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8

FILED
LOS ANGELES SUPERIOR COURT

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES
11

12 GIL N. MILEIKOWSKY, M.D.

13 Petitioner,

14 v.

15 WEST HILLS HOSPITAL MEDICAL
CENTER, an unknown entity; MEDICAL
16 STAFF of WEST HILLS HOSPITAL
MEDICAL CENTER; an unknown entity;
17 HOSPITAL CORPORATION OF AMERICA,
also known as HCA, INC., a Tennessee
18 corporation; JOHN B. HARWELL; JAMES R.
LAHANA, and DOES 1 through 100, inclusive,
19

20 Respondents.
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) CASE NO. BS 091943
)
)

) Petition filed: August 19, 2004
)
)

) **RESPONDENTS' OPPOSITION TO**
) **PETITIONER'S PETITION FOR WRIT OF**
) **MANDATE**

) [Respondents' Objections to and Motion to Strike
) Portions of the Declaration, Reply Declaration and
) Supplemental Declaration of Petitioner Gil N.
) Mileikowsky; Second Request for Judicial Notice;
) Declaration of Marion McWilliams; Declaration of
) Irene Faust, M.D. In Support of Respondents'
) Opposition to Petitioner's Petition for Writ of
) Mandate; Declaration of Devin M. Senelick, Esq.;
) Evidentiary Appendix; Appendix of Non-
) California Authorities Cited in Opposition to
) Petitioner's Petition for Writ of Mandate; Second
) Request for Judicial Notice filed concurrently
) herewith]

Date: March 23, 2005
Time: 9:30 a.m.
Department: 85

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1 **I. PRELIMINARY STATEMENT**

2 More than three years after losing his privileges, Petitioner Gil Mileikowsky, M.D. ("Petitioner")
3 suddenly filed a mandate petition in the hope of regaining staff privileges at West Hills Hospital &
4 Medical Center and Medical Staff of West Hills Hospital & Medical Center erroneously sued as West
5 Hills Hospital Medical Center, an Unknown Entity; Medical Staff of West Hills Hospital Medical
6 Center ("West Hills" or the "Hospital") without having to submit to peer review.¹ Petitioner complains
7 that he was unlawfully deprived of his right to practice medicine at West Hills in violation of California
8 Business & Professions Code ("B&P Code") §809.2, *et seq.*, for four reasons: First, Petitioner contends
9 that the termination of his Judicial Review Committee ("JRC") hearing by a hearing officer was not
10 authorized by law because B&P Code §809.2, *et seq.*, guarantees Petitioner a peer review hearing and
11 written decision by the JRC. Second, Petitioner claims the decision was unlawful because termination
12 was ordered by a biased hearing officer who should have been disqualified. Third, Petitioner contends
13 that termination of the JRC hearing for his refusal to produce documents concerning Cedars-Sinai
14 Medical Center's ("Cedars-Sinai") summary suspension and revocation of his privileges, including
15 without limitation the Notice of Charges, hearing transcripts, statements of decision, (the "Cedars-Sinai
16 Documents") was not supported by substantial evidence. Petitioner argues that by executing a written
17 authorization for Cedars-Sinai to produce these documents, he insulated himself from termination for
18 refusing to make the documents available for the JRC hearing. Finally, Petitioner claims that his
19 privileges should be restored pending a final administrative decision because B&P Code §809.2, *et seq.*,
20 extends them automatically.

21 Each of Petitioner's arguments is without merit. Both the JRC hearing officer and the
22 Governing Board have authority to terminate the JRC hearing. Indeed, B&P Code §809.2(d) itself
23 recognizes that authority. The decision to terminate the hearing was appropriate because Petitioner's
24 misconduct (a) prevented the JRC from evaluating Petitioner's fitness to practice medicine, (b) impaired

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26
27 ¹ The Petition appears to be an after thought to other litigation spawned by a strategy of
28 disrupting and avoiding peer review. (See Respondents' concurrently filed Second Request for Judicial
Notice (hereafter "JN") of Petitioner's appeal from Judge Yaffe's decision affirming a hearing officer's
termination of a judicial review committee hearing in *Mileikowsky v. Tenet Healthsystem, Encino-
Tarzana Reg'l Med. Ctr.*, L.A.S.C. Case No. BS 079131, appealed under 2nd Civil No. B168705. (JN
Exhibits 7 through 13, inclusive.)

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1 with the Medical Staff's presentation of its case to the JRC, and (c) prevented a fair JRC hearing from
2 being conducted. As a result of Petitioner's decision to withhold the Cedars-Sinai Documents,
3 Petitioner never met the applicant's burden of demonstrating his competency. For that reason the
4 Hospital's Governing Board was compelled to deny Petitioner's application for privileges under
5 applicable law, regardless of the outcome of any JRC hearing. For these reasons, the decision to
6 terminate the JRC hearing is supported by substantial evidence.

7 Petitioner failed to meet his burden of proving that the John D. Harwell, Esq, who served as the
8 hearing officer for the JRC proceeding ("Mr. Harwell" or the "Hearing Officer"), was biased and should
9 have been disqualified. Both the *Haas v. County of San Bernardino* (27 Cal. 4th 1017 (2001)) and
10 *Yaqub v. Salinas Valley Memorial Healthcare System* (122 Cal. App. 4th 474 (2004)) cases are readily
11 distinguishable from the case at hand in important particulars. As a result they are not controlling and
12 their reasoning is inapposite. Petitioner's evidence was not sufficient to prove bias on any other basis.

13 Petitioner's position regarding the Cedars-Sinai Documents is disingenuous. Petitioner was in
14 possession of the Cedars-Sinai Documents and chose to withhold them based on a specious claim of
15 privilege. Despite the Medical Staff's written request for these documents, delivered to Cedars-Sinai,
16 with Petitioner's signed authorization to release them, the documents were not provided. Not only was
17 Petitioner so advised, but because Petitioner's fitness to practice could not be evaluated without the
18 requested documents, Petitioner received written notice from the Medical Staff that (1) privileges would
19 not be granted without the Cedars-Sinai Documents; (2) Cedars-Sinai had not provided them; and (3)
20 it was Petitioner's responsibility to produce them. There is no evidence that Petitioner made any effort
21 to arrange for Cedars-Sinai to deliver the requested documents to the Medical Staff or West Hills. To
22 the contrary, Petitioner continued to withhold the copies of the Cedars-Sinai Documents, which were
23 in his possession, even after the Hearing Officer repeatedly issued written orders to Petitioner to
24 produce them. The Hearing Officer advised Petitioner by letter on more than one occasion that the JRC
25 hearing could and would be terminated for his failure to produce the Cedars-Sinai Documents. Only
26 after Petitioner failed to respond to the Hearing Officer's letter of March 18, 2003 soliciting discussion
27 of appropriate sanctions and indicating the Hearing Officer's inclination to terminate Petitioner's JRC
28 committee appeal as the Medical Staff requested, did the Hearing Officer issue a 12 page written

1 decision terminating the JRC hearing. (RC² 283, CH 03625- 45; copy attached hereto as Exhibit "RB
2 1" for the Court's convenience.)

3 Petitioner's challenge to the Hearing Officer's decision is misguided. The decision Petitioner
4 must overturn is the decision of the governing body of the Hospital, which was based on its independent
5 review of the evidence, and made after giving Petitioner a hearing on the issue. (RC 334, CH 04269-72;
6 copy attached as Exhibit "RB 2" hereto.) Each of Petitioner's arguments is flawed by this failure to
7 recognize that the governing body made the decision and that it had the power and authority to do so.
8 That authority is the starting point of any analysis.

9 Petitioner's request to have "courtesy staff" privileges for gynecology restored pending a final
10 decision on his application is untimely and moot because the governing body of the Hospital has made
11 a final administrative decision to deny Petitioner privileges.

12 The Petition also is subject to other legal and equitable defenses. The Medical Staff's decision
13 to deny Petitioner's application for privileges was based on several grounds. Relief should be denied
14 because Petitioner has failed to challenge, let alone overturn, at least two of three bases on which
15 privileges were terminated or denied.

16 The Petition is also subject to complete defense based on Petitioner's conduct. Petitioner
17 acquiesced and did not challenge his loss of privileges for *more than three years*. The relief sought
18 would force the Hospital to violate state regulations that require staff membership and privileges to be
19 granted only if a physician has demonstrated *current* clinical competence to the Medical Staff and
20 require that current clinical competence be demonstrated at least every two years. Petitioner has not
21 undergone peer review since 2001, and he last demonstrated his competence in 1999. Both the Hospital
22 and the public were prejudiced by Petitioner's delay since 2001, because they lost the protection of
23 *current* peer review. If the relief requested is granted, circumventing the regulatory requirement for
24

25 ² All citations are to a combined chronological record, created at the Court's request bearing
26 Bates numbers CH 00001 through CH 04566. (the "CH Documents"; *see* Respondents' Evidentiary
27 Appendix, Declaration of Devin M. Senelick, Esq. filed concurrently herewith) In addition, the CH
28 documents cited in this Brief were compiled into a reduced chronological record and assigned an "RC"
exhibit number, ranging from RC 1 to RC 358 ("the "RC Documents") In each citation herein,
preceding the CH-series Bates numbers is a reference to the "RC" number. Respondents have provided
the Court with both CH Documents (the seven volume chronological record in CH Bates number order)
and the RC Documents (the reduced three volume chronological record). (*See* Respondents'
Evidentiary Appendix.)

1 peer review at least every two years, the Hospital will stand exposed to liability both for regulatory non-
2 compliance and for jeopardizing patient safety. Moreover, the public will be subjected to the care of
3 a physician whose competence is in question and who has not demonstrated his *current* competence to
4 the satisfaction of his peers on the Medical Staff.

5 **II. SUMMARY OF RELEVANT FACTS**

6 At all relevant times herein, West Hills has been and is an acute care hospital licensed by the
7 State of California, accredited by the Joint Commission on Accreditation of Healthcare Organizations
8 ("JCAHO") and which participates in the Medicare program. (McWilliams Decl., ¶¶ 11-13.) To
9 maintain its license, accreditation and participation in the Medicare program, West Hills abides by the
10 licensing regulation of Title 22 of the Code of California Regulations ("Title 22") and the JCAHO
11 accreditation requirements which mandate that peer review of *current* competence occur *before* staff
12 privileges are granted or extended and that staff privileges be granted for no more than a two year term.
13 (Faust Dec., at ¶3; McWilliams Decl at ¶¶ 11-13; Title 22 (JN Exhibit 1), JCAHO Hospital
14 Accreditation Standards (JN Exhibits 4 and 5), Medicare Conditions of Participation and Medicare
15 Interpretive Guideline (JN Exhibit 2).)

16 **A. Petitioner's Application for Privileges**

17 On or about November 22, 2000, Petitioner, a physician who had "courtesy staff" gynecology
18 ("GYN") privileges at West Hills, sought obstetrics ("OB") privileges. (RC 27, CH 00293-94.) While
19 the request for OB privileges were being processed, Petitioner sought temporary OB privileges to
20 deliver two babies.³ *Id.* Petitioner then pressed for temporary OB privileges to deliver eight more
21 babies. (RC 299, CH 03728-3844 at 003747.) In processing Petitioner's request for temporary
22 privileges, on November 27, 2000 the Medical Staff learned that OB privileges were being requested
23 because Petitioner's privileges at Encino-Tarzana Regional Medical Center ("Encino-Tarzana") had
24 been summarily suspended. (RC 28, CH 00295-319 at 00304.) On November 29, 2000, the Medical
25 Staff also was provided an B&P Code §805 report regarding the summary suspension and revocation

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27 ³ Physicians who practice at the Hospital regularly are Active Staff. (West Hills Medical Staff
28 Bylaws, RC 22, CH 00151-202 ("Bylaws"), §4.2-1(c).) "Courtesy Staff" is granted to physicians who
are on active staff at other hospitals and use West Hills infrequently and active staff membership at
another hospital is a requirement for "Courtesy Staff" membership. (Bylaws §4.3-1(a).)

1 of Petitioner's privileges at Cedars-Sinai. (RC 40, CH 00367-384 at 00378-379; JN Exhibit 6.)

2 On November 29, 2000, The Medical Staff unequivocally informed Petitioner that " your
3 application for temporary privileges has not been approved . . . should you decide to seek additional
4 privileges at West Hills Hospital and Medical Center, you will be asked to provide complete details
5 including *all supporting documents concerning actions taken against you at Cedars-Sinai Medical*
6 *Center and Encino Tarzana Hospital.*" (Emphasis supplied.) (RC 39, CH 00365-6; RC 299 CH 03728-
7 844 at CH 03744-5.)

8 Petitioner responded by telling the Medical Staff that he was not authorized by Cedars-Sinai to
9 provide copies of the Cedar-Sinai Documents to The Medical Staff. (RC 40, CH 00367-84 at CH 00369
10 and 00374-6.) There followed a series of communications in which Petitioner tried to get the Medical
11 Staff to conduct its review without the Cedars-Sinai Documents.⁴

12 Banking on Cedars-Sinai's preference for secrecy, Petitioner signed a consent form authorizing
13 the Cedars-Sinai Documents be provided to the West Hills Medical Staff, which the Medical Staff
14 forwarded to Cedars-Sinai on December 12, 2000 with a direct request for the Cedars-Sinai Documents.
15 (RC 330, CH 04208-12.) On December 13, 2000, in correspondence from the Medical Staff's counsel,
16 Mr. Lahana, to Petitioner concerning the status of his request that OB privileges be granted, Petitioner
17 was informed that temporary privileges would not be granted, that the direct request had been submitted
18 and that Medical Staff committees would act on his request when the Cedars-Sinai Documents were
19 received. (RC 299, CH 03728-44 at CH 03753; RC 65, CH 01004.) No response was received from
20 Cedars-Sinai, and on February 1, 2001 the Medical Staff informed Petitioner that Cedars-Sinai had not
21 responded to its direct request for the Cedars-Sinai Documents and that the direct request did not relieve
22 Petitioner of his obligation to provide the Cedars-Sinai Documents to the Medical Staff in support of
23 his application for OB privileges. (RC 70, CH 01661-3 at CH 01661.) In this same letter, Petitioner
24 was also reminded of his obligation to update the Medical Staff on the actions involving his privileges
25 at other hospitals ten days of any change.

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27
28 ⁴ Petitioner insisted that the Medical Staff be satisfied with his explanation of events and
patient charts he would provide. *See, e.g.,* RC 40, CH 00367-384; RC 44, CH 00551-3 at CH 00552;
RC 47, CH 00558-64 at 00559-61; RC 49, CH 00572-4; RC 50, CH 00575-86; RC 54, CH 00595-607;
RC 57, CH 00610-2; RC 62, CH 01000-1; RC 63, CH 01002.

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1 On May 18, 2001, as the two year term of Petitioner's GYN privileges were ending, Petitioner
2 filled out, signed and delivered to the Medical Staff office at West Hills the customary application form
3 requesting renewal of his GYN privileges for the 2001-2003 term with the addition of new privileges
4 for OB which he had previously requested (the "Application Form"). (RC 85, CH 01883-94.) In the
5 Application Form, as on prior occasions, Petitioner agreed to abide and be governed by the Bylaws.
6 Petitioner's Application Form only disclosed that there were adverse actions taken against his privileges
7 at Cedars-Sinai and Encino-Tarzana. Petitioner omitted to mention that his privileges had been
8 suspended by Century City Hospital on November 7, 2000 with a recommendation that they be revoked.
9 (RC 26, CH 00274-92.) He also did not explain why he was no longer on the medical staff of Valley
10 Presbyterian Hospital. (RC 11, CH 00136.)

11 Throughout the course of events which follow, Petitioner's application remained incomplete
12 because, among other reasons, Petitioner chose to withhold his copies of the Cedars-Sinai Documents
13 and did not make arrangements for Cedars-Sinai to submit them to the Medical Staff.⁵

14 The Medical Staff found itself in a position where Petitioner's application/re-application for
15 privileges was incomplete, Petitioner had lied on his Application Form, and Petitioner had failed to
16 meet his burden of producing information requested by the Medical Staff to address its concerns about
17 why Petitioner's privileges had been revoked or suspended at three other hospitals – Cedars-Sinai,
18 Encino-Tarzana and Century City.⁶ In addition, during the period Petitioner's application was pending,
19 Petitioner engaged in abusive conduct, both as an OB patient's guest and during a GYN procedure in
20 the West Hills operating room, which was the subject of several incident reports. (RC 131, CH 02075-
21 7; RC 132, CH 02078; RC 133, CH 02079; RC 134, CH 02080; RC 135, CH 02081.) Like incidents
22

23 ⁵ Although no longer a member of Cedar-Sinai's medical staff, Petitioner withheld documents
24 which were in his possession claiming that Cedars-Sinai had not authorized him to provide them to
25 West Hills' Medical Staff. (RC 40, CH 00367-84 at CH 00368-73.) Petitioner offered an April 16,
26 1999 letter to his counsel, Paul Hittelman, Esq., regarding Cedars-Sinai's refusal to give Petitioner
27 blanket authorization to release information as a ruse for claiming that protection under Evidence Code
28 §1157 might be lost. (RC 5, CH 00123-4.) Any information provided to the West Hills Medical Staff
by Petitioner or by Cedars-Sinai to conduct peer review was clearly protected by §1157. Petitioner thus
pursued a strategy of gaining privileges without meeting the Applicant's Burden under §6.4-1 of the
Bylaws.

⁶ Petitioner had also failed to disclosed each adverse action to the Medical Staff in writing
within ten days as §6.2(g) of the Bylaws required.

1 reported from Encino-Tarzana and Century City, Petitioner's conduct interfered with patient care and
2 safety at West Hills.⁷ Petitioner's 1999-2001 privileges were extended while the Medical Staff
3 conducted the investigation and peer review necessary to act on Petitioner's application for 2001-2003
4 privileges. After receiving adverse departmental and committee recommendations, on April 23, 2002
5 the Medical Executive Committee voted to recommend Petitioner's Application be denied. (RC 76,
6 CH 01705-7; RC 137, CH 02133-5.)

7 By letter of April 24, 2002 (the "Notice of Charges"), the Medical Staff informed Petitioner that
8 (a) his privileges would not be further extended beyond April 5, 2002 (the last extension granted
9 Petitioner), (b) that the Medical Staff recommended his application/reapplication be denied, giving
10 reasons therefore, and (c) that Petitioner could request a hearing to challenge the adverse
11 recommendation.⁸ (RC 138, CH 02136-42.) On May 23, 2002, Petitioner requested a hearing regarding
12 the adverse recommendation of the Medical Staff. (RC 141, CH 02155-6.) Shortly thereafter, pursuant
13 to the Bylaws, the Hospital appointed Mr. Harwell to act as the hearing officer and a hearing panel was
14 appointed. (RC 161, CH 2244 - 02403 at CH 02268 -70 (Voire Dire Transcript at 25:19 -21 and pp26:
15 21- 27: 12)

16 During the JRC hearing "discovery" process, on July 17, 2002, Petitioner's misrepresented to
17 Hearing Officer Harwell that "I have consistently disclosed everything I had to disclose to the WHHMC
18 and other Hospitals over the years." (RC 185, CH 02727-42 at CH 02730-31.) On July 17, 2002, the
19 Medical Staff responded that Petitioner had not done so and once again requested that Petitioner provide
20 the Cedars-Sinai Documents and certain other information Petitioner had failed to provide. (RC 191,
21 CH 02766-7.) The July 17 letter also informed Petitioner that failure to comply with the request by July
22 28, 2002 would result in the Notice of Charges being amended for his failure to cooperate. On July 22,
23 2002, the Medical Staff sent Petitioner yet another letter recapping Petitioner's failure to produce the
24 Cedars-Sinai Documents and asking the Hearing Officer to order the production of same by July 28,

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26 ⁷ The Second Amended Notice of Charges against Petitioner by Century City Hospital was not
27 provided prior to the creation of the chronological set of documents. It is included in the Administrative
Record as Bates numbers P 004132-47.

28 ⁸ Section 6.4-1 of the Bylaws provided for automatic revocation of Petitioner's privileges for
failing to provide the Cedars-Sinai documents (i.e. failure to meet applicant's burden) and §6.5-9 of the
Bylaws provided that privileges would not continue to be extended in these circumstances.

1 2002. (RC 299, CH 03728-844 at CH 03772.)

2 On July 29, 2002 Petitioner asked for additional time, until August 5, 2002, to respond. (RC
3 200, CH 02800-6 at CH 02800.) The Medical Staff accommodated Petitioner's request and waited until
4 August 21, 2002 before amending the Notice of Charges.⁹ (RC 207, CH 02828-31.) On September 3,
5 2002, Petitioner finally responded to, as he stated, "the latest correspondence from West Hills", but only
6 to request until September 10, 2002 to address the issues. (RC 299, CH 03728-44 at CH 03779-80.)

7 On October 3, 2002, the Medical Staff informed Mr. Harwell that Petitioner had not produced
8 the documents requested, which included the Cedars-Sinai Documents, and had not delivered his
9 promised response; the Hearing Officer was again requested to order the documents produced. (RC
10 299, CH 03728-844 at CH 03781.) On November 27, 2002, the Medical Staff again informed Mr.
11 Harwell that Petitioner had still not been produced the Cedars-Sinai Documents and other information
12 requested and that no response had been received from Petitioner, this time asking for an order that the
13 hearing be dismissed.¹⁰ (RC 220, CH 02886-8 at CH 02888.)

14 In a January 12, 2003 letter to Mr. Harwell requesting he terminate the proceeding, Petitioner
15 claimed he met his obligation by signing an authorization for Cedars-Sinai to produce the documents
16 and that the Medical Staff was responsible for Cedars-Sinai's failure to do so. (RC 234, CH 03020-
17 03083.) The Medical Staff responded on January 14, 2003 by pointing out "[Petitioner] ignores the fact
18 that he or his counsel have in their possession the very documents being sought and that the burden is
19 on [Petitioner] to produce that information not upon Cedars." (RC 299, CH 03728-844 at CH 03800-1.)
20 There followed a further interchange of 40 letters,¹¹ in which Petitioner and the Medical Staff both

22 ⁹ The Medical Staff agreed to allow Petitioner until August 12, 2002 to respond. Meanwhile,
23 the MEC approved Amendment of the Notice of Charges in case petitioner's response was
unsatisfactory (RC 299, CH 03728-844; at CH 03775; RC 203, CH 02811-2.)

24 ¹⁰ Petitioner apparently claimed that he did not receive this letter, but in all events, it was
forwarded to him by Mr. Harwell on December 6, 2002. (RC 220, CH 028868.)

25 ¹¹ Petitioner sent 31 letters, many lengthy. The Medical Staff sent six letters and the Hearing
26 Officer sent three letters. (See Letters from Petitioner: RC 235, CH 03058-99; RC 236, CH 03100-52;
27 RC 238, CH 03157-65; RC 239, CH 03166-218; RC 240, CH 03219-40; RC 241, CH 03241-59; RC
242, CH 03260; RC 243, CH 03261; RC 244, CH 03262; RC 245, CH 03263; RC 246, CH 03264; RC
247, CH 03265-321; RC 248, CH 03322-5; RC 249, CH 03326-7; RC 250, CH 03328-66; RC 253, CH
28 03373-87; RC 255, CH 03392-406; RC 256, CH 03407-26; RC 257, CH 03427-31; RC 258, CH 03432-
55; RC 259, CH 03456; RC 260, CH 03457-62; RC 262, CH 03464-74; RC 264, CH 03478-80; RC 265,
CH 03481-93; RC 266, CH 03494-506; RC 267, CH 03507; RC 269, CH 03510-5; RC 270, CH 03516-

1 asked for terminating sanctions.¹² On January 29, 2002, Mr. Harwell ordered that the hearing be
2 continued based on Petitioner's failure to produce the Cedars-Sinai Documents. (RC 299, CH 03728-
3 844 at CH 03813-4.) The same day, Petitioner responded stating, "As long as Mr. Harwell does not rule
4 on this matter, I have no obligation to provide you any additional information regarding Cedars-Sinai
5 Medical Center." (RC 299, CH 03728-844 at CH 03815-22.) On February 5, 2003 (to the extent he
6 had not done so before) Mr. Harwell ruled:

7 "ORDERED that Dr. Mileikowsky provide the MEC (or its designated representative)
8 access to inspect and copy (at their cost) documents from Cedars-Sinai relevant to the
9 charge that Cedars-Sinai summarily suspended Dr. Mileikowsky's privileges and
10 membership and further that failing the provision of these documents, terminating
11 sanctions will be imposed."

12 (RC 299, CH 03728-844 at CH 03823-38.) On February 14, 2003, The Medical Staff notified Mr.
13 Harwell that the Cedars-Sinai Documents have not been produced and asked that the promised
14 termination order be issued if they are not received by February 28, 2003. (RC 299, CH 03728-844 at
15 CH 03839.)

16 On March 18, 2003, Mr. Harwell issued another letter to the parties and orders. (RC 299,
17 CH 03728-844 at CH 03840-41.) The letter noted that following the order quoted above, Petitioner
18 "responded by facsimile and telephone message that he was occupied between February 5, 2003 and
19 March 14, 2003 in other matters and would 'respond' to these orders after March 14, 2003. To date no
20 response has been received." (*Id.*) The Hearing Officer ordered Petitioner to arrange for production
21 of the Cedar-Sinai Documents:

22 _____
23 26; RC 272, CH 03530-2; RC 273, CH 03533-40; Letters from the Medical Staff: RC 237, CH 03153-6;
24 RC 252, CH 03370-2; RC 254, CH 03388-91; RC 261, CH 03463; RC 268, CH 03508-9; RC 271, CH
03527-9; Letters from Mr. Harwell: RC 251, CH 03367-9; RC 263, CH 03475-7; RC 274, CH 03541-
55.)

25 ¹² On January 14, 2002, the Medical Staff again requested that Petitioner's appeal be dismissed
26 for his failure and refusal to produce the Cedars-Sinai Documents. (RC 299, CH 03728-844 at CH
03800.) On July 15, 2002, and again on January 17, 2003, Petitioner requested that Hearing Officer
27 Harwell issue terminating sanctions for the Medical Staff's alleged failure to provide all of the
documents he requested. (RC 299, CH 03728-844 at CH 02674-5; RC 234, CH 03020-57; RC 239, CH
03166-3218 at CH 03195-200, respectively.) On July 16, 2002, Mr. Harwell acknowledged that
28 terminating sanctions were available, but that they were not warranted under the circumstance. (RC
299, CH 03728-844 at CH 03765.)

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1 “within seven days of this letter (e.g., by March 24, 2003) or terminating sanctions will
2 be ordered. The nature of those sanctions is still undecided and discussion will be
3 sought from the parties, but at the moment, the hearing officer is inclined to issue
4 terminating sanctions including the dismissal of [Petitioner’s] challenge the MEC’s
5 recommendation to deny his re-application. . . . Please do not hesitate to contact me (in
6 writing only and with a copy to the other party) if I can be of any assistance.” (*Id.*)
7 On March 26, 2003, the Medical Staff informed Mr. Harwell that Petitioner had not arranged

8 for the Cedars-Sinai Documents to be produced and requested that Petitioner’s appeal of the Medical
9 Staff’s recommendation to deny privileges be dismissed. (RC 299, CH 03728-844 at CH 03842.) The
10 Hearing Officer Mr. Harwell, issued a 12 page (plus an enclosure) order terminating the hearing on
11 March 27, 2003. (RC 283, CH 03625-45; Exhibit RB 1 annexed hereto.)

12 **B. Governing Board Hearing**

13 Petitioner then appealed to the Governing Board. (RC 285, CH 03655-66.) As is customary
14 in these matters, the documentary evidence was made available to the Governing Board in advance of
15 the hearing by providing access to the Medical Staff’s files. (RC 290, CH 03677-8; *see also*,
16 McWilliams Decl., ¶9.) The Governing Board also accepted briefs from the parties.¹³ (RC 327,
17 CH 04158-202 (Petitioner’s Briefs); RC 299, CH 03728-844 (Medical Staff’s Brief); RC 289, CH
18 03674-6 and RC 290, CH 03677-8 (Procedural Correspondence from Ralph Helton).) The Governing
19 Board hearing was held before a Court Reporter on July 22, 2003 and August 19, 2003. (RC 326,
20 CH 04037-157 and RC 335, CH 04273-9, respectively.) As the transcript demonstrates, after oral
21 argument, evidence tardily submitted by Petitioner and evidence provided by the Medical Staff in
22 response to a specific Governing Board request (showing that the Medical Staff had requested the
23 Cedars-Sinai Documents directly from Cedars-Sinai and provided Cedars-Sinai with Petitioner’s written
24 consent to provide them) was accepted. (RC 335, CH 04273-9.)

25 Based on its own independent review, the Governing Board upheld the termination of the
26 Judicial Review Hearing. (RC 334, CH 04269-72.) The Governing Board found that Petitioner had
27 received the opportunity for a hearing but had prevented a fair hearing from taking place by refusing
28 to comply with the Hearing Officer’s order to produce the Cedars-Sinai Documents.

29 ¹³ Petitioner’s brief and evidence were accepted by the Governing Board even though they
30 were not submitted until well after the deadline for submission. (RC 335, CH 04273-9.)

1 At no time since the Governing Board's decision has Petitioner provided the Medical Staff with
2 the Cedars-Sinai Documents or submit to any further peer review by the West Hills Medical Staff.
3 Petitioner has not practiced at West Hills since April 2001 nor has he applied again for staff privileges.
4 It was not until August 19, 2004, a full year after the Governing Board's decision, that Petitioner first
5 challenged the Governing Board's decision by filing the instant action. Petitioner requested by
6 application for preliminary injunction filed on September 3, 2004 the restoration of privileges, which
7 he lost more than three years earlier, on April 5, 2001. Petitioner's request was denied after hearing on
8 October 7, 2004.

9 **C. Prejudice to Respondents and Potential Harm to Public**

10 In April of 2001 had Petitioner moved promptly and obtained a Court order restoring his
11 privileges for the 2001-2003 term, Petitioner would have faced peer review again to extend privileges
12 for the 2003-2005 term. (Faust Decl., ¶12.) Additionally, Petitioner's exercise of privileges during the
13 2001-2003 term would have provided the Medical Staff information to use in assessing Petitioner's
14 current competence. (Faust Decl., ¶13.) Because Petitioner has not practiced at the Hospital since April
15 2001, the Medical Staff has not conducted any peer review of Petitioner for four years. (McWilliams
16 Decl., ¶15.) The information which the Medical Staff has concerning Petitioner is stale, incomplete and
17 not verified by independent third party sources. (Faust Decl., ¶13.) Petitioner has not treated any
18 patients at West Hills since at least April 2001, and the Hospital no longer has any information with
19 respect to his current competence. (Faust Decl., ¶13; McWilliams Decl., ¶15.) Petitioner never
20 provided sufficient information to satisfy the Medical Staff about his loss of privileges at Cedars-Sinai,
21 Encino-Tarzana and Century City and did not explain the loss of privileges at Valley Presbyterian
22 Hospital. Century City Hospital is now closed and information concerning Petitioner's suspension and
23 loss of privileges there is no longer available from that independent, third party source. A peer review
24 evaluation of Petitioner's *current* fitness to practice could not be conducted from the information
25 currently in the Medical Staff and/or West Hills' possession. (Faust Decl., ¶13.)

26 **III. THE STANDARD OF REVIEW**

27 Regardless of whether mandate is sought under *Code of Civil Procedure* §1085 ("§1085") or
28 §1094.5 ("§1094.5"), Petitioner bears the burden of proving that, as he claims, there was a prejudicial

1 abuse of discretion. The decision of the Governing Board comes before the reviewing court with a
2 "strong presumption of correctness." *Fukuda v. City of Angels*, 20 Cal. 4th 805, 817 (1999). The
3 findings of the Governing Board must be affirmed unless they are "so lacking in evidentiary support
4 as to render them unreasonable." *Gaenslen v. Board of Dirs.*, 185 Cal.App.3d 563, 572 (1985).

5 Under §1094.5, "in cases arising from private hospital boards . . . abuse of discretion is
6 established if the court determines that the findings are not supported by substantial evidence in light
7 of the whole record." §1094.5(d); *see also, Gaenslen, supra*, at 574; *Anton v. San Antonio Community*
8 *Hosp. (Anton II)*, 132 Cal. App. 3d 638, 654 (1982). Specifically, Petitioner must show: (a) the hospital
9 failed to proceed in the manner required by law; (b) the decision is not supported by the findings; or (c)
10 the findings are not supported by evidence. *See* §§1094.5 (b) and (d); *Rosenblit v. Superior Court*, 231
11 Cal.App.3d 1434, 1443 (1991).

12 For a writ of mandate under §1085, Petitioner must first show that: "(1) the respondent has a
13 clear, present, and usually ministerial duty to act; and (2) the petitioner has a clear, present, and
14 beneficial right to performance of that duty." *Unnamed Physician v. Board of Trustees of Saint Agnes*
15 *Med. Ctr.*, 93 Cal. App. 4th 607, 618 (2001). Then, Petitioner must prove that "[a] the administrative
16 body exceeded its proper authority, [b] used unfair procedures, or [c] acted in a manner that was
17 arbitrary, capricious or entirely lacking in evidentiary support" (internal quotations omitted). *Weinberg*
18 *v. Cedars-Sinai Med. Ctr.*, 119 Cal.App.4th 1098, 1108-1109 (2004).

19 **IV. THE PETITION SHOULD BE DENIED BECAUSE IT WAS WITHIN THE**
20 **GOVERNING BOARD'S JURISDICTION AND AUTHORITY TO DETERMINE**
21 **WHETHER A JUDICIAL REVIEW HEARING PROVIDED A FAIR PROCEDURE**
22 **AND WHETHER TO TERMINATE THE HEARING AND/OR DENY PRIVILEGES**
23 **FOR PETITIONER'S FAILURE TO PRODUCE THE CEDARS-SINAI DOCUMENTS.**

24 The Governing Board is vested with the ultimate authority to determine who practices at the
25 Hospital. *See Weinberg, supra*, at 1109-10. The scope and breadth of the Governing Board's
26 jurisdiction over who practices at the Hospital is illustrated by *Hongsathavij v. Queen of*
27 *Angels/Hollywood Presbyterian Med. Ctr.*, 62 Cal. App. 4th 1123 (1998). *Hongsathavij* holds that a
28 hospital's governing body may properly override a medical staff judicial review committee's
recommendation to reappoint a physician. As the Court explained, because the governing body has
ultimate authority over who may practice at the hospital, it may deny the physician privileges based on

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1 its own evaluation of the seriousness of the physician's misconduct.

2 Consistent with the Governing Board's ultimate authority over the granting and denial of
3 privileges, B&P Code §809.4(b) recognizes the Governing Board's appellate jurisdiction to review
4 whatever occurs during a JRC hearing governed by B&P Code §809.2, *et seq.*

5 A. **Both the Governing Board and The Hearing Officer Had The Power and Authority**
6 **To Terminate The JRC Hearing For Petitioner's Repeated Refusal to Produce the**
Cedars-Sinai Documents.

7 1. **Express Statutory and Bylaws Authority.**

8 Petitioner offers no authority to support his argument that a Hearing Officer is without authority
9 to terminate a JRC hearing for violation of his orders. If Petitioner's argument that *only* a continuance
10 can be granted were accepted, a physician could prevent a hearing from ever being completed by
11 repeatedly refusing to produce documents.¹⁴ All the while the physician would remain on staff because
12 a final decision could never be reached.¹⁵ The only way to compel the hearing to proceed would be for
13 the Medical Staff to forego whatever the physician had chosen to withhold, forcing the JRC to make
14 decisions without all of the relevant information.

15 B&P Code §809.2 makes it clear that the legislature did not intend for either litigant, rather than
16 a neutral Hearing Officer, to determine what documents the other litigant obtained. B&P Code
17 §809.2(d) provides in pertinent part: "The arbitrator or presiding officer shall consider and rule upon
18 any request for access to information, *and may impose any safeguards the protection of the peer review*
19 *process and justice requires.*" [emphasis added]

20 The Bylaws provide in pertinent part at §10.3-2, entitled Prehearing Procedure:

- 21 "b. Both member and the Medical Staff shall have the right to inspect and copy, at
22 their own expense and as soon as is practicable, any documentary information
in the possession or under the control of the other which is relevant to the charge
against the member. . . .
- 23 "c. The arbitrator, Hearing Officer or other presiding officer shall consider and rule
24 upon any request for access to information *and may impose any safeguards for*
the protection of the peer review process and justice requires." [emphasis
25 added]

26 _____

27 ¹⁴ Section 809.2 allows a continuance, it does not suggest or imply that a continuance is the
28 only remedy.

¹⁵ Repeated continuances only encourage and reward physician misconduct.

1 Thus, there can be no argument about the authority of the Hearing Officer to order production of the
2 Cedars-Sinai Documents or as to the Hearing Officer's authority to make such orders in connection
3 therewith (safeguards) as the protection of the peer review process and justice require.

4 2. Implied Authority

5 Even without express authority, there is substantial case authority for the Hearing Officer's
6 actions. Power may be inferred as necessary to achieve the mission with which the administrative
7 agency or its Hearing Officer was charged.¹⁶ In upholding dismissal by an administrative law judge
8 ("ALJ") of a widow's annuity claim for failure to abide by the ALJ's orders, one Court noted "[a]
9 petitioner who ignores an order of the [presiding officer] does so at his or her peril. Litigants before
10 the Board . . . are obligated to respect the Board, its procedures, including deadlines, and the orders of
11 the Board's judges." *Mendoza v. Merit Systems Protection Board*, 966 F.2d 650, 653 (Fed. Cir., 1992);
12 cited with approval in *Cheguina v. Merit Systems Protection Board*, 69 F.3d 1143 (Fed. Cir. 1995).

13 B. Termination of the JRC Hearing Was a Proper Exercise of The Power and 14 Responsibility Vested in the Hearing Officer and in the Governing Board to Safeguard the Peer Review Process.

15 Both the Hearing Officer and the Governing Board were mindful of the importance of peer
16 review in protecting the public safety and regulating the quality of the medical care patients receive at
17 the Hospital.¹⁷ When Petitioner repeatedly refused to comply with the Medical Staff's request and the
18 Hearing Officer's orders to produce the Cedars-Sinai Documents, Petitioner did more than just violate
19 the Medical Staff's right to a fair peer review hearing. Petitioner prevented the JRC from performing
20 its very purpose and function – evaluating Petitioner's fitness to practice. The only reason for a JRC
21 hearing evaporated and the Governing Board was compelled to deny Petitioner privileges. (See
22 discussion at Section V, *infra*.)

23
24
25 ¹⁶ See *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. 2d 287, 302-303 (1943) ("the
26 authority of an administrative . . . officer . . . to adopt reasonable rules and regulations which are
27 deemed necessary to the due and efficient exercise of the powers expressly granted cannot be
28 questioned. This authority is implied from the power granted"). See also, *Laurell v. Bush*, 17 Cal. App.
409, 415-416 (1911); *Shoults v. Alderson*, 55 Cal. App. 527, 553 (1921).

¹⁷ "Peer review, fairly conducted is essential to preserving the highest standards of medical
practice. Peer review which is not conducted fairly results in harm both to patients and healing arts
practitioners by limiting access to care." B&P Code §§ 809 (a)(3) and (4).

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1 C. **If there Had Been A Flaw In the Selection of the Hearing Officer and/or A Flaw**
2 **In His Termination of the Hearing, Neither Flaw Would Be Material or Prejudicial**
3 **Because The Governing Board Exercised Its Ultimate Authority To Terminate the**
4 **Hearing Based on Its Own Independent Judgment.**

5 Since the Governing Board's decision was based on its own independent review of the facts and
6 circumstances, if there was an error in the selection of the Hearing Officer or in the Hearing Officer's
7 decision it is immaterial. The Governing Board's decision, based on its independent assessment of the
8 evidence, trumps whatever any JRC or Hearing Officer decided or might decide. *See Weinberg, supra*,
9 at 1109-10; *Hongsathavij, supra*, at 1135-7.

10 V. **THE GOVERNING BOARD'S DECISION CANNOT BE OVERTURNED UNDER CCP**
11 **§1094.5 BECAUSE THE BOARD ACTED WITHIN ITS JURISDICTION, DID NOT**
12 **ABUSE ITS DISCRETION AND PROVIDED PETITIONER A FAIR HEARING**
13 **REGARDING HIS FAILURE TO PRODUCE THE CEDARS-SINAI DOCUMENTS.**

14 Review under §1094.5 is used to test whether an administrative agency has properly performed
15 its function in a matter requiring a hearing.¹⁸ Section §1094.5(b) states:

16 "The inquiry in such a case shall extend to the questions whether the respondent has
17 proceeded without, or in excess of jurisdiction; whether there was a fair trial; and
18 whether there was any prejudicial abuse of discretion. Abuse of discretion is established
19 if the respondent has not proceeded in the manner required by law, the order or decision
20 is not supported by the findings, or the findings are not supported by the evidence."

21 Having already demonstrated that both the Hearing Officer and the Governing Board acted within his/its
22 jurisdiction, we focus first on the "abuse of discretion" test and then on the "fair trial" test.¹⁹
23 Petitioner's argument that Respondents did not proceed in the manner required by law because the
24 Hearing Officer should have been disqualified for bias is addressed separately in Section VI, *infra*.

25 A. **There Was No Prejudicial Abuse of Discretion.**

26 In cases arising from private hospital boards, "abuse of discretion is established if the court
27 determines that the findings are not supported by substantial evidence in light of the whole record."
28 §1094.5(d); *see also, Gaenslen, supra*, at 574; *Anton II, supra*, at 654. The administrative decision is

¹⁸ Administrative mandamus under §1094.5 lies when (1) a hearing is required by law to be given, (2) evidence is required to be taken, and (3) the determination of the facts is the responsibility of the administrative agency. *See Winkelman v. City of Tiburon*, 32 Cal. App. 3d 834 (1973); *Wilson v. Los Angeles County Civil Serv. Comm'n*, 103 Cal. App. 2d 426 (1951).

¹⁹ If review were under §1085, the points made in Sections IV, V and VI also dispose of any claim that "[a] the administrative body exceeded its proper authority, [b] used unfair procedures, or [c] acted in a manner that was arbitrary, capricious or entirely lacking in evidentiary support" (internal quotations omitted). *See Evidence Code* §§ 664, 550 and 606; *see also Weinberg, supra*, at 1108-9.

1 entitled to a "strong presumption of correctness" and may only be overturned if the decision was not
2 supported by substantial evidence. *See Fukuda, supra*, at 812; *Unterthiner v. Desert Hosp. Dist. of*
3 *Palm Springs*, 33 Cal. 3d 285, 294-295 (1983); §1094.5(c).

4 The purpose of the Judicial Review Hearing is to provide the Governing Board with the JRC's
5 evaluation of Petitioner's fitness to practice, including its evaluation of events leading to suspension,
6 restriction, revocation, loss, termination and/or surrender of the physician's privileges at other hospitals.
7 The 805 Report filed by Cedars-Sinai with the State of California reported that Petitioner was
8 summarily suspended, which requires a finding that Petitioner engaged in conduct which immediately
9 endangered three patients. (RC 40, CH 00367-84 at CH 00378; also in JN Exhibit 6.) The 805 Report
10 goes on to state that Petitioner's privileges were then revoked for "medical incompetence."²⁰ Review
11 of the Cedars-Sinai Documents was therefore critical to evaluating Petitioner's fitness to practice
12 because they shed light on why Cedars-Sinai found that the physician had placed patients or others in
13 immediate danger of physical harm and the care rendered by Petitioner which Cedars-Sinai considered
14 "medical incompetence." These issues cannot be fully explored by the Medical Staff and by the JRC
15 based on the affected physician's explanation because it may be biased or inaccurate. Independent
16 verification of what transpired, typically through the records of the proceedings (such as all notices of
17 charges, hearing transcripts and statements of decision) and other information available from third
18 parties, is normally required. Otherwise the Medical Staff and the JRC can be misled if the physician
19 involved does not give them a complete, reliable, honest and accurate version of events.

20 As discussed in detail in Section II (Statement of Relevant Facts), *supra*, and as demonstrated
21 by the briefs and evidence submitted to the Governing Board, at the Governing Board hearing (and
22 before the Hearing Officer), Petitioner admitted that the Cedars-Sinai Documents were in his in
23 possession, that they were repeatedly requested and repeatedly ordered produced and that Petitioner
24

25
26 ²⁰ The Section 805 and National Practitioner Data Bank reports are for summary suspension
27 and ultimately revocation of Petitioner's medical staff privileges by Cedars-Sinai and Encino-Tarzana
28 for at least five cases of incompetent medical care which endangered patients, including improper
delivery of one infant through improper delivery, and botched circumcision of another, and for
disruptive behavior. (Section 805 Report is JN Exhibit 6; the National Practitioner Data Bank report
is included in JN Exhibit 25.)

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1 repeatedly and deliberately disobeyed each order and refused to produce them.²¹ Thus there was
2 undisputed evidence which supported these specific findings of the Hearing Officer, which findings
3 were adopted by the Governing Board after its independent review of the evidence.

4 As the Hearing Officer recognized in his written decision, and as the Governing Board found
5 after its independent review of evidence, when Petitioner refused to produce the Cedars-Sinai
6 Documents in JRC hearing discovery, Petitioner did more than interfere with the Medical Staff's right
7 to a fair peer review. Petitioner prevented the JRC from performing the very purpose and function of
8 the hearing itself – evaluating Petitioner's fitness to practice.

9 The Hearing Officer, and later the Governing Board, determined that by withholding the Cedars-
10 Sinai Documents Petitioner impaired the Medical Staff's ability to meet its burden of proof and
11 persuasion for Petitioner's reapplication and deprived the Medical Staff of its specific statutory and
12 Bylaws rights to obtain and present evidence.²²

13 The Hearing Officer, and later the Governing Board, also considered evidence of Petitioner's
14 repeated refusal to abide by other orders which the Hearing Officer had made.²³ Petitioner was engaged
15 in a strategy of disrupting the peer review hearing. Allowing Petitioner's interference with the Medical
16 Staff's hearing rights only encouraged further disruption. This was particularly true of the Cedars-Sinai
17 Documents because by withholding them Petitioner was gaining a significant and unfair advantage.

18
19
20 ²¹ Petitioner took the position that he was withholding the Cedars-Sinai Documents in his
21 possession because Cedars-Sinai had not authorized him to release them, not because he was unwilling
22 to provide them.

23 ²² Withholding of the Cedars-Sinai Documents prevented the Medical Staff from exercising
24 its right under B&P Code §809.3 to "present and rebut evidence determined by the . . . [hearing] officer
25 be relevant." (*See also*, Bylaws §10.3-7.) Petitioner interfered with the Medical Staff from having "the
26 reasonable opportunity to . . . present all documentary evidence." (B&P Code §809.3(a)(4) and Bylaws
27 §10.3-7.) Petitioner hampered the Medical Staff's ability to meet the burden of proof and persuasion
28 it bears on a reapplication to show that Petitioner should not be granted privileges. (B&P Code §§
809.3(b)(1), (3) and Bylaws §10.3-9(a).)

²³ For example, Petitioner repeatedly faxed very lengthy documents to the Medical Staff,
physician's offices, the Medical Staff's counsel and the Hearing Officer, tying up their fax machines
for hours on end and making it impossible for them to conduct business. Mr. Harwell issued an order
limiting the length of faxes the parties could send and the number of people to whom Petitioner could
send his faxes. Petitioner repeatedly violated this order. (*See, generally*, RC 251, CH 03367-9; RC 252,
CH 03370-2; RC 255, CH 03432-55; RC 256, CH 03407-26; RC 271, CH 03527-9; RC 274, CH 03541-
55; RC 279, CH 03611-4.)

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1 All of these factors support the Hearing Officer's decision, and the Governing Board's own
2 decision following independent review of the evidence, to terminate the JRC hearing. Both B&P Code
3 §809.2(d) and the Bylaws §10.3-2(c) gave broad authority to impose any "safeguard" necessary to
4 protect the "peer review process" and the interests of justice. Termination of the JRC hearing was an
5 appropriate safeguard. It was rationally related to the impact of Petitioner's conduct. Since Petitioner
6 had prevented the JRC from evaluating his fitness to practice, there was no purpose in holding a hearing
7 at which the JRC could not conduct proper peer review. Moreover, even if Petitioner convinced a JRC
8 to recommend granting his Application without the JRC having reviewed the Cedars-Sinai Documents,
9 the Governing Board would be unable to accept that recommendation. As the Hearing Officer
10 recognized, and as the Governing Board concluded after its independent review of the evidence, *the*
11 *Governing Board was compelled to deny Petitioner privileges because it could not simply ignore the*
12 *summary suspension and revocation of Petitioner's privileges by Cedars-Sinai and other hospitals.*
13 *See Bell v. Sharp Cabrillo Hosp.*, 212 Cal. App.3d 1034, 1048 (1989) (holding that in evaluating a
14 physician's fitness to practice, a hospital cannot simply ignore another hospital's termination of a
15 physician's privileges).²⁴ There was no longer any reason to hold a JRC hearing.²⁵

16 The Hearing Officer, and later the Governing Board, also determined that by withholding the
17 Cedars-Sinai Documents Petitioner impaired the Medical Staff's ability to meet its reapplication burden
18 of proof and persuasion that Petitioner was not fit to practice, and they concluded that Petitioner
19 deprived the Medical Staff of its specific statutory and Bylaws rights to obtain and present evidence.
20 Petitioner made it necessary to remedy this unfairness to protect the integrity of the peer review process
21 and the interests of justice from an unfair hearing. Terminating the hearing remedied the unfairness
22 Petitioner created and prevented Petitioner from benefitting from his misconduct. Petitioner suggested
23 no remedy – and the continuances he now champions as the Hearing Officer's only option do not
24 remedy the unfairness caused by Petitioner's misconduct.

25
26
27 ²⁴ The Governing Board's fiduciary duty to the Hospital to protect it from liability for failure
28 to conduct peer review mandated denial of Petitioner's application under these circumstances.
Weinberg, supra, at 1114; *Hongsathavij, supra*, at 1143.

²⁵ *Civil Code* §3532. The law does not require idle acts.

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1 Terminating a civil lawsuit for refusal to produce essential documents has been legislatively and
2 judicially approved. No serious argument can be made that the rule is arbitrary, capricious or lacking
3 in rational basis. Not even Petitioner has the audacity to advance such an argument.

4 As demonstrated above, there is substantial evidence that supports the findings of the Hearing
5 Officer, which the Governing Board adopted as its own after independent review of the evidence, and
6 these findings warrant the administrative decision to terminate the JRC hearing. We will not dwell on
7 the overwhelming additional evidence in support of the findings and administrative decision.²⁶

8 **B. Respondents Proceeded in The Manner Required By Law and A Fair Trial Was**
9 **Provided.**

10 Petitioner makes two specific complaints that Respondents did not proceed in the manner
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12
13

14 ²⁶ Petitioner repeatedly disregarded many of the Hearing Officer's orders, making it impossible
15 to conduct a fair JRC hearing. There was no evidence that a lesser sanction that would have enabled
16 the JRC to evaluate Petitioner's fitness to practice and provide the Medical Staff with a fair hearing.

17 The Medical Staff sent Cedars-Sinai Petitioner's authorization to provide the Cedars-Sinai
18 Documents and Cedars-Sinai did not provide them. The Medical Staff made Petitioner aware that
19 Cedars-Sinai had not produced the requested records and told Petitioner that privileges would not be
20 granted unless Petitioner provided the Cedars-Sinai Documents that were in his possession. Petitioner
21 refused to produce the Cedars-Sinai Documents in his possession on the pretext of a specious privilege
22 claim, and Petitioner took no action to obtain the Cedars-Sinai Documents for the Medical Staff from
23 Cedars. (RC 281, CH 03618-21.) Petitioner admitted that he was aware of the Hearing Officer's order
24 and rebuffed repeated requests by the Hearing Officer to produce the Cedars-Sinai Documents despite
25 Petitioner's ability to do so. (RC 234, CH 03020-57.)

26 When Petitioner advised the Hearing Officer that he had produced all of the documents
27 requested by the Medical Staff, the Medical staff corrected this misrepresentation by pointing out that
28 the Cedars-Sinai Documents had been requested and not produced and reiterated its demand for them.
(RC 91, CH 02766-7.) When Petitioner held steadfast in his refusal to provide them, on August 12,
2002 the Medical Staff amended the notice of charges to make certain that Petitioner had proper notice
that this was one of the reasons for its recommendation that privileges be denied. (RC201, CH 02807.)

Terminating sanctions were initially requested by Petitioner who contended that the Hearing
Officer could and should terminate the hearing based on the unsubstantiated (and untrue) claim that the
Medical Staff was refusing to produce documents. (RC178, CH 02671-84.) Petitioner also admitted
that the Hearing Officer gave Petitioner notice of his authority and intention to terminate the hearing
if the Cedars-Sinai Documents were not produced, that Petitioner had several opportunities before and
after that notice to produce the Cedars-Sinai Documents but withheld them. Petitioner had the
opportunity to explain why the Hearing Officer should not terminate the hearing or impose other
sanctions and failed to do so. In fact, the record shows that whenever Petitioner requested additional
time to respond, the Hearing Officer delayed making his decisions until after the last date Petitioner
requested.

The foregoing also demonstrates that Petitioner's contentions (a) that the Cedars-Sinai
Documents were not sought, (b) that Petitioner was not advised that there was a problem obtaining them
and (c) that Petitioner cooperated fully in efforts to procure them are baseless.

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1 required by law – both related to what transpired at the JRC hearing.²⁷ The first complaint, that Hearing
2 Officer lacked authority to terminate the hearing, was disposed of in Section IV, *supra*. The second
3 complaint, that the Hearing Officer was biased, is addressed in detail by Section VI, *infra*. But it is not
4 sufficient for Petitioner to find fault with the JRC hearing. The decision challenged is that of the
5 Governing Board. Petitioner must prove that the Governing Board hearing itself did not meet the fair
6 process test.

7 1. The Governing Board Hearing

8 Petitioner was notified on April 24, 2002 that his privileges had been lost. (RC 138, CH 02136-
9 42.) Petitioner was given an amended notice of charges on August 21, 2002 and received the Hearing
10 Officer's decision of March 27, 2003 notifying him that the JRC hearing had been terminated for his
11 failure to comply with the Hearing Officer's orders requiring him to produce the Cedars-Sinai
12 Documents. (RC 283, CH 03625-45.) Petitioner's Brief to the Governing Board demonstrates that
13 Petitioner received notice and that he challenged the same matters at a Governing Board hearing held
14 on July 22, 2003 and August 19, 2003 as he raises here. (RC 327, CH 04158-202; also Petitioner's Ex.
15 XX.) Petitioner presented evidence and made written and oral argument to the Governing Board, he
16 received a written decision which, among other things, based on an independent review of the evidence,
17 adopted the Hearing Officer's findings and decisions as its own.

18 The test for determining whether Petitioner received a "fair trial" is whether Petitioner received
19 "rudimentary due process." *Oskooi v. Fountain Valley Reg'l Hosp. and Med. Ctr.*, 42 Cal. App. 4th
20 233, 249 (1996).²⁸ Both the Governing Board hearing and the JRC hearing meet this test. We will

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22 ²⁷ Although §1094.5(b) states, "Abuse of discretion is established if the respondent has not
23 proceeded in the manner required by law, the order or decision is not supported by the findings, or the
24 findings are not supported by the evidence," the legislature specifically amended §1094.5 to set forth
the standard for abuse of process in cases involving private hospitals. See §1094.5(d); see also, *Anton*
II, supra, at 654. Accordingly, the standard for abuse of process under §1094.5(d) controls here.

25 ²⁸ Petitioner's argument that he was wrongfully deprived of his right under B&P Code §809.2
26 to a hearing before a judicial review panel of physicians is plainly wrong. As the first sentence of B&P
27 Code §809.2 states, the hearing process described in §809.2, *et seq.*, is only required when privileges
are being terminated for a *medically disciplinary cause or reason* for which a report under B&P Code
28 §805 is mandated. Petitioner's failure to produce the Cedars-Sinai Documents was *not* a medical
disciplinary cause or reason as that term is defined in B&P Code §805. Because the issue was not
whether Petitioner's application for privileges should be denied for a "medical disciplinary cause or
reason," a fair procedure need not comply with the requirements of B&P Code §809.2, *et seq.*

1 address the Governing Board hearing first.

2 *Oskooi, supra*, recognized that the hearing to which a physician is entitled when termination of
3 privileges is for withholding information *need only meet "rudimentary due process" and can be limited*
4 *to whether the physician had failed to provide the information.* No higher standard applies to
5 termination of a JRC hearing.

6 "Here, Oskooi was suspended for omitting information from his application. He was
7 notified exactly why he was suspended and was given a full and fair opportunity to
8 respond and to present a defense. Nothing more is necessary. (*Miller v. National*
9 *Medical Hospital* (1981) 124 Cal.App.3d 81, 90-91 [177 Cal.Rptr. 119].)"

10 *Oskooi, supra*, at 245. As Presiding Justice Sills aptly stated in his concurring opinion:

11 "Dr. Oskooi was only entitled to 'rudimentary procedural and substantive fairness.'
12 (*Ezekial v. Winkley, supra*, 20 Cal. 3d at 278.) The essential elements of this
13 'rudimentary' fair procedure are (1) notification of 'the reason for the proposed
14 rejection' and (2) 'a fair opportunity to defend.' (*See Pinsker II, supra*, 12 Cal. 3d 541,
15 555.) Dr. Oskooi certainly had these. He was given fair notice that the hospital wanted
16 to suspend him because he omitted previous hospital affiliations on his application, and
17 a hearing on that point-complete with Hearing Officer and court reporter."

18 *Id.* at 249.

19 It is with good reason that Petitioner's brief does not challenge the fairness of the Governing
20 Board hearing. Petitioner recognizes that the Governing Board hearing was a fair process and that he
21 received the rudimentary due process required by *Oskooi*.

22 2. The JRC Hearing

23 Before turning to Petitioner's other major argument, the claim of Hearing Officer bias, even
24 though *Anton II* may not require it (*see* fn. 27, *supra*), we address Petitioner's other complaints about
25 the JRC hearing. Petitioner quibbles with the Hearing Officer's failure to hold oral argument. But in
26 the end Petitioner must concede that he was on notice of the Hearing Officer's order to produce the
27 Cedars-Sinai Documents, that he submitted his arguments against doing so to the Hearing Officer and
28 that the Hearing Officer disagreed with his arguments and ordered the Cedars-Sinai Documents
produced. Petitioner also must concede that after choosing to disobey several orders to produce the
Cedars-Sinai Documents, he received letters from the Hearing Officer notifying Petitioner of the
Hearing Officer's view that sanctions could be awarded including termination of the hearing and
indicating the Hearing Officer's intention to terminate the JRC hearing, was given an extended
opportunity to respond in writing and chose not to do so. Only after giving Petitioner ample opportunity

1 to submit opposition, and after Petitioner failed to do so or to request additional time to do so, did the
2 Hearing Officer order the JRC hearing terminated. Fair process requires no particular form. *Oskooi*,
3 *supra*, at 244-245. The Hearing Officer put Petitioner on notice of the issues and gave Petitioner the
4 opportunity to respond.²⁹ That is all that was required to meet the fair process test. Fundamental
5 fairness does not require oral argument, only a meaningful opportunity to respond. Moreover, any flaw
6 in the JRC proceeding was remedied by the Governing Board hearing which provided Petitioner yet
7 another opportunity to address these issues, both in a written brief and in oral argument. Clearly
8 Petitioner was given repeated and ample opportunities to make his arguments.

9 Petitioner finds fault in amendment of the Notice of Charges. Such amendments are not only
10 permitted, they are common. See *Yaqub, supra*, at 480-481 (September 14, 2001 Notice of Charges
11 amended to add other charges on October 26, 2001 and again on November 27, 2001); *Weinberg, supra*,
12 at 1104 (November 1999 Notice of Charges and December 1999 Amended Notice of Charges).
13 Petitioner has no basis to complain. Petitioner received proper notice and ample time (over a year) to
14 prepare his response for the JRC hearing that was to have taken place.

15 C. Petitioner Received The Opportunity To Have A Fair JRC Hearing And that is All
16 that is Required.

17 In its finding that Petitioner had received a fair opportunity for a JRC hearing, the Governing
18 Board showed a prescient understanding of due process. As the United States Supreme Court observed
19 in *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971):

20 "Due process does not, of course, require that the defendant in every civil case actually
21 have a hearing on the merits. A state can, for example, enter a default judgement against
22 a defendant who, after adequate notice, fails to make a timely appearance [citation
omitted]. What the Constitution does require is 'an opportunity . . . granted at a

23 ²⁹ Petitioner argument that he was not given an opportunity to address the request for
24 terminating sanctions is belied by the *four months* between the Medical Staff's November 27, 2002
25 request that Petitioner's appeal be dismissed for refusing to produce the Cedars-Sinai Documents and
26 Mr. Harwell's order of March 27, 2003 terminating the JRC hearing and the *36 letters* Petitioner issued
27 to the Medical Staff and Mr. Harwell during that period. (RC 225, CH 02896-985; RC 228, CH 02990;
28 RC 229, CH 02991-3005; RC 234, CH 03020-57; RC 235, CH 03058-99; RC 236, CH 03100-52; RC
238, CH 03157-65; RC 239, CH 03166-218; RC 240, CH 03219-40; RC 241, CH 03241-59; RC 242,
CH 03260; RC 243, CH 03261; RC 244, CH 03262; RC 245, CH 03263; RC 246, CH 03264; RC 247,
CH 03265-321; RC 248, CH 03322-325; RC 250, CH 03328-03366; RC 253, CH 03373-387; RC 255, CH
03392-406; RC 256, CH 03407-26; RC 257, CH 03427-31; RC 258, CH 03432-55; RC 259, CH 03456;
RC 260, CH 03457-62; RC 262, CH 03464-74; RC 264, CH 03478-80; RC 265, CH 03481-93; RC 266,
CH 03494-506; RC 269, CH 03510-5; RC 270, CH 03516-26; RC 272, CH 03530-2; RC 273, CH
03533-40; RC 276, CH 03558-60; RC 277, CH 03561-607; RC 278, CH 03608-10.)

1 meaningful time and in a meaningful manner . . . ' [citation omitted.]"

2 **VI. PETITIONER DID NOT MEET HIS BURDEN OF PROVING BIAS AS REQUIRED TO**
3 **DISQUALIFY THE HEARING OFFICER.**

4 **A. The Governing Board's Decision That Petitioner Failed to Prove Facts Requiring**
5 **Disqualification of Hearing Officer Harwell For Bias Is Supported By Substantial**
6 **Evidence.**

7 In trumpeting *Haas*³⁰ and *Yaqub, supra*, as authority for disqualifying Mr. Harwell from serving
8 as the Hearing Officer, Petitioner neglects to provide an analysis of those cases or their application to
9 the facts of the present case. As demonstrated below, the present case is readily distinguishable from
10 *Haas* and *Yaqub*. Moreover, Petitioner did not meet his burden of demonstrating to the Governing
11 Board, or to the Hearing Officer, that Mr. Harwell was biased. As discussed below, there is substantial
12 evidence to support the Governing Board's decision not to disqualify Mr. Harwell.³¹ Petitioner failed
13 to meet his burden of proving bias.

14 While there are a number of policy reasons not to apply *Haas* to medical staff peer review
15 hearings,³² in *Yaqub*, a decision many criticize, the Sixth District Court of Appeal applied *Haas* to
16 disqualify retired Justice Agliano as the hearing officer in a medical staff judicial review hearing. This
17 was the fourth occasion where Justice Agliano had been appointed by the Salinas Valley Memorial
18 Hospital Medical Staff (the "SVMH Medical Staff") to preside over a peer review hearing. In one of

19 ³⁰ *Haas* addressed the risk that bias could develop in favor of one of the litigants in an
20 administrative hearing when that litigant appointed the hearing officer on successive occasions, each
21 time to handle a single administrative hearing to which the litigant was a party. In *Haas*, the Supreme
22 Court held that because San Bernardino County had a steady flow of administrative hearings, it could
23 not follow a practice of hiring hearing officers on successive occasions to handle a single hearing
24 because of the risk that the hearing officer would seek to please the County in order to obtain future
25 appointments. This is the only case reversed without a showing of actual bias. The mere suggestion
26 or appearance of bias is insufficient. See *Gill v. Mercy Hosp.*, 199 Cal. App. 3d 889, 911 (1988).

27 ³¹ After conducting an independent review of the evidence, the Governing Board adopted the
28 Hearing Officer's conclusion that *Haas* should not apply, but that even if it did, Petitioner had not
29 established facts to invoke *Haas*. (See, e.g., RC 161, CH 02251-300 (transcript of July 1, 2002 hearing)
30 at 25:19-21, 26:21-27:12 and 28:15-29:8.)

31 ³² Unlike San Bernardino County, private hospitals and/or their medical staffs do not have a
32 continuous stream of hearings which may warrant and support employment of full time hearing officers
33 rather than hearing officers handled for a specific hearing. The impact of the risk of bias is attenuated
34 in Medical Staff hearings because the hearing officer's role in Medical Staff hearings is limited to
35 procedural matters which can be readily reviewed from the record. *Yaqub* has also been criticized as
36 unworkable because most peer review hearings occur over an extended period of time on nights and
37 weekends to accommodate the schedule of the physicians on the judicial review panel. For these
38 reasons, as a practical matter, Medical Staff hearings are not readily susceptible to the use of full time
39 or long term hearing officers.

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1 the three earlier hearings, Justice Agliano had been the hearing officer when Dr. Yaqub's privileges
2 were suspended. The fourth hearing involved enforcement of the restrictions on Dr. Yaqub's privileges
3 which had been put in place in connection with his suspension. Dr. Yaqub also complained that in
4 addition to serving as a hearing officer for SVMH Medical Staff hearings, Justice Agliano had other
5 relationships with the Salinas Valley Memorial Hospital, including having served on the Board of
6 Trustees of its foundation.

7 The *Yaqub* Court held that although there was no evidence of actual bias, based solely on his
8 financial interest in continuing to receive appointments to serve as a hearing officer from the SVMH
9 Medical Staff as he had in the past, Justice Agliano should have been disqualified from serving as the
10 hearing officer over Dr. Yaqub's objection. The Court held that the risk of bias due to Justice Agliano's
11 financial interest in being re-appointed on successive occasions by the SVMH Medical Staff could lead
12 to a hearing officer who, unlike Justice Agliano, was biased. The Court held that repeated appointments
13 should be avoided.

14 Unlike the hearing officers in *Haas* or *Yaqub*, except for serving as the Hearing Officer in this
15 one matter, Mr. Harwell had no other relationship of any kind with West Hills or its Medical Staff. He
16 was not appointed by West Hills or its Medical Staff as a hearing officer on any prior occasion, and he
17 had no other affiliation of any type with West Hills or its Medical Staff. Mr. Harwell did not seek out
18 the subject appointment. (RC 161, CH02251-300 at CH 02268-70, at 25:19-27:12.) Because this case
19 does not involve a pattern of successive appointments, neither *Haas* nor *Yaqub* apply.³³

20 Moreover, unlike the hearing officers in *Haas* and *Yaqub*, Mr. Harwell was not appointed by
21 either of the litigants. In the medical staff judicial review hearing over which Mr. Harwell was
22 appointed to preside, the litigants were the Medical Staff and Petitioner. Mr. Harwell was not appointed
23 or paid by either litigant. He was appointed and paid by the Hospital, which is a separate and distinct
24 party from its Medical Staff.

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27 ³³ If an impermissible risk of bias could be inferred from the first and only occasion on which
28 a hearing officer is hired, whether on an *ad hoc* or long term basis, no hearing officer could ever be
hired by a party. More than a single hiring of a hearing officer is required to create a risk of bias. In
Haas and *Yaqub* this was the successive hiring of the same hearing officer in a series of single hearing
appointments.

1 As every physician knows, the Medical Staff is a separate and distinct organization from the
2 Hospital. The Medical Staff is a self governing organization comprised solely of the physicians (and
3 other designated licentiates) with practice privileges at the Hospital. The Medical Staff makes its own
4 decisions through the voting of its physician members and physician governance of the committees and
5 departments which the Medical Staff has established.³⁴

6 The fact that the Hospital and its Medical Staff are not one and the same was recognized in
7 *Hongsathavij, supra*, where the Medical Staff (acting through its Judicial Review Committee) made a
8 decision to recommend a physician as fit to practice at the Hospital with which the Hospital (acting
9 through its Board of Directors) disagreed. *Hongsathavij* expressly stated that the Medical Staff was an
10 organization distinct from the Hospital.³⁵

11 In a well publicized Ventura trial court decision, Judge Henry J. Walsh held that the medical
12 staff of a hospital was a separate and distinct organization with standing to sue the Hospital.³⁶ This
13 holding is consistent with recently enacted B&P Code §2282.5, effective January 1, 2005, which
14 recognizes that a medical staff is an organization distinct from the hospital, with its own separate
15 governance and the right to sue the hospital.

16 There can be no doubt that a self-governing Medical Staff which can not only disagree with the
17 Hospital, but can defy its directives and sue the hospital is not the same organization as the Hospital.
18 This is a critical distinction, because in *Haas* and *Yaqub* the “risk of bias” analysis applied only because
19 the hearing officer was appointed by one of the litigants – in *Haas* by the County of San Bernardino and
20 in *Yaqub* by the Medical Staff. *Haas* and *Yaqub* are not controlling in the present case because the

21 ³⁴ Having a self-governing Medical Staff, which is separate and distinct from the
22 administration and Board of Directors that operate the Hospital, is a requirement which West Hills
23 fulfills in order for the hospital to be licensed, maintain its accreditation and to qualify for the Medicare
24 program under the Conditions of Participation. (See 22 C.C.R. §§ 70701(a)(1)(F) and 70703(a); 2005
Hospital Accreditation Standard MS.1.10; 42 C.F.R. 482.22 (see JN Exhibits 1, 3 and 4.)

25 ³⁵ In distinguishing two cases, the *Hongsathavij* Court stated, “Indeed, in *Gaenslen* and
26 *Cipriotti*, the courts never had to distinguish carefully which of the decisions (that of the judicial review
committee or of the governing body) they were reviewing, because the administrative decisions of *both*
entities were the same.” *Hongsathavij, supra*, at 1136 (Emphasis added.).

27 ³⁶ Community Memorial Hospital had demurred on the ground that the Medical Staff lacked
28 standing to sue because the Medical Staff and the Hospital was a single organization and the Hospital
could not be sued by one of its subordinate parts. The demurrer was denied on the grounds that the
Medical Staff was a separate and distinct organization from the Hospital. (see JN Exhibits 14.)

1 Hearing Officer, Mr. Harwell, was appointed and paid by the non-litigant Hospital.³⁷

2 For these reasons the proof Petitioner proffered fell short of what was required for
3 disqualification. Petitioner failed to show that the Hearing Officer was appointed by a litigant. He also
4 failed to introduce evidence of successive appointments or any other relationship between the Hearing
5 Officer and the Hospital or its Medical staff.

6 Petitioner made no showing of actual bias. Consistent with a practitioner whose practice is
7 principally representing physicians,³⁸ the record demonstrates that at Petitioner's request Mr. Harwell
8 conducted proceedings over a more extended time than the Medical Staff preferred to accommodate
9 Petitioner's travel plans and litigation.³⁹ Mr. Harwell acted with great restraint providing Petitioner
10 many opportunities over many months to produce the Cedars-Sinai Documents and an extended notice
11 and opportunity to argue against termination of the JRC hearing. The fact that the Governing Board
12 reached the same conclusions based on its own independent review of the evidence supports the view
13 that Mr. Harwell was not biased.

14 Petitioner also failed to establish actual bias of Mr. Harwell (or conflict of interest) based on
15 proof that Mr. Harwell was the hearing officer for a Medical Staff hearing in which Petitioner was
16 involved at another hospital which was not affiliated with West Hills. No relationship was established
17 by Petitioner between the two Medical Staff hearings. Hearing officers like Judges are permitted to hear

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20 ³⁷ The Medical Staff Bylaws, at §10.1-5, provide only for the Medical Staff to request the
21 appointment of a hearing officer. The Hospital is not obligated to follow any recommendation the
22 Medical Staff may make and may select whatever hearing officer it pleases. Appointment of the
23 Hearing Officer by the Hospital, whose Governing Board is charged with appellate review, is akin to
24 judicial appointment of Special Master. While the person appointed as a Special Master may initially
25 have been identified or recommended by one of the parties, the Special Master is appointed by the
Judge. Even if the Judge repeatedly appoints the same Special Master, the Special Master's desire to
please the Judge to gain future appointments does not create a risk of bias in favor or against either
litigant. Petitioner is also estopped to pursue an objection based on Mr. Harwell having been
recommended by the Medical Staff, because that was not the basis for disqualification which Petitioner
presented at the Governing Board hearing. (See Section X, C below for authority regarding estoppel and
invited error including fn. 52).

26 ³⁸ Mr. Harwell's practice is devoted principally to representing physicians in Medical Staff
27 disciplinary matters and before the Medical Board. He also has served as a hearing officer for Medical
Staff hearings involving other hospitals which have no affiliation with West Hills.

28 ³⁹ See, e.g., RC 146, CH 02167-97; RC 160, CH02240-3; RC 200, CH 02800-6; RC 201,
CH02807.

1 more than one matter involving the same parties and both frequently do so.⁴⁰

2 Petitioner's claim that Mr. Lahana had appeared before hearing officers Mr. Harwell on other
3 occasions did not show bias. Counsel regularly appear again and again before the same Judge. Such
4 a professional relationship does not prove bias.

5 **VII. THE ERRORS PETITIONER CLAIMS WERE MADE ARE HARMLESS BECAUSE**
6 **THE GOVERNING BOARD WAS WITHIN ITS AUTHORITY TO DENY**
7 **PETITIONER STAFF PRIVILEGES FOR REFUSING TO PRODUCE THE CEDARS-**
8 **SINAI DOCUMENTS BASED ON PETITIONER'S VIOLATION OF THE MEDICAL**
9 **STAFF BYLAWS.**

8 The Medical Staff Bylaws provide independent authority for both the Hearing Officer and the
9 Governing Board's decision to deny Petitioner privileges for failing to produce the Cedars-Sinai
10 Documents when directed to do so by the Hearing Officer. Bylaws §6.4-1 recognizes that:

11 *"In connection with all applications for appointment and reappointment, advancement*
12 *or transfer, the applicant shall have the burden of producing adequate information for*
13 *a proper evaluation of his/her experience, health status, background, training and*
14 *demonstrated ability for clinical privileges and staff category requested, and of resolving*
15 *any reasonable doubts about these matters and of satisfying requests for information;*
16 *and of persuading the medical staff by a preponderance of the evidence of his/her*
17 *qualifications for staff membership and privileges. The applicant's failure to sustain*
18 *this burden shall be grounds for denial of the application."* (Emphasis added.)

16 In addition, Bylaws §6.5-9 provides in pertinent part, *"Failure by the member to timely complete and*
17 *return the reappointment application form or provide other documentation or cooperation will result*

21 ⁴⁰ The evidence presented to the Governing Board was that Century City Hospital is not
22 affiliated with West Hills, and there was no connection between the two hearings. Petitioner has only
23 now proffered inadmissible evidence (Petitioner's documents P 004080-139 and P 004148-528) clearly
24 available to Petitioner and not Respondents, but not presented by Petitioner to the Governing Board at
25 its hearing of July 22, 2003, regarding Mr. Harwell's recusal of himself as a hearing officer for Century
City Hospital (at the parties to that hearing's mutual request) to support his contention that Mr. Harwell
had a conflict of interest. Petitioner has also proffered irrelevant evidence concerning the successor
hearing officer, Ms. Van Hall regarding matters which occurred after the Governing Board hearing
regarding Petitioner's effort to obtain Ms. van Hall's recusal.

26 Even if this inadmissible evidence were considered, the fact that Century City Hospital may
27 have chosen to avoid the risk that Petitioner could challenge an adverse ruling on this ground does not
28 establish a conflict of interest. Neither would the opinion of the litigants that physician should not have
more than one matter pending before the same Judge or hearing officer. Something more is required for
disqualification and it does not exist in the present case. Even Petitioner's inadmissible evidence
establishes only that a hearing officer was handling two unrelated cases involving Petitioner at two
unrelated hospitals. This is not a conflict of interest.

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1 in the automatic termination of the member's appointment." (Emphasis added.)⁴¹

2 Rudimentary due process was met by The Governing Board's hearing because the hearing can
3 be limited to whether the documents were produced. *Oskooi, supra*, at 245; *Webman v. Little Co. of*
4 *Mary Hospital*, 39 Cal.App.4th 592 (1995) (holding that physician's refusal to produce information
5 requested to evaluate his application for privileges was grounds for denial or revocation of medical staff
6 privileges).⁴²

7 **VIII. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER FAILED TO MEET**
8 **HIS BURDEN OF PROVING THAT ALL THREE OF THE BASES ON WHICH**
9 **PETITIONER LOST HIS PRIVILEGES WERE PROCEDURALLY OR**
10 **SUBSTANTIVELY DEFICIENT.**

11 By its letters of April 24, 2002 and August 21, 2002, the Medical Staff advised Petitioner that
12 it was proceeding on four bases. First, Petitioner's privileges were automatically terminated under §6.5-
13 9 of the Bylaws (the "First Basis").⁴³ Second, the Medical Staff determined that Petitioner failed to
14 meet the Applicant's Burden under §6.4-1 of the Bylaws (the "Second Basis").⁴⁴ Third, the Medical

15 ⁴¹ Petitioner's refusal to produce the Cedars-Sinai Documents also was a violation of Bylaws
16 §6.3 which states, in pertinent part: "By applying for appointment to the medical staff, each applicant...

17 "c. consents to Hospital representatives inspecting all records and documents which
18 may be material to an evaluation of his/her professional qualifications and
19 competence to carry out the clinical privileges he/sh requests, of his/her health
20 status, and of his/her professional ethical qualifications."

21 ⁴² Petitioner seeks distinguish himself from *Webman* claiming he engaged in no misconduct
22 because he signed an authorization form for Cedars-Sinai to release records. *Webman* does not require
23 misconduct, just a failure to produce information. It is also clear that Petitioner engaged in misconduct
24 by defying the Hearing Officer's order to produce the Cedars-Sinai Documents he was withholding.

25 ⁴³ The First Basis is Bylaws §6.5-9 which is entitled "Time Periods for Processing" and
26 governs when a physician's term of appointment is extended if the Medical Staff is unable to finish
27 processing the application before the end of the physician's two year appointment. This section
28 provides, in pertinent part, "*Failure by the member to timely complete and return the reappointment*
application form or *provide other documentation or cooperation* in order that the reapplication may be
fully processed by the expiration date will result in the *automatic termination* of the member's
appointment." (Emphasis added.)

29 ⁴⁴ The Second Basis is Petitioner's failure to meet the "Applicant's Burden" under §6.4-1 of
the Bylaws which places on every applicant and re-applicant for staff privileges:

30 "... the burden of producing adequate information for a proper evaluation of his/her
31 experience, health status, background, training and demonstrated ability for clinical
32 privileges and staff category requested, and of resolving any reasonable doubts about
33 these matters, and of satisfying requests for information; and of persuading the medical
34 staff by a preponderance of the evidence of his/her qualifications for staff membership
or privileges. The applicant's failure to sustain this burden shall be grounds for denial

1 Staff recommended denial of privileges based on conduct of Petitioner which qualified as a "medical
2 disciplinary cause or reason" (the "Third Basis"). Fourth, Petitioner lied on his application for
3 privileges (the "Fourth Basis").⁴⁵

4 Petitioner's claims are all based on the argument that he has been deprived of the hearing before
5 his JRC peers required by B&P Code §809.2, *et seq.* This is a mistaken assumption that is fatal to
6 Petitioner's position.

7 Neither the First Basis nor the Second Basis for terminating or denying Petitioner privileges
8 involve a "medical disciplinary cause or reason" as defined in B&P Code §805. As a result, a hearing
9 is *not* mandated by B&P Code §809.2, *et seq.*, and Petitioner's privileges are not automatically extended
10 by that statute for termination or denial on the First Basis or the Second Basis.⁴⁶ With respect to the
11 First Basis and the Second Basis, the Bylaws do not provide for an automatic extension of privileges
12 pending administrative appeal (hearing). On the First Basis, the loss of privileges occurs automatically
13 is a result of the term of the applicant's appointment simply coming to an end. On the Second Basis,
14 the Medical Staff extends privileges only if Petitioner did not cause the delay in processing his
15 application. On the Second Basis, Petitioner would not be entitled to an extension because the delay
16 is caused by his refusal to produce the Cedars-Sinai Documents.

17 Any hearing Petitioner would be entitled to need only meet rudimentary due process and is
18 limited to whether Petitioner failed to produce the Cedars-Sinai Documents. For the reasons explained
19 above, Petitioner already received a hearing on that subject both before the JRC and the Governing

20 _____
21 *of the application.*" (Emphasis added.)

22 ⁴⁵ Petitioner had also lied on his application by omitting Century City Hospital's disciplinary
23 action, and had engaged in abusive conduct. *See Unterthiner, supra*, 33 Cal. 3d 285 (holding that lying
24 on an application for medical staff privileges is sufficient evidence of untrustworthiness and interference
with the peer review process to warrant denial or revocation of medical staff privileges); *Miller v.*
Eisenhower Med. Ctr., 27 Cal. 3d 614 (1980); *Pick v. Santa Ana-Tustin Community Hosp.*, 130 Cal.
App. 3d 970 (1982) (upholding denial of medical staff privileges for disruptive behavior).

25 ⁴⁶ By adopting and agreeing to be bound by the Bylaws, the physicians who are or become
26 members of the Medical Staff agree to waive any "rudimentary due process" rights for those *automatic*
27 *terminations* for which the Bylaws provide no hearing right. *Abrams v. St. Johns Hosp. & Health Ctr.*,
28 25 Cal. App. 4th 628 (1994) (holding that these rights may be waived). Public policy does not preclude
the self-governing Medical Staff, a group of physicians, agreeing among themselves, that hearings shall
be dispensed with in certain circumstances. Elimination of such an administrative remedy is not the
loss of a substantive right. Physicians who believe that they have been mistreated can go directly to
Court for redress without having to exhaust the remedy of an administrative hearing.

1 Board, and the findings of the Hearing Officer, which were adopted by the Governing Board and are
2 supported by substantial evidence, support the First Basis and the Second Basis because they
3 determined that the Cedars-Sinai Documents were requested by Petitioner, that he withheld them
4 throughout the peer review process including when ordered to produce them by the Hearing Officer.
5 Clearly, Petitioner has no basis to complain about the loss or denial of privileges on the First Basis or
6 the Second Basis. Because Petitioner has failed to overturn termination or denial of privileges on
7 two of the four bases, there is no basis for the Court to restore or grant Petitioner privileges. As a result,
8 his challenge to the Third Basis and Fourth Basis is, as a practical matter, moot.

9 **IX. THIS COURT CANNOT GRANT PETITIONER'S PRIVILEGES BY WRIT UNDER**
10 **THE PRETEXT OF RESTORING PRIVILEGES LOST IN APRIL 2002.**

11 **A. Privileges Cannot Be Obtained under §1085 Because the Governing Board Has**
12 **Denied Petitioner Privileges after a Hearing.**

13 Section 1085 applies to an administrative body's decision when no hearing is required.⁴⁷
14 Petitioner's request for a writ restoring Petitioner's privileges at West Hills pending a final
15 administrative decision may be a "ministerial duty" if restoration of privileges is mandated by B&P
16 Code §809.2, *et seq.*, and no discretion is involved in the decision.⁴⁸ As noted above, this argument for
17 automatic extension of his privileges under B&P Code §809.2, *et seq.*, applies only to the Third Basis
18 and Fourth Basis for denial of privileges.

19 **B. Mandate Under §1085 Is No Longer Available Because Petitioner Has Received A**
20 **Hearing And The Governing Board Has Made a Final Administrative Decision To**
21 **Deny Privileges.**

22 Petitioner's request comes too late. Whether or not mandate would lie if Petitioner had sought
23 restoration of his privileges back in April of 2002 when they were not extended, this remedy is no

24 ⁴⁷ "[O]rdinary mandate [pursuant to §1085] is used to review adjudicatory actions or decisions
25 when the agency was not required to hold an evidentiary hearing." *Bunnett v. Regents of Univ. of Cal.*,
26 35 Cal. App. 4th 843, 848 (1995); *see also, Johnston v. Sonoma County Agricultural Preservation &*
27 *Open Space Dist.*, 100 Cal. App. 4th 973, 983-984 (2002).

28 ⁴⁸ Section 1085 requires that (1) the respondent failed to perform an act despite a *clear, present*
and *ministerial duty* to do so; and (2) Petitioner has a clear, present and beneficial right to the
performance. *See Riverside Sheriff's Ass'n v. County of Riverside*, 106 Cal. App. 4th 1285 (2003); *see*
also, Kong v. City of Hawaiian Gardens Redevelopment Agency, 101 Cal.App.4th 1317 (2002).
However, mandate will not issue if the duty to act on the part of the agency is mixed with discretionary
power or exercise of judgment. *See Los Angeles County Prof'l Peace Officers' Ass'n v. County of Los*
Angeles, 115 Cal. App. 4th 866, 869 (2004).

1 longer available. The Hospital provided Petitioner with an administrative remedy which resulted in
2 final administrative action after hearing on July 22, 2003 and August 19, 2003. For that reason, and
3 because the Governing Board decided to deny privileges, Petitioner's remedy is no longer found under
4 §1085.

5 **C. The Court Cannot Grant Petitioner Privileges By Writ Because Doing So Would**
6 **Compel the Hospital to Perform An Illegal Act.**

7 Petitioner's request that the Court grant him privileges must be denied because doing so would
8 compel an illegal act. "[I]t is well settled that mandamus will not lie to compel the performance of acts
9 which are illegal, contrary to public policy, or which tend to aid an unlawful purpose." *Cook v. Noble*,
10 181 Cal. 720, 721, 186 P. 150 (1919); *Duff v. City of Gardena*, 108 Cal.App.3d 930, 936 (1980);
11 *County of San Luis Obispo v. Superior Court (Munari)*, 90 Cal.App.4th 288, 292 (2001). Placing
12 Petitioner on staff at West Hills without having passed a peer review evaluation of his fitness to practice
13 within two years violates a California licensing regulation which applies to the Hospital (22 C.C.R.
14 §70701(a)(7); McWilliams Decl., ¶16.) Doing so would also violate the accreditation standards of
15 JCAHO, and compliance with those standards is required by the federal government's Medicare
16 Conditions of Participation. (McWilliams Decl., ¶16; *see also*, MS4. 40 (fn to item 1) and MS 4.60
17 (item 3).)

18 **D. Petitioner's Request for Privileges Is Barred by Laches.**

19 Petitioner applied for privileges on May 18, 2001. Based on peer review, on April 24, 2002
20 Petitioner was informed that his privileges would no longer be extended. Petitioner did not seek
21 restoration of privileges from the Court until August 19, 2004 when Petitioner filed this Petition. He
22 sought to obtain privileges by injunction on September 3, 2004. It is now almost four years since
23 Petitioner was subjected to any type of peer review evaluation of his fitness to practice at West Hills
24 and nearly six years since he passed such an evaluation. (Faust Decl., ¶13; McWilliams Decl., ¶15.)
25 This is far longer than the two years which the State and Federal governments and JCAHO mandate for
26 such an evaluation.

27 Petitioner's three-year delay in seeking privileges by writ has prejudiced West Hills, its Medical
28 Staff and the public. Had Petitioner acted promptly and succeeded in having his privileges restored for

1 the 2001-2003 term, Petitioner would have been required to submit again to peer review in order for
2 his privileges at West Hills to be extended for the 2003-2005 term and yet again for the 2005-2007 term.
3 (Faust Decl., ¶12.) The Hospital would have had the opportunity (and responsibility) to conduct peer
4 review of Petitioner's fitness to practice to protect itself and the public in connection with each request
5 to extend privileges. As a result of Petitioner's delay, this protection has been lost.

6 The Hospital, not to mention the public, has been prejudiced significantly by the loss of such
7 peer review protection. Privileges can only be granted now by allowing Petitioner to circumvent the
8 legally mandated two year peer review and appointment cycle thereby depriving the Hospital of its
9 ability to protect itself and the public by peer review evaluation of Petitioner's *current* fitness for
10 Medical Staff membership and privileges. The Hospital would also be forced to violate legal
11 regulations and the standards of accreditation. The Hospital would have increased liability exposure
12 to malpractice actions and could incur *Elam* liability for permitting Petitioner to practice at the Hospital
13 without having undergone more current peer review.⁴⁹

14 As demonstrated above, all of the elements for laches are met: "(1) the failure to assert a right
15 (2) for some appreciable period so as to amount to unreasonable delay (3) which results in prejudice to
16 the adverse party." *In re Marriage of Powers*, 218 Cal. App. 3d 626, 642 (1990). Laches is a proper
17 defense to petitions for mandamus. *See Miller, supra*, 614 P.2d 258 (1980) (reversing the trial court's
18 holding of laches due to insufficient evidence of prejudice or harm resulting from a one year delay) and
19 *Peterson v. Superior Court*, 31 Cal. 3d 147, 163 (1982).

20 **E. Petitioner Is Estopped to Obtain Privileges By Writ.**

21 While the Court could direct the Governing Board to hold further JRC proceedings and/or
22 another Governing Board hearing if it determines that a writ of mandate or administrative mandate
23 should issue, Petitioner's request that privileges be restored goes beyond the relief which should be
24 afforded. Petitioner's failure to immediately seek and obtain a Court order reinstating his privileges
25 constitutes acquiescence in the April 2002 termination. According to Petitioner's own declaration, he

26 ⁴⁹ *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 347-348 (1982), held that a "Hospital
27 owes generally a duty to insure the competency of its medical staff and to evaluate the quality of
28 medical treatment rendered on its premises." Further, *Elam* established that if a hospital conducted
periodic reviews in a negligent manner, or if it recommended staff privileges when none ought to be
had, the hospital could be liable for a physician's errors. *See id.*

1 no longer qualifies for "courtesy staff" privileges because he is not on the "active staff" of any other
2 hospital. The Hospital has relied on Petitioner's lack of privileges and failure to submit an application
3 to extend privileges for the 2003-2005 term and undergo associated peer review (which would have
4 required production of the Cedars-Sinai Documents and updated information regarding Petitioner's his
5 loss of privileges). As a result, neither the Hospital, the Medical Staff (nor the Court) has had the
6 opportunity to evaluate Petitioner's *current* fitness to practice. For these reasons, the doctrine of
7 estoppel applies to defeat Petitioner's request for relief.

8 **F. Unclean Hands.**

9 The rule of unclean hands is "[W]henever a party who, as actor, seeks to set judicial machinery
10 in motion and obtain some remedy, has violated conscience, good faith or other equitable principles in
11 his prior conduct, then the doors of the court will be shut against him...". *Lynn v. Duckel*, 46 Cal. 2d
12 845, 850 (1956).⁵⁰ "No one can take advantage of his own wrong." Civil Code §3517. The unclean
13 hands doctrine applies to proceedings for writ of mandate. *See Allen v. Los Angeles County Dist.*
14 *Council of Carpenters*, 51 Cal. 2d 805, 811-2 (1959). Petitioner's wilful and repeated refusal to provide
15 the Cedars-Sinai Documents and his prevention of peer review constitutes unclean hands.

16 **G. Privileges Cannot Be Granted Because The Court Cannot Substitute Its Judgment**
17 **Concerning Petitioner's Fitness For the Judgment Of The Hospital.**

18 While the Court may order further JRC or Governing Board proceedings, the Court should not
19 substitute its judgment for that of the Hospital's Medical Staff and Governing Board. Moreover,
20 because neither the Hospital, the Medical Staff, a JRC or the Court has *current* information concerning
21 Petitioner's fitness to practice, there is no basis on which the Court can evaluate Petitioner's fitness to
22 practice as required to protect both the Hospital and the public.

23 **H. Public Policy Mandates Denial of Petitioner's Request for Privileges.**

24 As pointed out above, the Governing Board was compelled to deny Petitioner privileges for
25 refusing to produce the Cedars-Sinai Documents to the JRC for peer review. Sound public policy of
26

27 ⁵⁰ An unclean hands defense applies to equitable remedies such as those sought in the present
28 action. *Behm v. Fireside Thrift Co.*, 272 Cal. App. 2d 15, 22 (1969). Recently, the defense also has been
applied to actions at law. *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal.
App. 2d 675, 728 (1964); *Pond v. Ins. Co. of North America*, 151 Cal. App. 3d 280, 290 (1984).

1 protecting patient safety and the quality of care mandates this result.

2 **X. PETITIONER'S AVOIDANCE OF PEER REVIEW AND REQUEST THAT HEARING**
3 **OFFICER HARWELL GRANT PETITIONER TERMINATING SANCTIONS**
4 **RESULTS IN THE REMAINDER OF HIS CLAIMS BEING BARRED BY LACHES,**
5 **UNCLEAN HANDS, ESTOPPEL AND BEING CONTRARY TO PUBLIC POLICY.**

6 **A. Petitioner's Should Be Barred From The Relief Requested By the Doctrine of**
7 **Laches Because of The Prejudice Caused By His Delay In Filing this Action.**

8 Because of Petitioner's delay, there is a gap in the Medical Staff's peer review protection which
9 cannot be filled by resuming a JRC hearing or holding another Governing Board hearing based on
10 Petitioner's stale application for 2001-2003 privileges. The lack of current information concerning
11 Petitioner would make resumption of a JRC hearing or a Governing Board proceeding fruitless because
12 it cannot yield a proper evaluation of Petitioner's *current* fitness to practice as would be necessary to
13 warrant granting privileges.⁵¹

14 **B. Petitioner's Unclean Hands Should Bar the Relief Requested.**

15 As discussed above, Petitioner's wilful and repeated refusal to provide the Cedars-Sinai
16 Documents constitute unclean hands. This should bar all relief.

17 **C. Petitioner Is Estopped from Complaining about the Hearing Officer Imposing**
18 **Terminating Sanctions Against Him by His Own Request to the Hearing Officer.**
19 **for Terminating Sanctions In His Favor.**

20 The doctrine of invited error prevents a party from asserting an alleged error as grounds for
21 reversal when the party induced the commission of error through its own conduct. *Hasson v. Ford*
22 *Motor Co.*, 32 Cal. 3d 388, 420-421 (1982); *See Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 403 (1999).
23 This is an application of estoppel to judicial proceedings which should apply with equal force to
24 Petitioner's conduct in an administrative hearing.⁵² Petitioner requested the Hearing Officer order

25 ⁵¹ (See 22 C.C.R. §§ 70701(a)(7); JCAHO 2005 Hospital Accreditation Standard MS4.40 (fn
26 to item 1) and MS 4.60 (item 3); 42 C.F.R. 482.22 (see JN Exhibits 1, 2 and 5).)

27 ⁵² Estoppel is a defensive doctrine operating to prevent one party from taking unfair advantage
28 of another. *Franklin v. Merida*, 35 Cal. 558, 567 (1868); *In re Marriage of Umphrey*, 218 Cal. App. 3d
647, 658 (1990). The essence of estoppel is that, through false language or conduct, the person to be
estopped has caused another to act in a way that person would not otherwise have acted and has caused
injury as a result. *State Compensation Ins. Fund v. WCAB*, 40 Cal. 3d 5, 16 (1985); *In re Lisa R.*, 13
Cal. 3d 636, 645 (1979). The doctrine of estoppel is codified in part in Evidence Code §623 which
provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led
another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising
out of such statement or conduct, permitted to contradict it."

1 terminating sanctions in his favor. Petitioner's sudden challenge to the Hearing Officer's authority,
2 because sanctions were issued against him instead is clearly barred by the doctrines of estoppel and
3 invited error.

4 **D. Public Policy Mandates Denial of the Petition.**

5 Petitioner's refusal to provide the Cedars-Sinai Documents prevented the Governing Board from
6 ever receiving a recommendation that Petitioner be granted privileges based on a proper evaluation of
7 Petitioner's care and conduct. In these circumstances, public policy requires the Governing Board and
8 the Court to deny Petitioner privileges. Issuance of a writ which orders a further JRC hearing or
9 Governing Board proceeding without requiring Petitioner to *first* (a) produce the Cedars-Sinai
10 Documents, (b) submit more *current* information for peer review by the Medical Staff, and (c) to
11 cooperate in the Medical Staff's peer review would violate public policy. There is strong public policy
12 of protecting the quality of patient care and patient safety by requiring every physician to pass peer
13 review by demonstrating his *current* competence and fitness to hold privileges before privileges are
14 granted. This public policy outweighs any legal or equitable sympathy a Court could have for
15 Petitioner's self-induced problems.

16 **XI. CONCLUSION**

17 For the foregoing reasons, the Petition should be denied.

18
19 DATED: February 28, 2005

Respectfully submitted,

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