a hospital. (Amicus Answer, pp. 71-72.) Natarajan is asking this Court to impose a bright-line rule that every hearing officer who might be hired for future work is per se biased. His new case-by-case approach conflicts with that rule and demonstrates that he has no cognizable argument in the first instance.

investor-owned hospitals is relevant to respond to amici's contention that "hospitals no longer pose a risk of abusing their power to terminate physician privileges." (Amicus Answer, p. 25.)[4] Natarajan says the number of investor-owned hospitals is relevant to show that some California hospitals that "have a corporate responsibility to maximize profits for their owners" (Fourth MJN, p. 4) and that "[t]he idea that all of those executives would ignore any financial considerations when deciding on hearing officers for hospital hearings is not credible and no evidence supports that concept."[5] (Amicus Answer, p. 26.)

This too is irrelevant. That there are for-profit hospitals in California is not in dispute. Moreover, the inference Natarajan asks the Court to draw from the number of such hospitals is pure speculation. There is simply no basis for assuming that hospitals, including those with a profit motive, engage in unfair medical staff hearings for financial reasons. In fact, every hospital, no matter what its ownership, has an interest in preserving hospital assets and also has an interest in guarding against being sued for "negligently failing to ensure the

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[4] Dignity Health is a not-for-profit public benefit organization.

[5] Natarajan cites financial data of Dignity Health (see *infra* Part B.2) to argue that *non-profit* hospitals, like for-profit hospitals, are not "immune from financial considerations." (Amicus Answer, p. 26, & fn. 6.) This speculative and irrelevant assertion in and of itself demonstrates that the number of for-profit hospitals is irrelevant even to Natarajan's own argument. And Natarajan's assertion that executives at non-profit hospitals seek to generate revenue "to justify their generous compensation packages" (*ibid.*) is just more speculative irrelevancy.

competency of its medical staff and the adequacy of medical care rendered to patients at its facility." (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (2009) 62 Cal.App.4th 1123, 1143; *El-Attar v. Hollywood Presbyterian Med. Ctr.* (2013) 56 Cal.4th 976, 993.) The two interests are aligned, not mutually exclusive. This is why "[a] hospital's governing body must be permitted to align its authority with its responsibility and to render the final decision in the hospital administrative context." (*Hongsathavij*, 62 Cal.App.4th at 1143.) And the number of for-profit hospitals in California sheds no light on whether any hospital conducts unfair hearings to increase profit, much less that any nefariously undertakes to cultivate a network of biased hearing officers to do its bidding.

2. The financial resources of hospitals are irrelevant.

The second category of evidence of which Natarajan requests judicial notice is OSHPD data showing 2019 financial information for California hospitals, as well as excerpts of the 2018 Form 990s for Dignity Health, Kaiser Foundation Health Plan, Inc., and the California Hospital Association. (Exhibits 11-14.) Natarajan asserts that this financial information responds to amici's supposed contention that "hospitals cannot afford to operate a system without using hearing officers with a financial incentive to favor them."[6] (Fourth MJN, p. 3.) Thus, he seeks judicial notice of hospital financial data to try to show that

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[6] Again, no amicus argued that hospitals use or need to use hearing officers with a financial incentive to favor them.

"California hospitals have ample resources to train retired judges and justices and other attorneys to serve as hearing officers . . . ." (Fourth MJN, p. 4.)

Quite apart from the wildly speculative and offensive notion that hospitals besieged with financial and other challenges in confronting the pandemic have free money for such an exercise, the resources of California hospitals or CHA say nothing about the proper standard for disqualifying hearing officers for financial bias, which is the question before the Court. There is no reason to require hospitals to devote their own limited resources to developing hearing officer training programs rather than to patient care.

Natarajan's additional speculation about the potential cost of a training program (e.g., "[i]t's hard to imagine that the cost of such a training would exceed $30,000" (Amicus Answer, p. 76)) also misses the mark. This Court is not a blue ribbon commission tasked with musing about how hospitals should spend their limited resources. And it is ironic that, while claiming that hearing officers who want future work are biased because they necessarily will favor hospitals, Natarajan now argues that hospitals should pay for and be in charge of hearing officer training—which on Natarajan's theory would only exacerbate the imaginary problem of hearing officers' supposed fealty to hospitals. Natarajan's economic "solution" would (again, on his theory) leave the proverbial fox to guard the henhouse. Indeed, Natarajan's very attempt at social engineering shows that he too is aware of the problem of California having too few specially

trained hearing officers to function.[7]

Natarajan also argues a secondary reason for submitting the OSHPD aggregate hospital financial data: to show that "a large majority of hospital patient revenue is generated from public funds, supporting his contention that private hospitals are quasi-public institutions that are required to provide due process when conducting quasi-judicial hospital hearings for the public benefit." (Fourth MJN, p. 4.) This too is irrelevant. Hospitals earn revenue from public funds because they serve a substantial number of patients covered by Medicare, Medi-Cal, and other government-funded programs. The law is well settled that a hospital's receipt of public funds does not make the hospital a state actor. (See *Julian v. Mission Commun. Hosp.* (2017) 11 Cal.App.5th 360, 401; *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 903.)

3. The hospital bylaws are irrelevant.

Finally, Natarajan requests judicial notice of portions of the medical staff bylaws of two of the UC Regents' five public hospitals, UCLA and UCSF. He says he seeks judicial notice of

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[7] Exhibit 12, the 2018 Form 990 of "Kaiser," is irrelevant for an additional reason. Natarajan submitted the Form 990 of Kaiser Foundation *Health Plan*, Inc., which provides health care coverage and is not a hospital. The Kaiser entity that is comprised of hospitals, Kaiser Foundation *Hospitals*, is the entity that appears as amicus in this case. See <https://about.kaiserpermanente.org/who-we-are/fast-facts> Even if hospital financial data had any relevance (it does not and it should not resurface in any form), Natarajan has not provided such data for "Kaiser."

this evidence "to rebut" an argument made by amici Scripps and the Regents by showing that "UC's bylaws permit the hearing officer to deliberate with hearing panel members without a request to do so from the hearing panel . . . ." (Fourth MJN, p. 5.)

The point that Natarajan is attempting to "rebut" is that: "[t]ypically, a hearing officer would participate in deliberations only if allowed to do so under the bylaws *and* invited to do so by the panel of medical professionals." (Scripps/Regents Brief, p. 12, fn. 1 [citing CMA Model Bylaws] [emphasis in original]; see also Fourth MJN, p. 3.) Nothing in the UCLA or UCSF bylaws Natarajan cites "rebuts" this general statement. (Fourth MJN, p. 58 [UCSF Bylaw § 3.15.1.6.3 (the hearing officer "may participate in the deliberations of [the panel], but shall not be entitled to vote")]; *id.*, p. 73 [UCLA Bylaw § 8.5.4(d) ("the Hearing Officer may participate in the deliberations of the Hearing Committee and be a legal advisor to it, but the Hearing Officer shall not be entitled to vote")].) That the bylaws permit the hearing officer to participate in deliberations does not negate amici's assertion that this "typically" does not happen unless the panel also requests it. At any rate, the far more important point, confirmed by both hospitals' bylaws (and St. Joseph's' bylaws here) and the Supreme Court, is that the hearing officer *may not vote*. (See Fourth MJN, p. 58 [UCSF Bylaws § 3.15.1.6.3]; *id.*, p. 73 [UCLA Bylaws § 8.5.4(d)]; *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1271.)

While Natarajan does not mention this in the MJN, he also cites the UCSF bylaws as proof that hospital lawyers are involved

in hearing officer selection. (Amicus Answer, p. 31.) Again, Natarajan is speculating: "When medical staff leaders are asked to [appoint hearing officers], it can reasonably be inferred that they will always, or virtually always, turn to medical staff or hospital attorneys for advice, who then in effect make the selection." (*Ibid.*) The UCSF Bylaw he cites, which permits the "President of the Medical Staff in conjunction with the Office of Legal Affairs" to appoint hearing officers, does not provide any support for this "reasonabl[e] . . . infer[ence]." (See Fourth MJN, p. 57 [UCSF Bylaw § 3.15.1.6.) Also, Natarajan does not mention that the same UCSF bylaws do not allow a hearing officer to rule on challenges to his own impartiality, as the statute permits (Bus. & Prof. Code, § 809.2, subd. (c)). (Fourth MJN, p. 58-59 [UCSF Bylaw § 3.15.1.7 ("Challenges to the impartiality of the Hearing Officer shall be ruled on by the President of the Medical Staff in consultation with the Office of Legal Affairs.")].) Thus, one of the primary duties of a hearing officer of which Natarajan complains—his ability to rule on challenges to his own impartiality—has been deleted from the UCSF Bylaws.

C. Conclusion

Dignity Health respectfully requests that the Court deny Natarajan's Fourth Motion for Judicial Notice as none of the tendered material has any relevance to the issue under review.

Dated: January 21, 2021 MANATT, PHELPS & PHILLIPS, LLP

By: /s/Barry S. Landsberg
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PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

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Brigette Scoggins

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STATE OF CALIFORNIA
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Date

/s/Joanna McCallum

Signature

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