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13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 IN AND FOR THE COUNTY OF TULARE

16 KAWEAH DELTA HEALTH
CARE DISTRICT,

17 Plaintiff,

18 vs.

19
20 JOSEPH MOZA, M.D.,
and DOES 1 through V, Inclusive,

21 Defendant.
22

Case No. 99-186487

**DEFENDANT JOSEPH MOZA,
M.D.'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF HIS SPECIAL
MOTION TO STRIKE THE
COMPLAINT AS A SLAPP**

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1 INTRODUCTION

2 This case is a clear example of a SLAPP (Strategic Lawsuit Against Public Participation).
3 On its face, this lawsuit alleges that it is filed in retaliation for a defendant's attempts to obtain
4 action from hospital oversight authorities and which seeks a prior restraint to stop the defendant
5 from communicating with those authorities. It should be dismissed under the anti-SLAPP
6 statute, because it is based on conduct which is absolutely privileged.

7
8 I. HISTORY AND CONTEXT OF THE DISPUTE BETWEEN THE PARTIES

9 This SLAPP suit is brought by Kaweah Delta Hospital ("Kaweah"), a public hospital,
10 against Dr. Joseph Moza ("Dr. Moza"), in retaliation for Dr. Moza's complaints during the
11 Consolidated Accreditation and Licensure Survey ("CALs survey"). The CALs survey is
12 conducted by the state Department of Health Services ("DHS") which, pursuant to Health &
13 Safety Code § 1282, contracts with the Joint Commission on Accreditation of Healthcare
14 Organizations ("JCAHO") and the Institute for Medical Quality ("IMQ") to participate in the
15 survey. (Nelson Decl., ¶ 3.) As the DHS contract for the CALs survey states, "from the
16 standpoint of the State [the purpose of the CALs survey program] is to provide information to
17 enable the State to determine whether the hospitals inspected are complying with the Health
18 Facilities Act and regulations thereunder." (Nelson Decl., ¶ 11; see also ¶¶ 6-26.)¹

19 Dr. Moza's complaints to the CALs survey related to Kaweah's handling of his
20 application for staff privileges at Kaweah. (Complaint, ¶¶ 16, 24, 30.) Dr. Moza's application
21 for staff privileges was denied even though he had an exceptional record as a surgeon: 174
22 major surgeries with no mortality and minimal morbidity. (Blaisdell Decl., ¶¶ 4-7.) Kaweah's
23 treatment of Dr. Moza has been so outrageous that leading surgeons in the country have
24 volunteered to help him *pro bono*. (Blaisdell Decl., ¶ 3; Antoine Decl., ¶ 25.) William
25 Blaisdell, a renowned surgeon, filed a statement, noting that the proceeding was like "witch
26

27 ¹ Defendant requests that this Court grant judicial notice, pursuant to Evidence Code
28 sections 452(c) and (h) and 453, of the three exhibits to the declaration of Kathleen Nelson: the
contract between DHS, JCAHO, and IMQ; JCAHO standards; and CMA's CALs criteria.

1 hunting" and that the meritlessness of the allegations had "destroyed the credibility of [Dr.
2 Moza's] accusers." (Blaisdell Decl., ¶ 12.) JCAHO has issued to Kaweah a "type 1"
3 recommendation rating in the credentialing area, meaning that the hospital must correct its errors
4 in the area of credentialing. (Antoine Decl., ¶ 23 and Exhibit P thereto; on the meaning of a type
5 1 recommendation, see Ex. B to Nelson Decl., AC-21.)

6 The consequences of a refusal to grant staff privileges in California are very severe.² Dr.
7 Moza's career is being ruined, since he cannot operate at Kaweah, the local public hospital, and
8 he is being refused staff privileges at additional hospitals. (Moza Decl., ¶ 12.) Kaweah has now
9 filed this SLAPP to further drain Dr. Moza's resources and to punish him for his complaints
10 during the CALS survey.

11 12 **II. DR. MOZA'S ACTIONS ARE COVERED BY THE CALIFORNIA ANTI-SLAPP 13 LAW.**

14 **A. The California Anti-SLAPP Law Was Enacted to Protect the Fundamental 15 Constitutional Rights of Petition and Speech and Is to Be Construed Broadly.**

16 In response to the disturbing increase in meritless lawsuits brought "to chill the valid
17 exercise of the constitutional rights of freedom of speech and petition for the redress of
18 grievances," in 1992 the Legislature overwhelmingly enacted California's pioneering anti-
19 SLAPP law, Code of Civil Procedure section 425.16,³ to protect against these SLAPPs, Strategic

20
21 ² California courts have long recognized that "It is common knowledge ... that in these
22 modern times a surgeon or physician who is not permitted to practice in a hospital is, as a
23 practical matter, denied his right to fully practice his profession, the staff privilege being, in
24 effect, equivalent to a special license." (*Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 866-
25 867, quoting *Wyatt v. Tahoe Forest Hospital District* (1959) 174 Cal.App.2d 709.)

26 A doctor is entered into a database. (See Business & Professions Code § 805.) Every
27 subsequent hospital to which the doctor applies is required to consult the database and therefore
28 is informed about the averse status of the doctor. (*Id.*) The result is that a doctor loses staff
privileges or is never granted staff privileges ad seriatim at more and more hospitals, ruining the
doctor's career forever. (Moza Decl., ¶ 12.)

³ Statutory section references herein are to the Code of Civil Procedure, unless
otherwise indicated.

1 Lawsuits Against Public Participation.⁴

2 To invoke the protection of the anti-SLAPP statute, a defendant must merely make a
3 prima facie showing that section 425.16 applies, by showing that the plaintiff's causes of action
4 arise from defendant's acts in furtherance of his or her right of petition and/or right of free
5 speech in connection with a public issue. (§ 425.16, subd. (b)(1);⁵ *Wilcox v. Superior Court*
6 (1994) 27 Cal.App.4th 809, 819-821.)

7 In 1997, the Legislature unanimously amended the statute to expressly require that it be
8 "construed broadly." (Stats. 1997, ch. 271, § 1.) In response, the Supreme Court has directed
9 that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a
10 manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" (*Briggs v. Eden*
11 *Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior*
12 *Court* (1996) 49 Cal.App.4th 1170, 1176.)

13 **B. The Allegations of the Complaint.**

14 On the face of the complaint, Dr. Moza is being sued for his petition and speech which is
15 covered under the anti-SLAPP law. The complaint alleges that:

- 16 • On or about September 25, 1998, and November 6, 1998, Dr. Moza "disclosed ...
17 confidential Medical Staff peer review information to the Joint Commission for the
18 Accreditation of Healthcare Organizations ('JCAHO') in an improper attempt to circumvent the
19 hearing and appeal process provided for in the medical staff bylaws and required by Section
20

21 ⁴ Subdivision (a) of section 425.16 provides: "The Legislature finds and declares that
22 there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of
23 the constitutional rights of freedom of speech and petition for the redress of grievances. The
24 Legislature finds and declares that it is in the public interest to encourage continued participation
25 in matters of public significance, and that this participation should not be chilled through abuse
of the judicial process. To this end, this section shall be construed broadly."

26 ⁵ Subdivision (b) (1) provides: "A cause of action against a person arising from any act of
27 that person in furtherance of the person's right of petition or free speech under the United States
28 or California Constitution in connection with a public issue shall be subject to a special motion
to strike, unless the court determines that the plaintiff has established that there is a probability
that the plaintiff will prevail on the claim."

1 809." (Complaint, ¶ 9.) The confidential information which Dr. Moza allegedly disclosed to
2 JCAHO consisted of "certain credentials committee, medical executive committee, and
3 department of surgery meeting minutes and peer review reports." (*Id.*, ¶ 24.)

4 • On or about September 25, 1998, Dr. Moza sent a letter to JCAHO in which he stated
5 among other things, that he has "a very serious problem with Kaweah," that "the Medical Staff
6 abusing its authority" because he is "a competitor," that he is "suspicious of the whole process,
7 and that his "case cries out for outside investigation." (*Id.*, ¶ 15.)

8 • On or about October 6, 1998, Dr. Moza sent a letter to the Institute of Medical Quality
9 (IMQ) of the California Medical Association (CMA) in which he stated his belief that proctorin
10 at Kaweah was "being used politically to exclude and screen out competitors." (*Id.*, ¶ 16; see
11 also ¶ 30.)⁶

12 Finally, the complaint alleges that, by engaging in the above activity, Dr. Moza defamed
13 "Kaweah's integrity and business practices, specifically its medical staff hearing process," and
14 attempted "to disrupt Kaweah's medical staff hearing practice by wrongfully involving outside
15 agencies in same." (*Id.*, ¶ 30.)

16 C. The Anti-SLAPP Statute Applies to this Lawsuit.

17 Subdivision (e) contains illustrations of acts covered under this statute:

18 (e) As used in this section, "act in furtherance of a person's right of petition or free
19 speech under the United States or California Constitution in connection with a public
20 issue" includes: (1) any written or oral statement or writing made before a legislative,
21 executive, or judicial proceeding, or any other official proceeding authorized by law; (2)
22 any written or oral statement or writing made in connection with an issue under
23 consideration or review by a legislative, executive, or judicial body, or any other official
24 proceeding authorized by law; (3) any written or oral statement or writing made in a place
25 open to the public or a public forum in connection with an issue of public interest; (4) or
26 any other conduct in furtherance of the exercise of the constitutional right of petition or
27
28

⁶ The first allegation, that Dr. Moza disclosed confidential information to JCAHO, is
24 contained expressly in the first and third causes of action, and is incorporated in the other two by
25 reference. (Complaint, ¶¶ 9, 24, 13, 21, and 29-30.) The second allegation, regarding Dr.
26 Moza's letter to JCAHO of September 25, 1998, is contained in the second cause of action, and
27 is incorporated by reference in the third and fourth. (*Id.*, ¶¶ 15, 21, and 29-30.) The third
28 allegation, regarding Dr. Moza's letter to IMQ of October 6, 1998, is also contained in the
second cause of action and incorporated by reference in the third and fourth. (*Id.*, ¶¶ 16, 21, 29-
30.)

1 the constitutional right of free speech in connection with a public issue or an issue of
2 public interest.

3 As discussed below, Dr. Moza's alleged communications are covered by at least three of these
4 subdivisions: (e)(1), (e)(2), and (e)(4).

5 **1. Dr. Moza's Alleged Communications Were Made before an Official
6 Proceeding Authorized by Law, and Are Covered Under Subdivision
7 (e)(1).**

8 Kaweah's lawsuit is covered by the anti-SLAPP law because all of the causes of action
9 arise from Dr. Moza's alleged statements "made before ... any other official proceeding
10 authorized by law," as provided in subdivision (e)(1) of the anti-SLAPP law.

11 In this case, there are two official proceedings. First, there is Kaweah's administrative
12 hearing regarding Dr. Moza's application for staff privileges at Kaweah. (Complaint, ¶¶ 5, 7-9.)
13 Dr. Moza's alleged communications were made to achieve the objects of that proceeding and
14 they have some connection or logical relation to it. (See *Silberg v. Anderson* (1990) 50 Cal.3d
15 205, 212.) (See Complaint, ¶¶ 8-9, 15-16.) As discussed below in Part III-A-2, such a public
16 hospital proceeding on a doctor's application for staff privileges is an "official proceeding
17 authorized by law" for purposes of Civil Code section 47, subdivision (b) (hereafter, section
18 47(b)). An official proceeding for purposes of section 47(b) is also an official proceeding for
19 purposes of the anti-SLAPP law. (*Briggs v. ECHO, supra*, at p. 1121.)

20 Second, there is the hospital accreditation and licensure process, conducted under the
21 state DHS contract with JCAHO and IMQ, pursuant to Health & Safety Code section 1282. As
22 discussed below in Part III-A-3, Dr. Moza's alleged communications to JCAHO and IMQ were
23 made in that process and thus were made in an "official proceeding authorized by law" for
24 purposes of section 47(b). As just noted, that means they were also made in an official
25 proceeding for purposes of the anti-SLAPP law.

26 **2. Dr. Moza's Alleged Communications Were Made in Connection With
27 An Issue Under Consideration or Review by an Official Proceeding
28 Authorized by Law, and Are Covered Under Subdivision (e)(2).**

Dr. Moza's alleged communications are also covered by subdivision (e) (2) of the anti-
SLAPP statute, as statements "made in connection with an issue under consideration or review

1 by ... any other official proceeding authorized by law." (Emphasis added.)

2 Dr. Moza's alleged communications were made in connection with issues under
3 consideration or review, in Kaweah's peer review proceeding, as well as in the
4 DHS/JCAHO/IMQ oversight of Kaweah, as discussed below in Part III-A-2 and -3. A statement
5 "in connection with" an official proceeding need not be a statement to the official proceeding.
6 (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 14-15; see also *Briggs, supra*, 19 Cal.4th at
7 pp. 1110, 1114-1117 [private telephone message covered under anti-SLAPP statute as relating to
8 issues under consideration or review in proceeding]; *Braun, supra*, 52 Cal.App.4th at p. 1046-
9 1048 [speech relating to issues under consideration in official proceeding covered under
10 statute].) Subdivision (e)(2) of the anti-SLAPP law covers communications made not just during
11 an official proceeding, but also those made preparatory to or in anticipation of such a proceeding
12 (*Dove Audio, supra*, 47 Cal.App.4th at p. 784), as well as those made in connection with it.
13 (*Lafayette Morehouse v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 855, 863.)

14 **3. Dr. Moza's Alleged Conduct Was Done in Furtherance of His**
15 **Constitutional Rights of Petition and of Speech in Connection with a**
Public Issue, and Are Covered under Subdivision (e)(4).

16 Dr. Moza's communications about Kaweah's administrative adjudication of the dispute
17 regarding his application for medical staff privileges, and his attempts to elicit investigation and
18 action from DHS, JCAHO and IMQ, also constitute "conduct in furtherance of the exercise of
19 the constitutional right of petition or of the constitutional right of free speech in connection with
20 a public issue or an issue of public interest," as provided in subdivision (e) (4) of the anti-SLAPP
21 law. Although a public issue is not necessary for subdivision (e)(4) to apply to petition-related
22 activity, the protection of public health and the interest in fair peer review are important public
23 issues or issues of public interest. (See *Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 890;
24 *Business & Professions Code* § 809(a); *Anton v. San Antonio Community Hospital* (1977) 19
25 Cal.3d 802, 823-825.)

1 **III. PLAINTIFF CANNOT ESTABLISH A PROBABILITY OF PREVAILING ON IT**
2 **CLAIMS.**

3 Once the defendant makes a prima facie showing that the lawsuit is covered by section
4 425.16, as Dr. Moza has, to defeat the special motion to strike the plaintiff must establish, by
5 competent admissible evidence within the personal knowledge of the declarant(s), that there is a
6 probability that the plaintiff will prevail on its claims. (*Wilcox v. Superior Court, supra*, 27
7 Cal.App.4th at pp. 819-821, 823-825, 828-830; *Church of Scientology v. Wollersheim* (1996) 42
8 Cal.App.4th 628, 653-655.) Plaintiff Kaweah can not do so.

9 **A. Defendant Moza's Alleged Communications Are Privileged under the Federal
and State Constitutions and Civil Code section 47(b).**

10 As discussed below, Dr. Moza's communications to JCAHO and IMQ were absolutely
11 privileged under the federal and state constitutions and Civil Code section 47(b). This case
12 involves not one but two acts of petitioning the government. Dr. Moza's act of petitioning
13 Kaweah, a public entity, for staff privileges, and his use of Kaweah's administrative process, is
14 the first. Second, Dr. Moza's alleged communications to IMQ and JCAHO were also acts of
15 petitioning the government.

16 **1. Dr. Moza's Alleged Communications Are Constitutionally Privileged
17 Petition Activity, under the First Amendment and the California
Constitution, Art. I, § 3.**

18 According to the United States Supreme Court, petition activity is constitutionally
19 protected by the First Amendment unless it was "'not genuinely aimed at procuring favorable
20 government action' at all." (*City of Columbia v. Omni Outdoor Advertising Inc.* (1991) 499 U.S.
21 365, 380.) Here there can be no doubt that Dr. Moza's intention behind his communications to
22 JCAHO and IMQ was to spur favorable action by these hospital oversight agencies. (Moza
23 Decl., ¶ 7.) Equally clear is Kaweah's attempt to silence Dr. Moza, most vividly illustrated by
24 the prior restraint requested in the form of an injunction to stop that petitioning activity.
25 (Complaint, Prayer ¶¶ 1C, 3E, & 4A.)

26 Similarly, the California Constitution provides that "The people have the right to ...
27 petition government for the redress of grievances." (Article I, § 3.) California's constitutional
28 protections for petition and speech are greater than those in the First Amendment. (*Robins v.*

1 *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910.) In California, petitioning statements
2 are constitutionally entitled to "absolute immunity" when in response to "statutory invitation for
3 public participation." (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 745.) Here, the
4 express invitation for public participation is a fundamental part of the CALS survey, which is
5 conducted by the Department of Health Services, JCAHO, and IMQ, pursuant to Health and
6 Safety Code section 1282. (Nelson Decl., ¶¶ 3, 23-26.)

7 **2. Dr. Moza's Alleged Communications Were Made in the Course of Staff**
8 **Privilege Proceedings of a Public Hospital and Are Absolutely**
9 **Privileged under Civil Code section 47(b).**

10 Civil Code section 47(b) provides in relevant part: "A privileged publication or broadcast
11 is one made: ... (3) in any other official proceeding authorized by law, or (4) in the initiation or
12 course of any other proceeding authorized by law and reviewable pursuant to Chapter 2
13 (commencing with Section 1084) of Title I of Part 3 of the Code of Civil Procedure..."

14 This section 47(b) privilege is absolute and it "applies to any publication required or
15 permitted by law in the course of" an official proceeding, "even though the publication is made
16 outside the courtroom" and no function of the official body or its officers is involved. The
17 communication must be made "to achieve the objects of the [proceeding]" and must "have some
18 connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.)
19 "The only cause of action not subject to the [§ 47(b)] privilege is malicious prosecution."
20 (*Financial Corporation of America v. Wilburn* (1987) 189 Cal.App.3d 764, 771.)

21 As discussed above, Dr. Moza's alleged communications were made in the course of staff
22 privilege proceedings of a public hospital. It is well established that these are official
23 proceedings authorized by law, for purposes of the litigation privilege in Civil Code section
24 47(b). (*Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 866-867.)

25 Kaweah is obligated to follow JCAHO standards regarding the staff privileges process.
26 (See Health & Safety Code § 32128(a)(2).) Thus, Dr. Moza's complaint to JCAHO about
27 Kaweah's staff privileges procedures, an effort to obtain a fair staff privileges process, has a
28 connection or logical relation to the staff privileges proceeding. (Moza Decl., ¶ 7.) Therefore,
Dr. Moza's complaints about Kaweah's staff privileges process to, and request for an

1 investigation by, JCAHO and IMQ are privileged under Civil Code section 47(b)(3) and (4).⁷

2 **3. Dr. Moza's Alleged Communications Were Made to JCAHO and IMQ,**
3 **Both Official Hospital Oversight Agencies, and Are Absolutely**
4 **Privileged under Civil Code section 47(b).**

5 The CALS survey and DHS/JCAHO/IMQ hospital oversight are official proceedings
6 authorized by law and communications made therein are absolutely privileged. (See *Braun v.*
7 *Bureau of State Audits* (1998) 67 Cal.App.4th 1382, 1388-1391 [confidential investigative audit
8 is an "official proceeding authorized by law" for purposes of Civil Code § 47(b)]; *Lebbos v.*
9 *State Bar of California* (1985) 165 Cal.App.3d 656, 668 [informal complaints to the State Bar
10 are part of "official proceedings" protected by Civil Code § 47(b): "any communication with an
11 official agency designed to prompt investigation by that agency is absolutely privileged."])

12 Dr. Moza's communications to JCAHO and IMQ were appropriately intended to invoke
13 their oversight responsibility with respect to Kaweah's peer review and hearing/appeal process.
14 (See Complaint, ¶¶ 9, 12, 15-16, 18, 20, 24; Moza Decl., ¶ 7.) The peer review proceeding of a
15 public hospital is governed by JCAHO standards.⁸ In fact, Dr. Moza's complaints apparently led
16 to JCAHO giving Kaweah a "type 1" recommendation in the area of credentialing performance.
17 (Antoine Decl., ¶ 23 and Exhibit P thereto; Nelson Decl., Ex. B, p. AC-21.) Therefore, Dr.
18 Moza's communications to JCAHO and IMQ were absolutely privileged under Civil Code
19 section 47(b)(3), as attempts to secure official action from DHS, JCAHO and IMQ. (*Dove*
20 *Audio v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 780 [letter soliciting support
21 for complaint to attorney general absolutely privileged].)
22

23 ⁷ Dr. Moza's communications are also privileged under Civil Code sections 47(c) and
24 43.8.

25 ⁸ JCAHO standards govern medical staff appointment, hearing, and appeal procedures,
26 and have the force of law. (See Health & Safety Code § 32128(a)(2) [hospital rules must
27 provide for appointment of medical staff as provided by JCAHO standards]; *Anton v. San*
28 *Antonio Community Hospital, supra*, 19 Cal.3d at pp. 818-820 & n. 18; see also Business &
Professions Code § 809.6(a) [parties in peer review proceedings are bound by any applicable
professional society or medical staff bylaws].)

1 **B. Plaintiff Cannot Show a Probability of Prevailing on Any of Its Causes of**
2 **Action.**

3 As discussed above, Dr. Moza's communications to JCAHO and IMQ are absolutely
4 privileged. In addition to and independent of that fundamental flaw in Kaweah's SLAPP,
5 Kaweah cannot show that it has a probability of prevailing on any of its individual causes of
6 action, as discussed below.

7 **1. Kaweah's Claim for Breach of Contract Has No Merit.**

8 The completely meritless nature of this lawsuit is underscored by the fact that Kaweah is
9 suing Dr. Moza for allegedly violating a bylaw which was drafted to expressly permit his
10 communications to IMQ and JCAHO.

11 **a. Kaweah's Bylaw 13.2-2 Permits Disclosure of Peer Review**
12 **Information to DHS, IMQ and JCAHO**

13 Bylaw 13.2-2, which Kaweah claims Dr. Moza violated by communicating with JCAHO
14 and IMQ (see Complaint, ¶¶ 9, 11), is taken verbatim from Bylaw 12.2-2 from the California
15 Medical Association (CMA) Model Medical Staff Bylaws. The CMA bylaw in question reads:

16 12.2-2 Breach of Confidentiality. Inasmuch as effective peer review and consideration
17 of the qualifications of Medical Staff members and applicants to perform specific
18 procedures must be based on free and candid discussions, any breach of confidentiality of
19 the discussions or deliberations of Medical Staff departments or committees, except in
20 conjunction with other hospital, professional society or licensing authority, is outside
21 appropriate standards of conduct for this Medical Staff and will be deemed disruptive to
22 the operations of the hospital. . . .

23 (Nelson Decl., ¶ 28; emphasis added.)

24 The key language for the purposes of this case is that underlined above, which permits
25 disclosure of peer review and other medical staff committee information to "other hospital,
26 professional society or licensing authority." IMQ and JCAHO, as "nonprofit professional
27 organizations," perform inspections of hospitals as described in Health & Safety Code section
28 1282. (Nelson Decl., ¶¶ 3, 11.)

 In fact, as explained in the declarations of Cedric Tealer, the Senior Policy Analyst for the
CMA, and Kathleen Nelson, the Chief Operating Officer at IMQ, this language in CMA's Model
Medical Staff Bylaws was intended to specifically permit disclosure to JCAHO and IMQ.

(Nelson Decl., ¶ 29; Tealer Decl., ¶ 4.)

1 Disclosure by physicians to DHS, JCAHO, and IMQ, is vitally necessary to preserve the
2 ability of those organization to perform their accreditation and licensing functions. As stated in
3 the Tealer and Nelson declarations, organizations like IMQ and JCAHO are staffed by trained
4 professionals with expertise in such matters, who are prepared to and have a duty to consider
5 reports of concerns about peer review and credentialing matters and to respond appropriately.
6 (Nelson Decl., ¶ 30.) Unless this Court interprets the bylaws to permit appropriate disclosure,
7 "[t]he ability of organizations like IMQ and JCAHO to function appropriately in such matters
8 would be severely jeopardized unless members of the medical staff, physicians and others are
9 able to communicate concerns to IMQ and JCAHO without fear of reprisal." (Nelson Decl., ¶
10 30; Tealer Decl., ¶ 5.) It is an important part of the CALS survey that these organizations
11 receive complaints from the public and staff members. (Nelson Decl., ¶¶ 23-25.) This Court
12 should interpret bylaw 12.2 to preserve the continued viability of the CALS survey and the
13 licensure and accreditation of California hospitals.

14 **b. Kaweah's Interpretation of Its Contract With Dr. Moza Violates**
15 **The Ethical Rules of The American Medical Association and the**
16 **California Medical Association**

17 Kaweah is not actually suing Dr. Moza directly for his alleged breach of the medical staff
18 bylaws, since such a cause of action can only be brought by the medical staff, not the hospital.
19 (See discussion below.) Kaweah is instead suing for breach of the consent and release form,
20 which it construes as a contract, which Dr. Moza signed with the hospital. (See Complaint, ¶5.)
21 That document provides in pertinent part that Dr. Moza agreed to be bound by the bylaws of the
22 medical staff and "with the principles of medical ethics of the American Medical Association."
23 (Ex. A to Complaint, ¶ 2.) The ethical rules and policies of the AMA are also binding upon
24 members of the CMA. (Tealer Decl., ¶ 6.)

25 Cedric Tealer, who interprets the ethical Code and ethical policies of the AMA for CMA,
26 because the AMA rules are binding on CMA (Tealer Decl., ¶ 1), has explained that "there is
27 nothing unethical about a physician reporting concerns regarding peer review or credentialing
28 matters to IMQ, JCAHO or DHS." (Tealer Decl., ¶ 6.) Tealer explains that "if anything, it
would be unethical to retaliate against a physician for making such a report." (*Id.*) IMQ also

1 states that it is unethical for a hospital to retaliate against a person who complains about a
2 hospital to IMQ or the CALS survey. (Nelson Decl., ¶ 26.) Accordingly, the contract upon
3 which Kaweah is allegedly suing Dr. Moza, properly interpreted, prohibits Kaweah's contract
4 cause of action.

5 c. **Kaweah's Interpretation of the Bylaw is Arbitrary, Capricious,
6 Illegal and Void as Against Public Policy.**

7 Kaweah's reading of the bylaws should also be rejected by this Court because it is
8 arbitrary, capricious, illegal and void against public policy. As noted above, California public
9 hospitals have a duty to conform with JCAHO's standards, which have the force of law for
10 public hospitals in California. (*Anton, supra*, 19 Cal.3d at p. 820, n. 18; Health and Safety Code
11 § 32128.) The Legislature has specifically authorized, and the State of California has contracted
12 for, the CALS survey, which evaluates whether the medical staff's bylaw are being fairly and
13 uniformly applied. (Nelson Decl., ¶¶ 3, 6-22, and Ex. A thereto.) As part of the survey,
14 JCAHO, DHS and IMQ have a right to review all medical staff documents and conduct
15 interviews with the medical staff and the public. (Nelson Decl., ¶¶ 13, 21.)

16 The CALS survey requires hospitals to facilitate those public interviews. (Nelson Decl.,
17 ¶ 23 and AC 15-17 of Ex. B thereto.) A hospital that fails to facilitate the public
18 interview/complaint process or which misrepresents pertinent facts may be penalized in the
19 accreditation process. (Nelson Decl., ¶ 23 and AC 1-16 of Ex. B thereto.)

20 Doctors should be encouraged to report concerns regarding medical care, or unethical
21 conduct in peer review, to appropriate authorities and to participate in the CALS survey. Such
22 reports are privileged under California law because they encourage quality patient care. (Civil
23 Code § 47 (b); *Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 941-943.) To facilitate
24 disclosure, Civil Code section 56.10(2) specifically authorizes physicians to disclose medical
25 records to accreditation authorities, so long as patient identifying information (*e.g.*, name,
26 telephone number) is not disclosed. "All contracts which have for their object, directly or
27 indirectly, to exempt anyone from responsibility for his own . . . willful injury to the person or
28 property of another, or violation of law. . . are against the policy of the law." (Civil Code §

1 1668.) Accordingly, this Court should reject Kaweah's unreasonable interpretation of the
2 bylaws as void and against public policy.

3 **2. Kaweah's Claim for Misappropriation of Trade Secrets Has No Merit**

4 Kaweah's trade secret cause of action fails for three additional reasons. First, Kaweah's
5 trade secret claim is based upon its contract claim. (Complaint, ¶ 24.) The contract claim, as
6 discussed above, fails by its own terms and is void as against public policy. Second, Kaweah
7 alleges its trade secret consists of "its committee meeting agendas, minutes and notes and peer
8 review reports." (Complaint, ¶ 22.) However, these materials are not trade secrets since they do
9 not derive "independent actual or potential economic value from not being generally known to
10 the public or to other persons who can obtain economic value from its disclosure or use." (Civil
11 Code §3426.1(d).) Third, Kaweah does not own the materials it claims are trade secrets.
12 Hospitals have a dual structure consisting of an administrative governing body and the organized
13 medical staff. (See *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224.) Medical staff
14 documents are not the property of the hospital -- they are the property of the medical staff, which
15 is an independent entity by law. (*Santa Rosa Memorial Hospital v. Superior Court* (1985) 174
16 Cal.App.3d 711, 724 [drawing distinction between information protected as peer review
17 information in hospital's file], cited with approval in *Alexander, supra*, 5 Cal.4th at p. 1224, n.
18 8.) The contract Dr. Moza signed with the hospital does not convert the medical staff materials
19 into the property of the hospital.

20 **3. Kaweah's Claim for Trade Libel Has No Merit.**

21 Kaweah's trade libel claim, its second cause of action, is without merit because Dr.
22 Moza's allegedly defamatory statements are either:

23 • true (Dr. Moza does have a serious problem with Kaweah, and he is suspicious of the
24 whole process; compare Moza Decl., ¶ 14, with Complaint, ¶ 15), which eliminates a key
25 element of the tort of trade libel, falsity (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547,
26 572) or

27 • protected opinion (that the medical staff is abusing its authority because he is a
28 competitor, that his case cries out for outside investigation, and that proctoring at Kaweah was

1 being used politically to exclude and screen out competitors). (Complaint, ¶¶ 15-16.) (See
2 *Dong v. Board of Trustees of Leland Stanford Junior University* (1987) 191 Cal.App.3d 1572,
3 1585-86 [letter accusing doctor of fraud and deception and calling for a peer group examination
4 of his behavior was protected opinion].)

5 Further, it is unclear how plaintiff can show actionable intentional disparagement of the
6 quality of property, which results in special damages in the form of pecuniary loss, required
7 elements for this tort. (*Witkin, Summary of California Law, Torts*, § 573, p. 668, citing Rest.2d,
8 Torts §§ 626; *Guess, Inc. v. Superior Court* (1986) 176 Cal.App.3d 473, 479.)

9 **4. Kaweah's Claim for Unfair Competition Has No Merit.**

10 Kaweah's fourth cause of action for unfair trade practices is completely derivative of the
11 facts alleged in the first three causes of action. It alleges no new facts. (See Complaint, ¶¶ 29-
12 34.) Therefore, it is as meritless as the first three causes of action on which it is based.

13 **5. All of Kaweah's Claims Fail Because of Kaweah's Failure To Exhaust
14 Its Judicial and Administrative Remedies**

15 Finally, all of Kaweah's claims fail because of Kaweah's failure to exhaust its judicial
16 and administrative remedies. Kaweah's only possible claim of injury from Dr. Moza's alleged
17 discussions with JCAHO and IMQ are that Kaweah received a type 1 recommendation in the
18 area of credentialing performance in response to Dr. Moza's complaint in the CALS Survey.
19 (See Antoine Decl., ¶ 23 and Exhibit F thereto; Nelson Decl., Ex. B, p. AC-21.) However,
20 Kaweah makes no allegation that it has sought to appeal that determination or to have it set aside
21 through the administrative processes provided by JCAHO, the State Department of Health
22 Services, or even the Superior Court. Without exhausting its appropriate remedies, Kaweah
23 cannot sue. (See Health & Safety Code § 1280.5; see also *Westlake Community Hospital v.*
24 *Superior Court* (1976) 17 Cal.3d 465, 474-478.)

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1 **CONCLUSION**

2 For the reasons set forth above, defendant requests that this Court grant his special motion
3 to strike and dismiss this SLAPP.

4 Dated: July 16, 1999

Respectfully submitted,

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