LIU, J.

SUPREME COURT
FILED

OCT 15 2012

Frank A. McGuire Clerk

Deputy

No. S205568

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK T. FAHLEN, M.D.

Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, et al.

Defendants and Appellants.

Court of Appeal No. F063023

Stanislaus County Superior Court No. 662696

ANSWER TO PETITION FOR REVIEW AND DECLARATION IN OPPOSITION TO REQUEST FOR STAY

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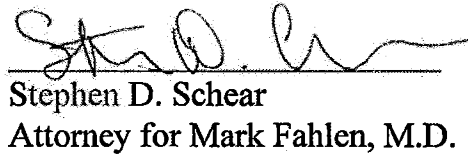
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rules 8.208, 8.488)

This form is submitted on behalf of the Plaintiff and Respondent Mark Fahlen, M.D.

There are no interested entities or persons that must be listed in this certificate under Rule 8.208.

Dated: October 14, 2012



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ISSUE PRESENTED FOR REVIEW

The Petition for Review of Appellants Sutter Central Valley Hospitals and Steve Mitchell (hereafter, "Sutter") challenges whether a whistleblower statute, Health and Safety Code section 1278.5, permits physicians to pursue a civil lawsuit without first exhausting judicial remedies. Sutter's Petition is premised entirely upon the claim that a physician is required to overturn a termination of hospital privileges through a writ of mandate before bringing a lawsuit under Section 1278.5. The Court of Appeals found that the language of the statute, its legislative history and California Supreme Court precedent establish that exhaustion of remedies is not a prerequisite to filing a lawsuit under Section 1278.5.

WHY REVIEW BY THIS COURT IS UNNECESSARY

Sutter's Petition grossly misrepresents the impact of the Court of Appeal's decision in this case by repeatedly asserting that it "abrogates" the rule of exhaustion of *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465. The decision below only recognizes an exception to the *Westlake* rule of exhaustion for cases in which physicians have a statutory retaliation claim under Section 1278.5. In applying this exception, the decision is squarely in line with this Court's decisions in *State Board of Chiropractic Examiners v. Superior Court* ("*Arbuckle*") (2009) 45 Cal.4th 963 and *Runyon v. Board of Trustees of California State University* (2010)

48 Cal.4th 760, which recognized an exception to *Westlake* in analytically identical circumstances. The decision does not overturn *Westlake* but rather properly applies this Court's more recent binding precedent.

Sutter also attempts to strengthen its Petition by misstating the holding in *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012), 204 Cal.App.4th 65, in order to create a conflict between the decision below and *Nesson*. However, in contrast to the decision below, *Nesson* never analyzed the specific issue of whether exhaustion is required in an action brought under Section 1278.5. It did not examine the language, legislative history, or purpose of Section 1278.5. Nor did it even mention the two California Supreme Court cases which are directly on point. There is no doubt that *Fahlen* will be considered as authoritative precedent on the issue presented here and *Nesson* will not. This Court need not expend its time and resources to affirm the validity of a carefully reasoned decision by the Court of Appeal which fully and correctly analyzes the exhaustion issue.

FACTUAL BACKGROUND

Dr. Fahlen is a highly competent and well-respected Modesto physician. (Clerk's Transcript ("CT") 286 at ¶¶ 2-3.) He served on the medical staff of Memorial Medical Center ("Memorial")[1] from 2003-08 and served as the Vice-Chairman of the Department of Nephrology at Memorial

[1] Defendant Sutter Central Valley Hospitals does business as Memorial Medical Center. (CT 11 at ¶ 3.)

from 2007-08. (*Id.*) From 2005 to 2008, Dr. Fahlen was also employed by the Gould Medical Group. (*Id.* at ¶ 4) He presently serves as the Chair of the Department of Medicine at Doctors Medical Center, an elected position in which he has quality assurance and administrative responsibility over 140 physicians. (*Id.* at ¶ 2.) Dr. Fahlen was also appointed by the Stanislaus County Board of Supervisors to serve on the Board of Directors of the Stanislaus County Community Health Center. Dr. Fahlen is well-known for his exceptional dedication to patients and their families. (CT 459-61, 464, 472-73, 484-86, 569-70.)

During his appointment at Memorial, Dr. Fahlen encountered numerous instances in which Memorial nurses provided substandard care which jeopardized the safety of his patients. (CT 287-94 at ¶¶ 7-31.) Dr. Fahlen was an outspoken advocate for his patients in these situations, many of which were life-threatening. (*Id.*) From January 2004 to April 2008, Dr. Fahlen complained to the hospital administration as many as twenty times regarding substandard or otherwise improper nursing care at Memorial. (CT 287-94 at ¶¶ 7-31; CT 407-08 at ¶ 21.)

Despite Dr. Fahlen's complaints, serious nursing errors and insubordination continued. (CT 291-94, 319, 321, 323.) After a nurse prematurely discharged from the ICU a poor young woman who was in multi-organ failure and in need of emergency dialysis, Dr. Fahlen wrote the hospital administration. He advised the hospital that "premature discharge

from the ICU due to nursing aggression is a common medical error made in this institution. I personally have witnessed injury and death to patients as a result." (CT 293-94 at ¶ 30; CT 331-32.)

Retaliatory Conduct by Memorial Medical Center

The hospital failed to respond to Dr. Fahlen regarding any of his complaints about poor nursing care. (CT 294 at ¶ 32; CT 407-08 at ¶ 21.) Instead, Sutter engaged in a campaign of retaliation against Dr. Fahlen intended to drive him from the practice of nephrology in Modesto. (CT 294-98 at ¶¶ 33-51.) Defendant Steve Mitchell testified at Dr. Fahlen's peer review hearing that in May of 2008, he provided the Gould Medical Group ("Gould") with confidential information regarding unsubstantiated allegations against Dr. Fahlen. Gould then terminated Dr. Fahlen's employment on May 14, 2008, based on the information provided by Mr. Mitchell. (CT 294-95 at ¶ 34; CT 403 at ¶¶ 5-6; CT 438-46, 449, 453.) Mr. Mitchell testified that he wanted Gould to terminate Dr. Fahlen so that he would leave Modesto and the hospital would not have to go through the process of terminating his hospital privileges through a peer review hearing. (CT 438-42.)

Contrary to Mr. Mitchell's intentions, Dr. Fahlen did not leave Modesto after Gould terminated his employment. He instead decided to establish a private practice in Modesto. (CT 295 at ¶¶ 37, 38.) On May 27, 2008, soon after he was terminated from Gould, Dr. Fahlen requested a meeting with Mr. Mitchell to discuss the status of his hospital privileges at

Memorial. (CT 295 at ¶ 37.) After receiving Dr. Fahlen's request, Mr. Mitchell sent an e-mail to Dave Benn, the Chief Executive Officer of Memorial, stating that "He does not get it!" (CT 499.) Mr. Mitchell testified that in his e-mail to Mr. Benn, he meant that Dr. Fahlen "did not get" that he was going to lose his privileges at Memorial. (CT 454.) In response, Mr. Benn wrote, "Looks like we need to have the Medical Staff take some action on his MedQuals!!! Soon!!!" (CT 499.)

Dr. Fahlen met with Mr. Mitchell on May 30, 2008, to discuss his hospital privileges at Memorial. Mr. Mitchell testified that during this meeting, he suggested Dr. Fahlen move away from Modesto and practice nephrology in another community. (CT 437.) Mr. Mitchell admitted that when Dr. Fahlen informed him of his plans to stay in Modesto, he threatened Dr. Fahlen with a medical staff investigation and a negative report to the Medical Board of California if he did not resign from Memorial. (CT 295 at ¶ 38; CT 436, 451-52.) After Dr. Fahlen refused to succumb to Mr. Mitchell's threats, Defendants followed through with Mr. Benn's command and promptly initiated a medical staff peer review investigation of Dr. Fahlen. (CT 495.) In August 2008, Memorial's Medical Executive Committee (MEC) recommended that Dr. Fahlen's application for reappointment to the medical staff be denied based on the hospital administration's allegation that he had engaged in "disruptive" behavior. (CT 297 at ¶ 44; CT 548.) It is undisputed that Sutter

terminated Dr. Fahlen's privileges because of his complaints about nursing care, although it justified the termination based on the alleged manner (or alleged lack of manners) he used when he stated his concerns about patient care to nurses. (CT 408 at ¶ 22-23.)

The Peer Review Hearing

On August 26, 2008, the MEC of Memorial recommended the denial of Dr. Fahlen's reappointment to the medical staff based on the allegations that he had engaged in "disruptive" behavior. (CT 297 at ¶ 44; CT 548.) Pursuant to Memorial's Medical Staff Bylaws ("Bylaws"), Dr. Fahlen requested a hearing by a Judicial Review Committee ("JRC") to review the MEC's recommendation. (CT 297 at ¶ 45; CT 538-39.) Over the course of eight months, from October 2009 to May 2010, the JRC conducted thirteen days of hearings to review the recommendation of the MEC. (CT 563-64.)

Undisputed evidence introduced at the hearing showed that Dr. Fahlen was well-respected for his clinical skills and his exceptional dedication to patients and their families by both physicians and nurses. (CT 407 at ¶ 20; CT 427; CT 466, CT 468-69, 470; CT 477, 479-480) Memorial, on the other hand, was unable to support its charges with competent evidence. It failed to provide ***any*** evidence to show that Dr. Fahlen's conduct at any time had any adverse impact on patient care. (CT 407 at ¶ 19; CT 408-09 at ¶¶ 24-26; CT 410 at ¶ 30.) The Chief of the Medical Staff, Dr. Todd Smith, who was called as a witness by Sutter,

testified he was not aware of a single patient whose medical care was adversely affected by Dr. Fahlen's behavior. (CT 410 at ¶ 30; CT 428.) The Chair of the medical staff's Ad Hoc Investigating Committee, Dr. Michael Cadra, also called by Sutter, testified that the investigating committee was not aware of any instance in which Dr. Fahlen's alleged difficult behavior adversely affected patient care or had harmed any patient. (CT 410 at ¶ 30; CT 423, 424.)

The JRC's decision of June 14, 2010, concluded that the MEC did not sustain its burden of proving that the denial of Dr. Fahlen's reappointment was reasonable and warranted. (CT 550-51.)

The MEC accepted the decision of the JRC and decided not to exercise its right to appeal. (CT 72, 100 (Bylaw § 8.5-1).) Pursuant to the Bylaws, the Sutter Board of Directors was required to affirm the decision of the JRC if it was supported by substantial evidence. (CT 513-14 (Bylaw § 4.5-8(b)(2)); CT 101 (Bylaw § 8.5-6(b)).) Nevertheless, on January 7, 2011, the Board terminated Dr. Fahlen's privileges to practice medicine at Memorial, contrary to the decision reached by the JRC. (CT 71-78.) In its decision the Board conceded that Dr. Fahlen's conduct had not led to any specific act or omission that compromised patient safety at Memorial. (CT 76.)

PROCEDURAL HISTORY

On March 9, 2011, Dr. Fahlen filed the complaint in the underlying action, alleging whistleblower retaliation and other related claims. (CT 10-27.) The complaint alleged that Sutter and Mr. Mitchell retaliated against Dr. Fahlen for his complaints about nursing and patient care at Memorial by, *inter alia*:

1. intentionally causing him to be fired by his employer, the Gould Medical Group;

2. threatening him with a peer review investigation and negative reports to the Medical Board of California if he did not leave the Modesto area;

3. causing the medical staff to initiate a medical disciplinary action against him when he refused to leave town; and

4. terminating his hospital privileges at Memorial despite the fact that he won his administrative hearing.

(CT 18-20, 547-51.)

On April 26, 2011, Sutter filed a demurrer, seeking dismissal of all seven causes of action. (CT 28-32.) The demurrer was primarily based on Sutter's assertion that Dr. Fahlen's claims were barred for failure to exhaust his judicial remedies by way of a petition for writ of mandate. (CT 33-48.) On June 30, 2011, the trial court overruled the demurrer in its entirety. (CT 606-07.)

On May 26, 2011, Sutter filed a motion to strike ("anti-SLAPP motion") on six of the seven causes of action alleged in the complaint, pursuant to Code of Civil Procedure section 425.16. (CT 49-66.) Sutter did not move to strike the fourth cause of action for interference with contractual relations, which was based on Sutter's successful effort to have Dr. Fahlen fired by the Gould Medical Group. (*Id.;* CT 24.) Sutter's anti-SLAPP motion again relied on the argument that Dr. Fahlen's claims were legally insufficient because he failed to exhaust his judicial remedies. (CT 49-66.) On June 30, 2011, the trial court denied Sutter's anti-SLAPP motion in its entirety. (CT 608.) On August 1, 2011, Defendants filed a notice of appeal on the order denying their anti-SLAPP motion. (CT 622-23.)

On December 30, 2011, Sutter filed a second writ of supersedeas, seeking a stay of all discovery proceedings pending resolution of the appeal on the anti-SLAPP motion.[2] In response, the Court of Appeal issued a temporary stay of all trial court proceedings on January 10, 2012. In its appeal, Sutter argued that the trial court erred by denying its anti-SLAPP motion, again relying on its exhaustion of judicial remedies argument. In

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[2] Sutter later admitted that the stay requested in its second writ of supersedeas was "imprecisely worded" and should have included an exception to allow Dr. Fahlen to proceed with discovery on his fourth cause of action for interference with contractual relations. (Informal Reply in Support of Second Petition for Writ of Supersedeas, filed Feb. 14, 2011, at p.12.)

its decision of August 14, 2012, the Court of Appeal affirmed the trial court's denial of the anti-SLAPP motion with respect to Dr. Fahlen's first and second causes of action, but reversed the trial court on the other counts at issue.[3] The Court of Appeal also lifted its stay on trial court proceedings. On September 25, 2012, Sutter filed a Petition for Review.

ARGUMENT

I. THERE ARE NO COMPELLING REASONS TO GRANT REVIEW OF THE DECISION BY THE COURT OF APPEAL.

A. The Decision Does Not Abrogate *Westlake's* Traditional Rule of Exhaustion.

To try and persuade this Court to grant review, Sutter has grossly misrepresented the impact of the Court of Appeal's decision on the traditional rule of exhaustion described in *Westlake*. In its Petition, Sutter repeatedly states that the decision below "abrogated", "undid", or "displace[d]" the *Westlake* rule of judicial exhaustion and even goes so far as asserting that *Westlake* is no longer good law after the Court of Appeal's decision in this case. (Petition, at pp. 2, 20, 23, 25.) However, the Court of Appeal's decision simply recognized and applied this Court's cases establishing an exception to *Westlake* for certain whistleblower claims. The exception applies when, as here, individuals have statutory

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[3] The court of appeal's opinion incorrectly noted that the trial court denied the anti-SLAPP motion with respect to the fourth cause of action. (*Fahlen v. Sutter, supra,* 208 Cal.App.4th at 582.) In fact, the fourth cause of action was not the subject of Sutter's anti-SLAPP motion and was not at issue in the appeal. (CT 49-66.)

whistleblower claims and the Legislature acknowledged an administrative remedy but did not require its exhaustion. *State Board of Chiropractic Examiners v. Superior Court* ("*Arbuckle*"), *supra,* 45 Cal.4th 963 and *Runyon v. Board of Trustees of California State University, supra,* 48 Cal.4th 760.

Contrary to Sutter's representation that the decision below "abrogated" the *Westlake* rule of exhaustion, the Court of Appeal actually relied on *Westlake* when it dismissed Dr. Fahlen's third, fifth, sixth and seventh causes of action. (*Id.* at 580-82.) The Court held that the *Westlake* rule of exhaustion applies unless there is legislative intent not to require exhaustion, following *Arbuckle* and *Runyon.* Sutter's repeated mischaracterization of the decision below is a deliberate attempt to mislead this Court so it will grant its Petition for Review.

B. The Legislature Gave Physician Whistleblowers A Right to File Civil Actions Without Requiring Exhaustion of Administrative or Judicial Remedies.

The Legislature amended Section 1278.5, effective January 1, 2008, to extend the protection of that law to physicians, adding the term "members of the medical staff" to subdivisions a, b(1), d(1), d(2) and g. (CT 221-23.)

Section 1278.5, subd. (d)(2) specifically states that "discriminatory treatment of [a] . . . member of the medical staff . . . includes, but is not limited to, unfavorable changes in . . . privileges . . . of the medical staff, or

the threat of any of those actions." This portion of the statute establishes that the Legislature specifically intended to provide a remedy for the types of actions taken by Defendants – threats of actions against Dr. Fahlen's privileges and terminating his privileges. (*See,* CT 19 at ¶¶ 33-35.)

A hospital may only revoke a physician's hospital privileges through the peer review process set forth by Business and Professions Code sections 805 through 809.5. The Legislature clearly intended for peer review actions to be subject to a suit under Section 1278.5. The fact that the "threat" of an "unfavorable change in privileges" is sufficient to constitute a retaliatory act establishes that a physician may bring a Section 1278.5 suit *before* peer review proceedings have been completed. The inclusion of "an unfavorable change in privileges" establishes that a physician can bring a Section 1278.5 action *after* the conclusion of peer review proceedings, as Dr. Fahlen did here. When, as here, there is no ambiguity in the language of a statute, courts are to presume that "the Legislature meant what it said, and the plain meaning of the statute governs." (*Hunt v. Superior Court* (1999) 21 Cal. 4th 984, 1000.)

Nothing in Section 1278.5 states or implies that a physician cannot bring the action until after winning a writ of mandate on a termination of privileges. To the contrary, Section 1278.5, subd. (h) gives the medical staff of a hospital the right "to petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary

demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section . . ." Section 1278.5, subd. (h). This subdivision also expressly references a peer review hearing "as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code." It goes on to state that "If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed." This subdivision unequivocally establishes that the Legislature intended that the superior courts would have concurrent jurisdiction with the hospital's peer review procedures.

In addition, this subdivision indisputably acknowledges the parallel administrative remedy of hospital peer review proceedings. As discussed further below, under the rule of *Arbuckle* and *Runyon,* the Legislature's acknowledgment of a parallel remedy, without requiring exhaustion of the remedy, establishes that exhaustion of judicial remedies is not required here. (CT 106-07.)

Sutter attempts to rely on Section 1278.5, subd. (l), which states that nothing in the statute shall be construed to limit the ability of the medical staff to carry out its legitimate peer activities in accordance with Sections 809 to 809.5 of the Business and Professions Code. (AOB at 38-39.) However, this subdivision does not support Sutter's position. It again reflects the Legislature's decision to have concurrent jurisdiction when a

physician files a Section 1278.5 lawsuit. Under this section, a physician's filing of a whistleblower suit cannot be used to stop or interfere with the medical staff's peer review actions.

If Sutter was correct, and a physician could not file a Section 1278.5 lawsuit based on a termination of privileges until peer review proceedings were completed and fully exhausted, then there would be no need for either subdivision (h) or subdivision (l), since the peer review process would be completely finished before a physician could file suit. Thus, the Court of Appeal's decision is fully supported by the language of Section 1278.5. It also serves the express purpose of the statute, to protect the public health and safety by encouraging health care workers, including physicians, to report unsafe patient care and conditions. Section 1278.5, subd.(a).

C. Legislative History Confirms that the Legislature Decided Not to Require Exhaustion of Administrative Remedies.

When originally introduced as AB 632, the proposed statute did not contain the full text of current subdivision (h) or the text of current subdivision (l). (CT 226-30.) Hospital groups opposing the bill claimed that it might have a chilling effect on medical peer review and that it "could stop a peer review process in its tracks by the simple filing of a 1278.5 action . . ." (CT 237.) The Senate Committee's analysis queried: "Should a 1278.5 action be held in abeyance until a peer review process, if initiated, has been completed?" (CT 238.) Thus, the Legislature expressly

considered requiring exhaustion of the peer review process as a prerequisite for bringing a 1278.5 action. However, the Legislature rejected that approach. Instead, it strengthened subdivision (h) by amending the bill to add three additional sentences to the original version of AB 632 and also added a new subdivision (l) to ensure that a hospital's peer review process could proceed unimpeded by a 1278.5 action. According to the Senate Judiciary Committee, the amendments made to this bill on September 5, 2007, were taken to deal with some objections made by the hospitals regarding the impact of the bill on peer review. This analysis also states:

> This bill would provide equivalent whistleblower protection to a doctor that is currently available to an employee or a patient of a hospital facility and to other health care workers. The amendments would provide for an in camera hearing of evidentiary requests by a whistleblower complainant so that a court may determine whether or not the evidentiary demands would impede a peer review proceeding. The amendments would further clarify that the bill would not be construed to limit the ability of the medical staff to carry out its legitimate peer review activities.

(CT 242.) Thus, the Legislature knowingly chose concurrent jurisdiction and rejected the approach that the Defendants are asserting here. It instead gave a physician the same right to bring a whistleblower action as any other healthcare worker, while safeguarding the peer review process. Thus, the legislative history as well as the language of Section 1278.5 demonstrates that the decision below is consistent with the Legislature's intent when it amended the law in 2007.

The hospitals lost their battle in the Legislature to require exhaustion of peer review proceedings as a precondition to a physician's lawsuit under Section 1278.5. They are now asking this Court to undo that Legislative decision, contrary to the state policy adopted in the statute. This Court does not need to review the Court of Appeal's decision that the Legislature's intent and policy decision should be followed.

D. *Arbuckle* and *Runyon* Required the Court of Appeal's Decision.

In support of their exhaustion argument, Defendants rely on one sentence from the 1976 decision in *Westlake Community Hosp. v. Superior Court, supra,* which states that the decision of a peer review body is considered conclusive unless overturned by a writ of mandate. (See, Petition, pp. 6-7; Defendants' AOB, pp. 29-30, Defendants' Reply Brief, p. 22.) In *Westlake,* the plaintiff physician had only common law tort claims and no statutory whistleblower claim. (*Westlake Community Hosp., supra,* 17 Cal.3d at p. 470.) *Westlake* predated the 2008 amendment of 1278.5 by 32 years. It never considered and cannot constitute authority for the question presented here. The language in *Westlake* that is cited by Defendants does nothing more than explain the general rule requiring exhaustion of administrative remedies.

The decision below was required by this Court's decisions in *Arbuckle* and *Runyon.* In *Arbuckle,* the whistleblower statute required the

plaintiff to exhaust an internal administrative remedy by submitting her complaint to the administrative agency and obtaining findings by the agency before filing suit. The plaintiff obtained an adverse finding from the defendant Board of Trustees. The Court of Appeal concluded that the plaintiff had to completely exhaust the internal administrative remedy, by asking for a full hearing before an administrative law judge and then further exhausting judicial remedies, before filing a lawsuit for damages, based on the same analysis advanced by Sutter here. (*Arbuckle, supra,* 45 Cal.4th at pp. 970-971.) This Court reversed the Court of Appeal, holding that the plaintiff did not have to overturn the adverse internal determination by the administrative agency before pursuing a whistleblower claim for damages. While recognizing that exhaustion was the general rule, the Court held that:

> . . . [S]ection 8547.8(c) lacks language making this administrative exhaustion a prerequisite to bringing the specific type of damages action permitted under that provision. Section 8547.8(c) authorizes, not an action *to review* the decision of the State Personnel Board, but *a completely separate* damages action in the superior court in which the employee will enjoy all the procedural guarantees and independent factfinding that generally accompany such actions. Exhaustion of every possible stage of an administrative process is not particularly necessary where the civil action that Legislature has authorized is not one to review the administrative decision, but rather a completely independent remedy.

(*Arbuckle, supra,* 45 Cal.4th at pp. 972-973 (emphasis in original).)

The *Arbuckle* decision also considered the Court of Appeal's holding that the adverse administrative finding of the defendant collaterally

estopped plaintiff from bringing her lawsuit, unless that finding was first overturned by a writ of mandate. While recognizing that this contention was "true as a *general* matter", it rejected its application in cases where the Legislature had expressly authorized a whistleblower lawsuit:

> . . . [T]he Legislature expressly authorized a damages action in superior court for whistleblower retaliation . . . and in so doing it expressly acknowledged the existence of a the parallel administrative remedy. It did not require that the board's findings be set aside by way of a mandate action;. . . . The bareness of the statutory language suggests that the Legislature did not intend the State Personnel Board's findings to have a preclusive effect against the complaining employee.

(*Arbuckle, supra,* 45 Cal.4th at p. 976.)

In *Runyon,* the Supreme Court again addressed whether a plaintiff was required to overturn an adverse internal administrative decision before pursuing an action for damages authorized under a whistleblower statute. (*Runyon, supra,* 48 Cal. 4th at p. 773-75.) Government Code section 8547.12 provided that an employee could file a damages action only if the employee first filed an internal complaint that was not "satisfactorily addressed" by the administrative agency within 18 months. (*Id.* at p. 774) This Court held that the employee was entitled to bring an immediate action for damages unless the internal complaint was resolved to his satisfaction. It reaffirmed its holding in *Arbuckle* that if the Legislature (1) specifically authorizes a whistleblower damages action; (2) acknowledges the existence of a parallel administrative remedy, but (3) does not require reversal of an

adverse decision by way of a writ of mandate, then the damages action can proceed without exhaustion of judicial remedies. (*Runyon, supra,* 48 Cal.4th at p. 774-75.)

In this case, Section 1278.5 indisputably acknowledges the existence of a parallel administrative remedy of hospital peer review proceedings. Yet it does not require exhaustion of any administrative or judicial remedies before filing an action for damages and reinstatement. Pursuant to the decisions by this court in *Arbuckle* and *Runyon*, Dr. Fahlen is therefore plainly entitled to proceed with his whistleblower claim without exhausting his judicial remedies.

In its Petition for Review, Sutter only discusses this Court's decisions in *Arbuckle* and *Runyon* in a footnote which vainly tries to distinguish those cases based on an unclear distinction that has nothing to do with the reasoning in those decisions. (Petition, n. 2, pp. 18-19.) *Arbuckle* and *Runyon* were based on both Legislative intent and the policy implications of permitting an internal administrative agency to decide retaliation cases, subject only to a substantial evidence review by the courts. This Court correctly found that to require exhaustion of administrative or judicial remedies would effectively negate the whistleblower statutes. (*Arbuckle, supra,* 45 Cal.4th at 977; *Runyon, supra,* 48 Cal.4th at 784.)

E. Sutter's New Federal Argument Is Improper and Meritless.

In the same footnote, Sutter also claims that there are some unspecified "constitutional implications" to the decision below. It raises questions concerning federal immunities which were not raised in either the trial court or Court of Appeal. This new argument is therefore plainly improper and should not be considered. (*In re Marriage of Davenport,* (2011) 194 Cal.App.4th 1507, 1528.) Furthermore, California opted out of the federal Health Care Quality Improvement Act in 1989 when it adopted Business and Professions Code section 809 et seq. and the statutes cited by Sutter do not apply in California. (Business and Professions Code Section 809, subd. (a)(9)(A).) Finally, federal immunity does not apply unless a disciplinary action is based on reasonable beliefs. (42 U.S.C. section 11112, subd. a.) Retaliatory actions are not provided immunity under federal law and there are no "constitutional implications" to the decision below.

F. There is No Conflict Presented by the Decision in *Nesson.*

In another attempt to manufacture support for its Petition for Review, Sutter asserts that review by this Court is necessary to resolve a purported conflict between the decision in this case and the decision in *Nesson v. Northern Inyo County Local Hosp. Dist., supra.* Sutter misstates the holding

in *Nesson* to suggest that the Fourth District specifically considered the question of whether exhaustion is required before filing a claim under Section 1278.5. (Petition, pp. 2, 12-13.) Not so. *Nesson* held that the Section 1278.5 claim failed because Dr. Nesson could not demonstrate a link between his summary suspension and his complaints. (*Id.*, 204 Cal.App.4th at 87.)

As the court below noted, the *Nesson* decision did not separately analyze the exhaustion requirement as it applied to the Section 1278.5 claim. (*Fahlen*, 208 Cal.App.4th at 574, n. 6.) The court below correctly concluded that any conclusions made by the *Nesson* court regarding the application of the exhaustion doctrine to Section 1278.5 were dicta. (*Ibid.*) After granting Dr. Fahlen's request for judicial notice of the appellate briefs in *Nesson*, the court also observed that neither party in *Nesson* focused on the whistleblower claim. (*Ibid.*) Indeed, there is almost no discussion of Section 1278.5 in the plaintiff's briefs and the hospital did not mention it at all. (*Ibid.*)

As dicta, *Nesson* is not binding authority on any other court and there is no significant conflict that needs resolution by this Court. As described above, *Nesson* analyzed the exhaustion issue presented in that case without any analysis of Section 1278.5. It did not analyze Section 1278.5, subds. (h) and (l) which acknowledge the parallel administrative remedy of a peer review hearing without requiring exhaustion of that remedy. It did not analyze the language in Section 1278.5 which expressly gives a physician a right to sue for a loss of privileges. It did not review the legislative history which

establishes that the hospitals' proposal to require exhaustion of peer review proceeding was considered and rejected by the California Legislature. *Nesson* contains no discussion at all of either *Arbuckle* or *Runyon*, the controlling Supreme Court authority.

Sutter's attempt below to rely on the decision in *Nesson* was appropriately rejected by the Court of Appeal. Now Sutter contends that a conflict between *Nesson* and the decision below will lead to confusion and inconsistent judgments. It is evident that *Nesson* should not be considered authority on the Section 1278.5 exhaustion issue. It is extremely unlikely that any court will follow *Nesson* rather than the decision below on that question. This is especially true given that the decision below not only clearly analyzes the Section 1278.5 exhaustion question, but also explains why *Nesson* is not sound authority on that issue.

This Court should reject Sutter's transparent effort to create a legally significant conflict between *Nesson* and the decision below. The decision below is the only California case that directly addresses the issue of exhaustion in a Section 1278.5 case. Any future cases in which the same issue is properly analyzed will result in the same decision as the Court below. In the unlikely event that there are inconsistent decisions in the future on the question of exhaustion under Section 1278.5, this Court may grant review at that time.

G. Sutter's Policy Arguments Are Unsupported by the Record and Reflect Only the Interests of Healthcare Corporations.

In its policy argument, Sutter claims that "[r]etaliation claims are easy to allege and hard to overcome short of trial." (Petition, p. 21.) Going outside the record, it makes an unverified claim that unnamed attorneys who represent physicians have opined that it might be malpractice not to advise clients "to position themselves to allege retaliation claims." (Petition, pp. 21-22.) In other words, those unknown attorneys allegedly believe that they are bound by the standard of care to urge their physician clients to fabricate retaliation claims. Aside from denigrating the integrity of both physicians and the attorneys who represent them, this argument flies in the face of the realities of modern healthcare.

This case and the *Nesson* case are the first cases concerning Section 1278.5 brought to the appellate courts since the law was enacted in 1999. The statute was amended to protect physicians effective January 1, 2008, but there has been no flood of physicians alleging retaliation cases. The paucity of lawsuits under Section 1278.5 reflects the true reality confronting an individual faced with the possibility of litigating against multi-billion dollar healthcare corporations. These corporations have essentially unlimited resources to hire the best lawyers and to employ every procedural obstacle in the law to delay and frustrate a whistleblower's lawsuit.

As this case demonstrates, even an exceptionally strong whistleblower lawsuit can be delayed for years by demurrers, discovery disputes, anti-SLAPP motions and appeals. In this case, Sutter has filed a demurrer, a motion for judgment on the pleadings, discovery motions, two writs of supersedeas, one writ of mandate, one appeal and now a petition for review. It is now one and one-half years after Dr. Fahlen filed his civil lawsuit and Dr. Fahlen has yet to receive a single item of discovery.

Facing unlimited corporate resources, physicians who have valid whistleblower claims still face tremendous obstacles. Virtually every case will take at least four years because of the unlimited right of healthcare corporations to appeal a denial of an anti-SLAPP motion, no matter how meritless the motion. (*Id.*, Section 425.15, subd. (i).) A physician who has not actually been a whistleblower is highly unlikely to file a meritless case under Section 1278.5. Under current law, the physician will likely have to pay not only his own attorneys fees, but also the corporation's, if it prevails on an anti-SLAPP motion. (Code of Civil Procedure section 425.15, subd. (c)(1).) In the opinion of Dr. Fahlen's counsel, it would be malpractice for an attorney to advise a physician to "position himself" to generate a fabricated retaliation, because such a claim is almost certainly going to lose and will likely cost the physician a minimum of $100,000 in attorneys fees, and possibly much more, with almost no chance of success.

Another reality of current healthcare is that Sutter and other large healthcare corporations have had a nearly invulnerable defense to lawsuits alleging wrongful termination of hospital privileges. Under California law, the healthcare corporations are empowered to make the rules of the hearing, initiate the charges, prosecute the charges and choose the judge and the jury who will make a recommendation on the charges, even if the corporation has an actual bias against the physician. (See, e.g., *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1142-1143; *Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098.) If the result of the "fair hearing" is contrary to the corporation's agenda, it can disregard the fair hearing decision and terminate the physician's privileges anyway, as Sutter did with Dr. Fahlen. The corporate decision is then ordinarily subject to only a substantial evidence standard of review. (Code of Civil Procedure section 1094.5, subd. d.) It is no wonder that Sutter and the California Hospital Association want to keep physician whistleblowers trapped in a peer review cage where they hold all the keys.

The Legislature expressly enacted Section 1278.5 because it felt the strong remedies contained in the statute were necessary to protect whistleblowers from hospitals' retaliation. Sutter seeks to destroy the protections of Section 1278.5 for physicians by forcing them to first

overturn decisions in administrative hearings in which retaliation is not even an issue that is litigated.

Dr. Fahlen agrees with Sutter that the decision below should not be depublished. Not because depublication would be unfair to Sutter, but because the published decision of the Fifth District provides a small amount of protection for physicians who risk their careers to expose unsafe conditions for patients.

II. IF THIS COURT GRANTS REVIEW, IT SHOULD REVIEW THE COURT OF APPEAL'S DECISION THAT PEER REVIEW ACTIONS CONSTITUTE PROTECTED ACTIVITY UNDER THE ANTI-SLAPP STATUTE, AND ITS DECISION REQUIRING DR. FAHLEN TO SPLIT HIS CAUSE OF ACTION.

For the reasons stated above, this Court should deny Sutter's Petition for Review. However, if this Court decides to grant review, Dr. Fahlen requests review of the following issues incorrectly decided by the Court below: (1) whether a healthcare corporation's termination of a physician's hospital privileges are "protected activity" under the anti-SLAPP statute; and, (2) whether exhaustion of judicial remedies is required for causes of action based on the same facts as a pending retaliation claim under Section 1278.5.

A. Sutter's Actions Were Not Protected Activities Entitled to the Protections of the Anti-SLAPP Statute.

To prevail on an anti-SLAPP motion, defendants are required to prove that the challenged causes of action arise from "protected activity".

(Code of Civ. Pro. section 425.16(b)(1); *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.)

In this case, the Court of Appeal incorrectly concluded that a healthcare corporation's termination of a physician's hospital privileges is protected activity entitled to the protections of the anti-SLAPP statute. (*Fahlen v. Sutter, supra,* 208 Cal.App.4th at 570-72.)

A cause of action arises from protected activity under the anti-SLAPP statute only if the defendant's act upon which the cause of action is based was in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) In evaluating an anti-SLAPP motion, the court must look to "the substance" of the lawsuit to see if it arose from a defendant's protected First Amendment activity. (*Id.*)

Dr. Fahlen does not base his claims on anyone's exercise of the right to free speech or other protected activities under the anti-SLAPP statute. The gravaman of Dr. Fahlen's complaint is that Sutter took retaliatory actions against him in response to his whistleblower activities. Retaliatory actions taken against a person are not actions in furtherance of free speech, even though they are conveyed through words. (*McConnell, McConnell v. Innovative Artists Talent and Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 180.) "No employer action has any effect unless it is communicated, but no one would suggest that a statement or writing firing an employee is

protected First Amendment activity. A writing, as here, effectively eliminating all job duties is no different." (*Id.*)

In *Westlake, supra,* the Court analyzed this precise question in the context of peer review proceedings. *Westlake* held that peer review actions were *not* communicative activities subject to protection under Civil Code section 47, sub. 2, as statements during official proceedings, but rather unprivileged actions. (*Id.*, 17 Cal.3d at 481-482.) Using the *Westlake* analysis, peer review actions are also not free speech activities entitled to protection under the Anti-SLAPP statute. The fact that Sutter's threats and the termination of Dr. Fahlen's privileges were effectuated through words does not make them protected First Amendment activity. To the contrary, they were retaliatory actions which do not meet the standard for protected activity set forth in *City of Cotati v. Cashman, supra.*

B. Sutter's Retaliatory Actions Were Not "Peer Review Activities" Protected Under the Anti-SLAPP Statute.

In *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, the Court held that hospital peer review activities were "official proceedings" which could come under the ambit of the anti-SLAPP statute. For purposes of its anti-SLAPP analysis, the Court defined "peer review" as:

> [T]he process by which a committee comprised of licensed medical personnel at a hospital "evaluate[s] physicians applying for staff privileges, establish[es] standards and procedures for patient care, assess[es] the performance of

> physician currently on staff," and reviews other matters critical to the hospital's functioning.

(*Id.* at p. 199.)

Using this definition of peer review, none of Sutter's activities constituted "peer review", since none of Sutter's actions were taken by any committee of licensed medical personnel. To the contrary, Dr. Fahlen prevailed in his peer review hearing decided by six physicians and that decision was not appealed by the Medical Executive Committee of his hospital. (CT 72; CT 410 at ¶ 31; CT 411 at ¶ 35; CT 547-51.)

Smith v. Adventist Health System/West, (2010) 190 Cal.App.4th 40, examined issues similar to the ones presented here: (1) whether a hospital's disciplinary action against a physician's privileges is a "communicative" act; and (2) whether the actions of hospitals and their employees concerning a physician's privileges which are not taken during formal peer review proceeding are protected activities under the anti-SLAPP statute, if those actions are related to peer review. (*Smith v. Adventist, supra,* 190 Cal.App.4th at pp. 57-64.)

In *Smith v. Adventist*, the defendant hospital had summarily suspended Dr. Smith. After he was reinstated by the courts, the hospital refused to accept and process his reapplication for privileges. Dr. Smith sued the hospital for intentional interference with his right to pursue a profession and interference with prospective business advantage (two of the

counts also alleged by Dr. Fahlen) as well as two counts of unfair competition. His complaint was based on his contentions that his summary suspension and the hospital's refusal to accept and consider his reapplication were both unlawful. (*Id.* at p. 48.)

As Sutter conceded below, in *Kibler* this Court did not find that the summary suspension at issue in that case was protected activity. (AOB, p. 22.) Contrary to Sutter's argument, the Court in *Smith v. Adventist* assumed but did not decide that the hospital's summary suspension was "protected activity" for purposes of its anti-SLAPP analysis. (*Id.* at p. 56.) The *Smith v. Adventist* court then analyzed whether the "official proceedings" privilege of Civil Code section 47, the foundation of the opinion in *Kibler,* applied to all conduct related to peer review proceedings. The Court recognized that to so rule would effectively eliminate any damages remedy for a physician who was injured by unfair or unlawful peer review proceedings. It found that such an interpretation would be contrary to both California caselaw and Civil Code section 47, subd. (b)(4). The court held that the provisions of the anti-SLAPP statute applicable to peer review proceedings apply only to "communicative" conduct, based on the holdings in *Kibler* and *Rusheen v. Cohen* (2006) 37 Cal.4th 1048. (*Smith v. Adventist, supra,* 190 Cal.App.4th at pp. 57-60.)

The facts here are stronger than those in *Smith v. Adventist* and compel the same conclusion. Mr. Mitchell's interference with Dr. Fahlen's

employment relationship with Gould occurred before May 14, 2008, the date Gould terminated Dr. Fahlen. (CT 294-95 at ¶ 34; CT 403 at ¶¶ 5-6; CT 497.) Mr. Mitchell's threats to Dr. Fahlen took place on May 30, 2008. (CT 295 at ¶ 38; CT 404 at ¶ 9; CT 436-37; CT 450-51.) The MEC did not decide to commence an investigation of Dr. Fahlen until June 24, 2008. (CT 495.) The medical staff's Judicial Review Committee (JRC) rendered its decision that Dr. Fahlen should retain his hospital privileges on June 14, 2010. (CT 547-51.) The Sutter Board did not terminate Dr. Fahlen's privileges until January 7, 2011. (CT 71.)

The wrongful conduct alleged in this case is retaliation for complaints about unsafe hospital practices, conduct that is antithetical to public health and safety and expressly forbidden by statute. Terminating a physician's privileges because the physician complained about substandard hospital care not only damages the physician, it risks the lives of the hospital's patients. It intimidates other physicians from raising concerns about unsafe practices, for fear of meeting the same fate. The termination of Dr. Fahlen's privileges for retaliatory purposes was not an action in furtherance of Sutter's free speech rights and it is not a protected activity.

The court in *Smith v. Adventist* also ruled that the hospital's refusal to process Dr. Smith's reapplication for privileges was not protected activity under the anti-SLAPP statute because the reapplication had never been submitted to a medical staff committee for review. It held that such

conduct was not part of any "official proceeding" and was not a protected activity under the anti-SLAPP statute. (*Smith v. Adventist, supra,* 190 Cal.App.4th at pp. 61-64.) Likewise here, Sutter's retaliatory conduct before the MEC began its investigation on June 24, 2008, was not part of the hospital's peer review proceedings and cannot be a protected activity under Code of Civil Procedure section 425.16.

C. The Court of Appeal Erred by Requiring Dr. Fahlen to Split His Cause of Action.

All of the causes of action alleged by Dr. Fahlen involve the same "primary right" - - namely, his right to be able to practice his profession without facing unlawful retaliation or other wrongful interference. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) Dr. Fahlen must allege all of his counts arising from the same primary right to avoid splitting his cause of action. (*Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1684.) This rule serves judicial economy and ultimately protects defendants from having to face two separate lawsuits arising from the same or overlapping facts and damages. It would be extremely wasteful for both the court and the parties to have to relitigate the same issues in a separate lawsuit years down the road following a writ of mandate.

Furthermore, Sutter's administrative hearing at issue did not consider Dr. Fahlen's claims at issue in this lawsuit. Given the Legislature's decision to grant the Court broad remedial powers in a Section 1278.5

action, the Court of Appeal erred by requiring Dr. Fahlen to split his causes of action into separate lawsuits.

III. SUTTER'S REQUEST TO STAY AND FURTHER DELAY PROCEEDINGS IN THE TRIAL COURT SHOULD BE DENIED.

Sutter requests that this Court stay all proceedings in the superior court pending a final disposition of its Petition for Review. Sutter argues that without such a stay, it would suffer undue burden because it would be required to litigate proceedings that may prove entirely unnecessary. (Pet. for Review at 24-25.) Consistent with its practice in obtaining a blanket stay from the reviewing court below, Sutter failed to inform this Court that Dr. Fahlen has a pending claim against Defendants (for interference with his contractual relations with the Gould Medical Group) that was not subject to their anti-SLAPP motion.

This Court ruled in *Varian Medical Systems, Inc. v. Delfino,* (2005) 35 Cal.4th 180, 189, 195, n.8, that a plaintiff is entitled to proceed in the trial court with causes of action not affected by the appeal of an anti-SLAPP motion denial. Dr. Fahlen is therefore entitled to proceed with discovery in the trial court on his fourth cause of action. Sutter's deceptive argument for a blanket stay of proceedings should be rejected in its entirety.

This Court should not issue a stay of Dr. Fahlen's First and Second Causes of Action, either. It has been more than a year and one-half since Dr. Fahlen filed his action and he has yet to obtain one item of discovery

from the Defendants. Another stay of discovery will result in a loss of evidence, as witnesses have actual or claimed loss of memory about the events in question. (*Schumpert v. Tishman Co.* (1988) 198 Cal. App. 3d 598, 606.) Another lengthy delay of discovery would violate Dr. Fahlen's right to due process and a fair trial. (*See, Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867-68 (literal application of the discovery stay and the 30-day hearing requirement of Code of Civil Procedure section 425.16 could adversely impact a plaintiff's due process rights.)

A stay should also be denied because Dr. Fahlen and his patients are suffering irreparable harm from the unlawful termination of his hospital privileges. Although Dr. Fahlen has hospital privileges at Doctors Medical Center, his patients may have to be admitted to Memorial Medical Center in emergencies, or may be admitted to Memorial by physicians in other specialities or because of insurance reasons. As a result, Sutter's termination of Dr. Fahlen's privileges causes an ongoing interference with his treatment of his patients. (See Exhibit B, Plaintiff's Motion to Expedite Appeal, pp. 5-7.) Any further delay of the trial court proceedings will lengthen the time before Dr. Fahlen can obtain reinstatement of his privileges at Memorial.

Sutter has provided no case law or other authority to support its request for a stay of trial court proceedings. Rather, Sutter relies upon the

declaration of Sutter's counsel, Glenda Zarbock, to support its request for stay. (Petition, Exhibit B.) The declaration by Ms. Zarbock alleges that Dr. Fahlen has "pressed" Sutter to provide discovery. That allegation is untrue. (Exhibit A, Declaration of Stephen D. Schear in Opposition to Defendants' Motion for a Stay.) More importantly, it is irrelevant to the question of whether a stay should be granted. Dr. Fahlen has a fundamental and vested protected property right to practice his profession and cannot fully exercise that right without access to hospitals. (*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 824) Sutter has already wrongfully taken that property right for nearly two years. Dr. Fahlen should be permitted to proceed with his lawsuit in the trial court, especially given the fact that his fourth count was indisputably not at issue in Sutter's appeal or Petition for Review.

In the event that this Court decides to grant Sutter's request for a stay, Dr. Fahlen respectfully requests an expedited appeal before this Court for the reasons stated above and in his Motion for Expedited Appeal, Exhibit B to this Answer.

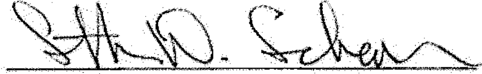
CONCLUSION

The decision of the Court of Appeal on the issue of Section 1278.5 exhaustion was well-reasoned and followed this Court's precedent and does not require review by this Court. This Court should therefore deny review

and permit Dr. Fahlen to proceed with his action in Superior Court without further delay.

Dated: October 15, 2012

Respectfully submitted,



STEPHEN SCHEAR, Bar No.83806
JENNY HUANG, Bar No. 223596
Attorneys for Respondent/Plaintiff
Mark Fahlen, M.D.

CERTIFICATE OF WORD COUNT

I, Stephen Schear, am duly licensed to practice before the Courts of California and am the attorney for Respondent Mark Fahlen, M.D. in this action. I certify that the foregoing Answer to the Petition for Review does not exceed 8,400 words including footnotes. Relying on the computer program used to prepare the brief, the exact number of words in the Answer to the Petition for Review totals 8,349 words.

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

Date: October 14, 2012

STEPHEN SCHEAR

1 I, Stephen D. Schear, declare:

2 1. I am one of the attorneys who represent Dr. Mark Fahlen in this action. This
3 Declaration is submitted in opposition to the Request for Stay made by Defendants Sutter
4 Central Valley Hospital and Steve Mitchell ("Sutter") in conjunction with the Petition for
5 Review in the Supreme Court.

6 2. In support of the Request for a Stay, Defendants' counsel Glenda Zarbock
7 claims that "[o]n August 27, 2012, counsel for Dr. Fahlen pressed for Defendants to
8 respond to special interrogatories and document requests that had been pending before
9 imposition of the stay."

10 3. This statement by Ms. Zarbock is highly misleading, to the point of being
11 intentionally deceptive.

12 4. After the Court of Appeal's decision on August 14, 2012, counsel for Dr.
13 Fahlen did nothing to "press" for discovery. On August 21, 2012, Ms. Zarbock called me
14 and informed me that Sutter had changed attorneys and that she and her law firm
15 HansonBridgett were now representing Sutter. She stated that she had not yet received
16 the case files, but she understood that discovery was pending. Her comments indicated
17 that she knew that the Court of Appeal had lifted its stay of trial court proceedings. She
18 stated she wanted to discuss the timing of discovery and Sutter's response to Dr. Fahlen's
19 First Amended Complaint which had been outstanding when the Court of Appeal imposed
20 the stay. I suggested we set a time to meet and confer the following week, so that Ms.
21 Zarbock would have time to review the file and then we could talk about a reasonable
22 schedule for production of discovery. Ms. Zarbock confirmed our phone conversation in
23 a letter dated August 22, 2012, attached as Exhibit C to this declaration. The letter
24 confirms that we had talked about timelines to move the case forward.

25 5. We then had a phone conference on August 27, 2012. In that phone call, Ms.
26 Zarbock's statements indicated that she understood that the stay of discovery had been
27 lifted by the Court of Appeal's opinion. She indicated that she had still not received the
28 files from Sutter's previous attorneys. I suggested that she send me a written proposal for

a timeline for producing discovery and she agreed to do so. I stated that Dr. Fahlen had not yet received any discovery, a year and one-half after the complaint had been filed, and we would like to proceed with discovery, but that I also did not want to jam her given that she was new to the case.

6. On August 30, 2012, I received a letter from Ms. Zarbock indicating that Sutter had changed its position and decided that the Court of Appeal's decision lifting the stay was not final and that the stay therefore remained in place until September 13, 2012, at the earliest. A copy of Ms. Zarbock's letter is attached hereto as Exhibit D.

7. I did not respond to that letter, because I believed it not worth creating a dispute about discovery before September 13, 2012. I decided to wait and see if Sutter filed a Petition for Review before raising discovery issues.

8. Ms. Zarbock's claim that Dr. Fahlen has requested "voluminous" documents is also misleading. As Exhibit 1 to Ms. Zarbock's declaration demonstrates, Dr. Fahlen only propounded two interrogatories to Sutter before the first stay took effect. As Exhibit 2 to Ms. Zarbock's declaration demonstrates, Dr. Fahlen's First Request for Production of Documents, consisting of 26 requests, is a reasonable and typical initial request for production of documents, focused on the documents necessary to proceed with the litigation.

10. Exhibit C is a true and correct copy of Dr. Fahlen's Motion to Expedite Appeal which was filed in the Court of Appeal on September 12, 2012. It sets forth facts demonstrating that Dr. Fahlen and his patients are suffering ongoing irreparable harm because of the termination of Dr. Fahlen's hospital privileges. Dr. Fahlen's motion to expedite his appeal was denied in the Court of Appeal.

11. If this Court imposes another stay on Dr. Fahlen's superior court litigation, it will be highly prejudicial to Dr. Fahlen. The termination of Dr. Fahlen's privileges took place in January 7, 2011, 21 months ago. The termination was based on events dating back to 2004, more than 8 years ago. Dr. Fahlen has been unable to obtain any discovery concerning his termination or the events leading up to his termination despite filing his

1 lawsuit in superior court on March 9, 2011. Another stay will cause evidence to be lost as
2 the memories of witnesses fade or because witnesses will be able to more plausibly claim
3 that they have forgotten events even if they do remember those events.
4 I declare under penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct. Executed on October 14, 2012, at Oakland, California.
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7 Stephen D. Schear
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COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

SEP 12 2011

By_______________
Deputy

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIFTH APPELLATE DISTRICT

MARK T. FAHLEN, M.D., Plaintiff and Respondent, v. SUTTER CENTRAL VALLEY HOSPITALS AND STEVE MITCHELL, Defendants and Appellants.	Appellate No. F063023 Stanislaus Superior Court Case No. 662696 PLAINTIFF DR. MARK FAHLEN'S MOTION TO EXPEDITE APPEAL

PLAINTIFF DR. MARK FAHLEN'S
MOTION TO EXPEDITE APPEAL

NOTICE OF MOTION AND GROUNDS FOR MOTION

Pursuant to California Rule of Court 8.240, Plaintiff and Respondent Mark Fahlen, M.D. hereby moves for an order for calendar preference in the Court of Appeal, because failure to expedite the appeal will jeopardize the health and lives of Dr. Fahlen's patients, due to Defendants' interference with Dr. Fahlen's ability to treat his patients. Plaintiff and Respondent requests an expedited briefing schedule and calendar preference for oral argument.

Defendant Sutter Central Valley Hospitals ("Sutter") owns Memorial Medical Center, a Modesto hospital where Dr. Fahlen had privileges to practice medicine for over seven years, until January 7, 2011. Defendant Steve Mitchell is and was the Chief Operating Officer at Memorial Medical Center.

Dr. Fahlen's lawsuit contends that Defendants retaliated against him for his complaints about substandard and dangerous nursing care by (1) having him fired from his medical group; (2) threatening him for the purpose of coercing him to leave town; (3) instigating hospital peer review proceedings, and (4) taking away his hospital privileges at Memorial Medical Center (MMC), located in Modesto, California – despite the fact that he won his medical staff Judicial Review Committee hearing. Dr. Fahlen seeks reinstatement of his hospital privileges and monetary damages pursuant to Health and Safety Code section 1278.5 and other causes of action. (Decl. of Stephen D. Schear, Exhibit A, Dr. Fahlen's complaint in this action.)

Defendants have appealed from the Superior Court's denial of an anti-SLAPP motion they filed pursuant to Code of Civil Procedure section 425.16.

Under Health and Safety Code section 1278.5, the Legislature has expressly provided the remedy of reinstatement. However, the effectiveness of that remedy can be eviscerated by the Defendants using the strategy of delay. Sutter's termination of Dr. Fahlen's privileges and its delaying tactics interfere with Dr. Fahlen's legally protected fundamental property interest in practicing medicine. It has already been eight months since Dr. Fahlen's termination and the litigation seeking reinstatement has not even reached the discovery stage.

The delay does not only affect Dr. Fahlen's legally recognized property interest in practicing medicine. Sutter's termination of Dr. Fahlen's privileges to practice at MMC is also

jeopardizing the health and lives of severely ill patients and will continue to do so unless and until the courts reinstate Dr. Fahlen's privileges at MMC. Dr. Fahlen's current inability to treat his nephrology patients at MMC has already caused significant damage to one patient and compromised the medical care of other patients. More patients will have their health and safety compromised if this Court fails to expedite this appeal.

STATEMENT OF FACTS.[1]

Dr. Fahlen's competence and qualifications are unquestioned.

Dr. Fahlen is Board-Certified by the American Board of Internal Medicine in both internal medicine and nephrology (the sub-specialty which diagnoses and treats kidney problems). He has practiced nephrology for eight years in Modesto, California. He has been elected twice as Chairman of the Department of Medicine at Doctors Medical Center, a hospital in Modesto, and he currently serves in that position, in which he has quality assurance and administrative responsibility for over 140 physicians. He served as the Vice-Chairman of the Department of Nephrology at Memorial Medical Center in 2007 until May, 2008. He also serves on the Board of Directors of Stanislaus County's Community Health Center after being appointed by the Stanislaus County Board of Supervisors to that position. He was recently nominated to serve as Vice-Chairman of the Board of the Community Health Center. Dr. Fahlen also currently serves as the medical director of the Ceres Dialysis Center. He has also served as the medical director of the Merced Dialysis Center and Delta Sierra Dialysis in Stockton. Dr. Fahlen's clinical competence as a physician has never been questioned by Defendants. (Decl. of Schear, Exhibit B, Testimony of Mitchell, pp. 703, 835; and Exh. J, Decl. of Mark Fahlen, M.D., ¶¶ 1-2.)

Factual Background Regarding Sutter's Termination of Dr. Fahlen's Privileges.

Dr. Fahlen complained about serious nursing errors at Memorial Medical Center (MMC) on numerous occasions over a four year period dating from January 2004 through April 2008. His complaints arose from nurses deliberately disobeying his orders; nurses not following or

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[1] These facts are presented not to address the merits of the appeal of the anti-SLAPP motion, but to demonstrate that an expedited appeal is necessary and appropriate to restore as quickly as possible Dr. Fahlen's ability to treat all of his patients.

changing his orders without his knowledge or consent; and nurses acting in an insubordinate manner, including refusing to correct problems described by Dr. Fahlen after being told about those problems. (Decl. of Schear, Exh. J, ¶ 3.) Details concerning the nature of Dr. Fahlen's complaints are contained in paragraphs 11 through 27 of his Complaint in this action, Exhibit A to Decl. of Schear.

Defendants retaliated by first getting Dr. Fahlen's employer, the Gould Medical Group ("Gould"), to terminate Dr. Fahlen, by giving Gould's leadership unsubstantiated information about alleged behavioral problems of Dr. Fahlen, without his knowledge or consent. At the time that Defendant Mitchell gave Gould information about alleged problems that had occurred with Dr. Fahlen in April, 2008, Dr. Fahlen had not yet even been notified about the incident reports that had been lodged concerning those incidents. Most of the alleged "behavorial" problems involved incidents in which Dr. Fahlen had complained about nursing errors. Gould fired Dr. Fahlen "without cause". Defendant Mitchell admitted in sworn testimony during Dr. Fahlen's Judicial Review Committee (JRC) hearing that he gave Gould negative information about Dr. Fahlen because he wanted to get Dr. Fahlen fired from his job, so that the Defendants would not have to go through a medical staff hearing to get rid of Dr. Fahlen. Mr. Mitchell testified that physicians that were fired by Gould Medical Group usually left town. (Decl. of Schear, Exh. B, pp. 739-743; 772-777; Exh. C, Testimony of Gandy, p. 154; Exh. J, ¶ 4.)

When Dr. Fahlen decided to stay in Modesto after being fired, Mr. Mitchell threatened him with a peer review investigation and a report to the Medical Board of California if he did not leave town. When Dr. Fahlen still refused to leave Modesto, Mr. Mitchell informed MMC's Chief Executive Officer David Benn in an email that Dr. Fahlen "does not get" that he was going to lose his privileges. Mr. Benn then instructed Mr. Mitchell to initiate peer review proceedings against Dr. Fahlen. Mr. Mitchell then encouraged the leadership of the medical staff of MMC to investigate Dr. Fahlen and to recommend the non-renewal of Dr. Fahlen's privileges, based primarily on the manner of Dr. Fahlen's complaints about problems with nursing care. The MMC Medical Executive Committee (MEC) did bring charges against Dr. Fahlen based on those incidents and a medical staff Judicial Review Committee hearing ensued. The charges against

Dr. Fahlen involved claims of "inappropriate" behavior such as allegations that Dr. Fahlen had "adopted a tone" with a nurse, or "spoke in a condescending manner" and other alleged lapses from gentility. (Decl. of Schear, Exh. B, pp. 783-790; Exh. D, email correspondence between Dave Benn and Steve Mitchell; and Exh. J, ¶ 4.)

The California Supreme Court has repeatedly held that a hospital cannot deny a physician's privileges on behavioral grounds unless it can prove that the physician's alleged "inability to 'work with others' in the hospital setting is such as to present a real and substantial danger that patients treated by him might receive other than a 'high quality of medical care' at the facility . . ." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 628-629; see also, (*Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592, 598. In 2009, the California Supreme Court affirmed that standard in *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 1271.)

> . . . [I]t . . . is settled that a physician may not be denied staff privileges merely because he or she is argumentative or has difficulty getting along with other physicians or hospital staff, when those traits do not relate to the quality of medical care the physician is able to provide.

At Dr. Fahlen's JRC hearing, Dr. Todd Smith, the hospital chief of staff, and Dr. Michael Cadra, the Chairman of the Ad Hoc Committee that had investigated Dr. Fahlen, and Dr Paul Golden, the former Chair of the MMC nephrology department, all testified that no conduct of Dr. Fahlen had ever impaired the quality of care provided to any patient. There was no evidence of any complaint from any nurse about any conduct of Dr. Fahlen for more than two years before the end of the hearing. The six physician members of the JRC, all of whom had been unilaterally appointed to the JRC by the MMC Medical Executive Committee over Dr. Fahlen's objections, found unanimously that Dr. Fahlen's privileges should not be terminated. The hospital's Medical Executive Committee accepted that opinion and did not appeal it. The bylaws of the medical staff of MMC required Defendant Sutter to accept the decision of the JRC if it was supported by substantial evidence, which it plainly was. Nonetheless, on January 7, 2011, Defendant Sutter terminated Dr. Fahlen's privileges at MMC. (Decl. of Schear, ¶ 5; Exh. E, testimony of Smith, p. 633; Exh. F, testimony of Cadra, pp. 283-284; Exh. G, testimony of Golden, p. 986; Exh. H; MMC bylaw section 4.5-8(b)(2); Exh. I, Fahlen Brief to Sutter Board, and Exh. J, ¶ 4.)

Because of Sutter's action, Dr. Fahlen can no longer provide medical care to those of his patients admitted to MMC by other physicians, in emergencies or due to insurance or other financial issues. As a result, those patients are denied the quality and continuity of care that Dr. Fahlen had previously provided to them. As a nephrologist, many of Dr. Fahlen's patients suffer from chronic life-threatening kidney disease. Because Dr. Fahlen is familiar with the condition and history of his patients, he is in the best position to provide high quality nephrology care to them. The following cases will serve as examples of how Sutter's action has endangered and continues to endanger the health and safety of patients. (Decl. of Schear, Exh. J, ¶ 6.)

Sutter terminated Dr. Fahlen's privileges on January 7, 2011, without advance notice or warning of any kind, by delivering a letter to Dr. Fahlen. At the time Sutter terminated his privileges, he had two patients in the hospital under his care and treatment, both of them severely ill. One of them, Michael Banks, was a dialysis patient with kidney failure who was in the intensive care unit with severe multi-system problems which endangered his life. When Sutter terminated Dr. Fahlen's privileges, he was forced to stop giving Mr. Banks medical care, even though he was Mr. Banks' nephrologist and most familiar with his kidney problems and treatment. The second patient, Robert Martinez, was hospitalized with a case of bacterial pneumonia. Because Mr. Martinez is a kidney transplant recipient, he is highly susceptible to both common and rare infections which could cause his death if not treated appropriately. Dr. Fahlen admitted Mr. Martinez to the hospital and at the time of the admission he was the only physician caring for Mr. Martinez. When Sutter terminated Dr. Fahlen's privileges, he was forced to stop taking care of Mr. Martinez, even though he had admitted him; he was the physician most familiar with his history, disease, care and treatment; and Mr. Martinez wanted Dr. Fahlen to be his physician during the hospitalization. It was completely unnecessary for Sutter to terminate Dr. Fahlen's privileges without advance notice while he had two patients in the hospital, given that there was no question about his competence. By taking that action, Sutter unnecessarily jeopardized the lives of both Mr. Banks and Mr. Martinez. (Decl. of Schear, Exh J, ¶¶ 10-11; and Exhs. K and L, Decls. of Banks and Martinez.)

Patient D.P. who has chronic kidney disease, has been a patient of Dr. Fahlen for three

years.[2] In August, 2011, he was admitted into MMC by his primary care physician. During that admission, Dr. Fahlen could not treat D.P. because of Sutter's termination of his privileges. D.P. was seen by another nephrologist who placed a stent in D.P.'s kidney, a procedure with no proven benefit and significant risk. As a result of complications from his surgeries, D.P.'s condition deteriorated and he had to be admitted to the Intensive Care Unit. He was in the hospital at least 14 days and required multiple blood transfusions. D.P.'s health and safety were adversely impacted by Sutter's termination of Dr. Fahlen's privileges. (Decl. of Schear, Exh. J, ¶ 7.)

Patient J.V. was Dr. Fahlen's patient for about two years. She was admitted to MMC by her primary care physician following a stroke in July, 2011. Dr. Fahlen was unable to treat J.V. and she ultimately died of colitis that was probably caused by the administration of antibiotics to J.V. Dr. Fahlen's inability to provide treatment, advice and support to the patient and her family during this patient's admission at MMC, because of his lack of privileges, adversely impacted the patient's care during the hospitalization. (Decl. of Schear, Exh. J, ¶ 8.)

Jackie Price is a 66 year old patient with chronic kidney disease that Dr. Fahlen has been managing medically without putting the patient on dialysis. Because Dr. Fahlen has been able to manage Ms. Price without dialysis, the patient has been more comfortable, since dialysis is a difficult procedure to endure, especially for long periods of time. In addition, avoiding dialysis also prevents the potential side effects of dialysis which include pain, bleeding, infection, significantly worsened quality of life with high rates of depression, heart attack, stroke and death. In May, 2011, another physician admitted Ms. Price to MMC. The nephrologist assigned to her case at MMC, who had no prior relationship with Ms. Price, tried to persuade her to go on dialysis (which is highly reimbursed by Medicare) even though dialysis was not indicated. The son of Ms. Price called Dr. Fahlen, who advised him that dialysis did not appear indicated based on the patient's condition. Ms. Price and her son declined the dialysis treatment. After she was discharged from MMC, she returned to Dr. Fahlen's care and has been able to avoid dialysis for

[2] Fictitious initials are used to protect the confidentiality of "D.P." and "J.V.", because Dr. Fahlen has not yet obtained consent to use their names in public documents. The other patients described herein have consented to the use of their names and medical conditions.

the three months following her admission to MMC. This patient was able to avoid significant harm only because the patient refused the recommendation of the nephrologist provided by MMC. (Decl. of Schear, Exh. J, ¶ 9; Exh. M, Decl. of Price.)

The termination of Dr. Fahlen's privileges at MMC threatens the lives of all of his patients, because any of them might be taken to MMC in an emergency or admitted to MMC by another physician, where they will be seen by nephrologists without a prior relationship with the patient, who are unfamiliar with the patients' conditions and histories, and who are sometimes less competent than Dr. Fahlen. The longer Dr. Fahlen is unable to practice at MMC, the more endangered will be the health and lives of his patients. (Decl. of Schear, Exh. J, ¶ 12.)

Procedural Delays Which Have Already Occurred in this Case:

On March 9, 2011, two months after the decision by Sutter's Board to terminate Dr. Fahlen's privileges, he filed this action against Defendants pursuant to Health and Safety Code section 1278.5, which authorizes a whistleblower physician to pursue a claim for reinstatement and damages for retaliatory actions taken by a health care entities and their employees. Since then, Defendants have taken multiple actions which have delayed the trial court proceedings:

1. Defendants requested a two week continuance of their time to respond to the complaint, to which Plaintiff agreed as a professional courtesy.

2. On April 26, 2011, Defendants demurred to the complaint on the ground that Dr. Fahlen was required to first obtain a writ of mandate overturning Sutter's decision terminating his privileges, before filing a suit pursuant to Health and Safety Code section 1278.5. Defendants did not demur to Dr. Fahlen's Fourth Cause of Action on statute of limitations grounds at that time. The Superior Court overruled the demurrer on June 30, 2011.

3. On May 9, 2011, Defendants filed the anti-SLAPP motion at issue in this appeal. As a result of Defendants' motion, Plaintiff's discovery was automatically stayed. The Superior Court denied the anti-SLAPP motion on the grounds that the decision to take away Dr. Fahlen's privileges was not protected activity and that Dr. Fahlen had established a prima facie case for the challenged causes of action in any event. Pursuant to Code of Civil Procedure sec. 425.16, subd. g, the discovery stay was automatically lifted upon the filing of the Notice of Entry of Order on

the Anti-SLAPP motion.

4. On July 8, 2011, Defendants refused to provide any discovery responsive to Plaintiff's First Request for Production of Documents and First Set of Interrogatories, which had been served on April 5, 2011. Defendants asserted that they were not obligated to provide discovery due to their intention to appeal the denial of their anti-SLAPP motion. Plaintiff then brought a motion to compel discovery which was filed on July 19, 2011. The motion was set for hearing on August 24, 2011.

5. On July 26, 2011, Defendants filed their Notice of Appeal in this matter. They then used the pending appeal as their primary ground for opposing Plaintiff's Motion to Compel Discovery. On or about August 2, 2011, they also filed a motion for a protective order prohibiting Plaintiff from undertaking discovery on the anti-SLAPP causes of action based on the same theory.

6. On August 23, 2011, the day before the hearing on Plaintiff's Motion to Compel, Defendants filed a motion for judgment on the pleadings on Plaintiff's fourth cause of action on a statute of limitations ground. On August 24, 2011, at the hearing on Plaintiff's Motion to Compel Discovery and Defendants' Motion for a Protective Order, Defendants argued that the hearing should be continued to the same date as their Motion for Judgment on the Pleadings. The Superior Court then agreed to continue the hearing on the Motion to Compel and on the Motion for Protective Order to September 20, 2011. If Defendants' Motion for a Protective Order and Motion for Judgment on the Pleadings are granted, Plaintiff will not receive any discovery until this appeal is completed. Even if Plaintiff's motion to compel discovery is granted, Plaintiff will not receive any discovery from Defendants before October, 2011, six months after Dr. Fahlen's discovery requests were served.

According to the Court of Appeal's opinion in *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 1003, an appeal takes 19 to 26 months, whatever its lack of merit. Therefore, if this motion to expedite is not granted, Dr. Fahlen will be denied his right to treat and care for his patients at MMC for more than two years, significantly endangering his patients who are admitted to MMC.

ARGUMENT

Dr. Fahlen and other physicians have a fundamental and vested protected property right to practice their profession and cannot fully exercise that right without access to hospitals. (*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 824.) Nonetheless, under California's current system of peer review, Sutter can prevent the reinstatement of Dr. Fahlen's privileges for years by using procedural maneuvers such as Defendants' pending appeal of the denial of an anti-SLAPP motion, in order to prevent a judicial decision on the merits of its actions. It has now been seven months since Sutter terminated Dr. Fahlen's privileges without valid legal grounds for doing so, resulting in danger and damage to Dr. Fahlen's patients admitted to MMC. Despite filing his lawsuit in March, 2011, Dr. Fahlen is hardly out of the box in terms of pursuing this lawsuit, as a result of Defendants' various motions and this appeal, as described above.

Dr. Fahlen's problem is not unique. Health Care systems and their attorneys have learned that they can effectively get rid of physicians they don't want with impunity, because even if they eventually lose in court, it will take years and years (and the expenditure of large amounts of legal resources) for the physician to regain his privileges. The ongoing litigation in this Appellate District between Brenton Smith and Adventist Health Care System/West is one example of a hospital's ability to prevent a physician from maintaining hospital privileges despite years of successful litigation by the physician. Dr. Smith was first summarily suspended in 2002 by an affiliate of Adventist Health Care system. Selma Community Hospital, an Adventist hospital, terminated his privileges in 2005 and it took him three years to have that decision reversed in the Court of Appeal. See *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478,1498-1499. However, even after winning in the Court of Appeal, the Selma Hospital continued to refuse to grant him privileges based on positions that were without any legal merit. Dr. Smith was required to obtain a preliminary injunction from the superior court in 2008 in order to regain his privileges and he had to litigate the merits of that preliminary injunction in another appeal. *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 734-735. Dr. Smith filed a civil suit for injunctive relief and damages in 2007. As here, the defendants filed an anti-SLAPP motion and appealed the denial of that motion. The defendants' appeal was not rejected by the

Court of Appeal until November 16, 2010. *Smith v. Adventists Health System/West* (2010) 190 Cal.App.4th 40, 47-49.) Dr. Smith is presumably still litigating in the superior court, nine years after his first summary suspension, six years after he lost his privileges, after at least four different published appellate decisions in his favor.

Although the number of published opinions in *Smith* may be unique, the ability of a health care system to delay for years a judicial determination on a denial of privileges is not unusual. In the recent case of *El-Attar v. Hollywood Presbyterian Medical Center* (August 19, 2011) 198 Cal.App.4th 664, the hospital unlawfully terminated Dr. El-Attar's privileges on September 8, 2006. He was not granted a new hearing by the Court of Appeal until August 19, 2011, almost five years later. In *Mileikowsky v. West Hills Hospital and Medical Center, supra,* 45 Cal.4th at 1266, the physician's JRC hearing was unlawfully terminated by the hearing officer on March 27, 2003. Dr. Mileikowsky was unable to obtain a decision granting him a new hearing until April 6, 2009, six years later.

Private health corporations have developed the ability to devastate or destroy a physician's career by using legal delay as a primary weapon. They can take away a physician's right to practice to medicine with impunity, because they know that time and legal resources are on their side. In the meantime, the patients of physicians whose privileges are wrongfully terminated suffer the consequences.

In this case, Dr. Fahlen's competence is unquestioned, he won his JRC hearing, and the termination of his privileges was unlawful under the hospital's own bylaws. Dr. Fahlen's patients face the prospect of injuries, unnecessary procedures, disability or death due to their inability to use him as their physician at Memorial Medical Center. The Court of Appeal should therefore expedite this appeal in order to reduce the damage to the health and safety of Dr. Fahlen's patients that is being caused by Defendants' actions.

Dated: September 9, 2011 Respectfully submitted,

Stephen D. Schear
Jenny Huang
Attorneys for Defendant Mark Fahlen, M.D.

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August 22, 2012

VIA E-MAIL to steveschear@gmail.com

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Re: *Fahlen v. Sutter Central Valley Hospitals, et al.*
Stanislaus County Superior Court Action No. 662696

Dear Mr. Schear:

It was a pleasure to speak with you yesterday. This will confirm that we have scheduled a conference call for Monday, August 27, 2012 at 11:00 a.m. to discuss the current status of Dr. Fahlen's state court action in light of the recent appellate court rulings, to review the status of the pleadings and outstanding discovery, and to reach an mutually-acceptable timeline for upcoming due dates in order to move this matter forward, while affording my colleague Lori Ferguson and me time to familiarize ourselves with this matter, given our substituting into the case as counsel this week. As mentioned, we have yet to receive the case files from Arent Fox, but we expect to receive them, or at least some of them, later this week.

The call-in number and password for the conference call are as follows:

Access Phone Number: (800) 214-0037

Access Code: 9955088

Thank you for your consideration. I look forward to speaking with you again on Monday.

Very truly yours,

Glenda M. Zarbock

cc: Lori C. Ferguson, Esq.

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August 30, 2012

VIA E-MAIL

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Jenny C. Huang, Esq.
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2831 Telegraph Avenue
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Re: *Fahlen v. Sutter Central Valley Hospitals, et al.*
Stanislaus County Superior Court Action No. 662696

Dear Counsel:

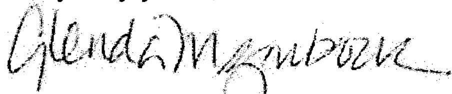
Since our telephone call with Mr. Schear this past Monday, I have spent more time assessing the status of Dr. Fahlen's state court action in light of the appellate court decision filed on August 14, 2012. Under California Rules of Court, rule 8.264(b)(1), the appellate court's decision is not final until 30 days after filing. Until that time has run, the decision may be modified. (Rule 8.264(c)(1).) Moreover, during this 30-day period and until the remittitur issues, the trial court lacks jurisdiction to act on the appellate court's decision. Accordingly, the appellate court's decision to lift the stay will not take effect until after the remittitur issues, which will not occur until September 13, 2012, at the earliest.

Based on the above-referenced authorities and the date on which plaintiff filed the first amended complaint, it appears defendants' response to the first amended complaint will be due 14 days after the remittitur issues, at which time the stay on the trial court proceedings will be lifted, absent a petition for Supreme Court review.

In light of the foregoing, it would be premature to propose dates on which defendants will respond to the first amended complaint and to the outstanding discovery. I suggest that we revisit these issues once the remittitur has issued. Until then, the stay of the trial court proceedings remains in effect.

If your analysis of these issues differs, please do not hesitate to forward any pertinent authorities and we would be happy to consider them. Thank you.

Very truly yours,



Glenda M. Zarbock

cc: Lori C. Ferguson, Esq.

PROOF OF SERVICE

Re: *Sutter Central Valley Hospitals, et al. v. Fahlen*, Case No. S205568

I, the undersigned, hereby declare:

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

2. On October 15, 2012, I served this document entitled **Answer to Petition for Review** by depositing a true and correct document of this document, with proper postage affixed for first class delivery, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed as follows:

HANSON BRIDGETT LLP Joseph M. Quinn Glenda Zarbock Lori Ferguson 425 Market Street, 26th Floor San Francisco, CA	Attorneys for Appellants/Defendants Sutter Central Valley Hospitals and Steve Mitchell
Court of Appeal of the State of CA Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
The Honorable Timothy Salter Department 22 Stanislaus County Superior Court 801 10th Street Modesto, CA 95353	Superior Court
Jana DuBois, VP Legal Counsel California Hospital Association 1215 K Street, Suite 800 Sacramento, CA 95814	Legal Counsel for Amicus Curiae for Appellant
Long X. Do California Medical Association 1201 J. Street, Suite 200 Sacramento, CA 95814	Legal Counsel for Amicus Curiae for Respondent

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

Dated: October 15, 2012
Oakland, California

SIGRID HERR