S156986

IN THE SUPREME COURT OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.,

Plaintiff and Appellant,

vs.

WEST HILLS HOSPITAL MEDICAL CENTER, ET AL.

Defendants and Respondents,

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B186238

BRIEF OF AMICUS CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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ISSUE PRESENTED

Does the hearing officer presiding over a medical peer review proceeding under Business and Professions Code[1] sections 809 et seq. have authority to terminate the proceeding for party misconduct, in this case the repeated and flagrant violation of the hearing officer's discovery orders?

I.
INTRODUCTION

The California Hospital Association ("CHA") is a nonprofit organization dedicated to representing the interests of hospitals and health systems in California. CHA has nearly 450 hospital and health system members, including general acute care hospitals, children's hospitals, rural hospitals, psychiatric hospitals, academic medical centers, county hospitals, investor-owned hospitals, and multi-hospital health systems. These members furnish vital health care services to millions of our state's citizens. CHA also represents more than 100 affiliate, associate, and personal members. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas, in an effort to improve health care quality, access and coverage; promote health care reform and

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[1] All further statutory references are to California Business and Professions Code Section 809 *et seq.* unless otherwise indicated.

integration; achieve adequate health care funding; improve and update laws and regulations; and maintain public trust in healthcare.

II.
CHA'S INTEREST IN THE MILEIKOWSKY CASE.

This *amicus curiae* brief is submitted in support of the defendants and respondents in the matter of *Mileikowsky v. West Hills Hospital Medical Center* (2007) 154 Cal.App.4th 752, review granted Dec. 12, 2007, No. S156986 ("*West Hills*"). CHA members have an ongoing and increasing interest in the appropriate, fair and effective application of the peer review process and applicable procedural safeguards aimed at ensuring fair process for all parties.

If the *West Hills* holding is not reversed, California hospital governing boards will be significantly hampered in meeting their obligation to ensure that medical staff peer review – essential to protecting hospital patients from sub-standard medical practice – is effective. Meeting that obligation is increasingly difficult. Limiting the authority of peer review hearing officers to control the proceedings will only encourage procedural mischief and discourage appropriate physician discipline.

III.
SECTIONS 70701 AND 70703 OF TITLE 22 OF THE CALIFORNIA CODE OF REGULATIONS MANDATE THAT CALIFORNIA HOSPITALS ENSURE THE COMPETENCE OF EVERY MEMBER OF THE MEDICAL STAFF.

A. The Statutory Scheme Imposes On Hospitals Full Responsibility for the Vital Function of Medical Staff Peer Review.

The importance of fair medical staff peer review procedures to the provision of high-quality health care in California hospitals cannot be overstated. As a condition of licensure, hospitals are required to participate in the state's regulation of physician conduct for the benefit of the public. California regulations mandate that the governing body of each California hospital require the hospital's medical staff to establish controls designed to "ensure the maintenance and achievement of high standards of professional and ethical practices of all of the members of the medical staff." (Cal. Code Regs., tit 22, § 70701, subd. (a)(7).) The medical staff must ensure that all of its members "demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the [medical] staff." (*Id.)* This duty is perpetual: Medical staff members must demonstrate such competence upon filing an initial application with the medical staff and at least every two years thereafter (*Id.*) and review of competency continues throughout each member's tenure on the medical staff.

The role of the medical staff in peer review is crucial: The organized medical staff is responsible to the hospital's governing body for the adequacy and quality of patient care. The hospital, however, is ultimately responsible for ensuring the competence of each member of the medical staff. (Cal. Code Regs., tit. 22, § 70703, subd. (a); *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332.) Hospitals' responsibilities in this regard never cease: They have a clear, non-delegable duty, mandated by law, to oversee physician peer review.

B. The Pressure on Hospitals to Ensure That Peer Review Is Conducted Aggressively, But with Exactitude, Is Increasing.

State agencies responsible for enforcing the laws related to peer review and protection of the public are making it clear that hospitals will be held accountable for adequately and aggressively screening a physician's competence and quality of care when he or she first applies for medical staff membership and privileges, and on an ongoing basis throughout the physician's tenure on the medical staff. Hospitals accordingly must devote considerable resources to ensuring that they "get peer review right;" there is very little margin for error.

For example, Business & Professions Code section 805 requires hospitals to file reports with the Medical Board of California when they take disciplinary action against physicians serving on their medical staffs ("805 Report"). Hospitals must file such reports with great care, and must

be prepared to confront the significant consequences flowing from an 805 Report.

That reporting statute serves a dual public protection purpose: First, it alerts the Medical Board to the hospital's action, and to the need to investigate the underlying facts in order to determine whether the Medical Board itself should take separate action against the physician's license to practice medicine. Second, the hospital disciplinary action, once reported to the Medical Board, is also disclosed to the public on the Medical Board's internet site.

When hospitals file 805 Reports, the subject physician is almost always entitled to a formal evidentiary hearing to challenge the underlying disciplinary action, pursuant to Business & Professions Code sections 809 et seq. ("section 809"). Those hearings are increasingly burdensome, time-consuming, and expensive for everyone involved, and require substantial investment of volunteer time by other members of the hospital's medical staff.

This combination of reporting requirements and hearing rights requires hospitals to chart a very careful course. On one end of the spectrum, hospitals that fail to take peer review action when it is warranted are subject to substantial liability to any patient who is harmed as a result. (*Elam v. College Park Hospital, supra*, 132 Cal.App.3d 332.) At the same

time, it is not always clear when 805 reports are required, but hospitals that do take action, but fail to file the reports, do so at their peril. Section 805 subdivision (k) provides for fines of up to $100,000 for such failure. The fines can be levied against the institution and individuals responsible for making such reports. The Medical Board may take action against any physician chief of the medical staff who is part of a failure to report. Representatives of the California Attorney General have recently announced the Attorney General's intention to make a priority of seeking such fines against non-reporting hospitals.

On the other end of the spectrum, a hospital that goes too far and takes unwarranted peer review action against a physician, resulting in an 805 Report, also does so at its peril, as liability to the affected physician can be substantial. (See *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434.)

The Court of Appeal's decision in *West Hills* needlessly makes that already exacting peer review process more burdensome and perilous. Peer review hearings are costly both in time and money. Typically, evidentiary sessions are scheduled in the evenings, starting around 6 p.m., after the physician volunteers who sit as hearing panel members have finished their clinical work day. It is not uncommon for such panel members to tire

under the demands of juggling patient care responsibilities and hearing panel service and to drop out before the hearing is completed. Delays because of a party's failure to comply with well established procedural requirements strain the process and the willingness of physician volunteers to participate. Indeed, CHA is aware of hearings its members have conducted that required over forty (40) evidentiary sessions and consumed nearly $1 million in legal fees on the hospital side alone – not including legal fees the hospital must pay to the hearing officer, or the cost of later court review. Shifting to the hearing panel issues properly addressed by the hearing officer – such as terminating sanctions for failure to cooperate, as the Court of Appeal did in *West Hills* will further complicate an already over-stressed process.

California hospitals, therefore, are under pressure from multiple directions in the peer review arena: They bear the final and ultimate responsibility for ensuring that peer review takes place; must report peer review actions to the Medical Board, or face substantial fines and damaging publicity; must offer the affected physician a comprehensive hearing for actions thus reported; and must stand ready to defend all those actions in court later. In light of this liability minefield and of peer review's vital importance to hospital operations and patient protection, CHA and its member hospitals have a significant interest in the Court's review of *West*

Hills, which will examine the scope of the peer review hearing officer's authority. Because all participants in a peer review hearing deserve a fair process that expeditiously adjudicates the clinical and legal questions presented, CHA urges the Court to reverse the Court of Appeal's decision in *West Hills Hospital, supra,* 154 Cal.App.4th 752.

LEGAL DISCUSSION

IV.
THE CALIFORNIA LEGISLATURE INTENDED THAT MEDICAL STAFF PEER REVIEW HEARINGS BE CONDUCTED FAIRLY AND EXPEDITIOUSLY FOR ALL PARTIES.

As noted above, the California Legislature sought fair process in medical staff peer review matters tailored to the needs of the California health care public with the enactment of section 809. The legislature articulated its intent in section 809, subdivision (a) (3) – (5), when it declared that:

> (3) Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.
> (4) Peer review that is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care.
> (5) Peer review, fairly conducted, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners.

A recent Court of Appeal decision described section 809's essence:

> "The statute [...] recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616-617.)

Implementing the Legislature's intent to preserve these high standards through a fair peer review process has become increasingly difficult. A rule like the one in *West Hills* deprives hospitals and their medical staffs of essential tools in combating efforts by physicians under review to burden and frustrate the peer review process.

Both the *West Hills* decision and an earlier Court of Appeal matter involving the same physician, *Mileikowsky v. Tenet HealthSystem,* (2005) 128 Cal.App.4th 531 ("*Tenet HealthSystems*"), addressed the scope of authority held by hearing officers in the proceedings mandated by section 809. In *Tenet HealthSystem,* the Court of Appeal held that hearing officers have the authority to terminate a medical staff peer review hearing if, among other things, the physician abuses discovery tools. In contrast, the *West Hills* court understates and undervalues a physician's discovery obligations as set forth in section 809.2 subdivision (d), which provides:

> the peer review body shall have the right to inspect and copy at the peer review body's expense any documentary information relevant to the charges which the licentiate has in his or her possession or

control as soon as practicable after receipt of the peer review body's request.

For almost the entire nine month pre-hearing period, Dr. Mileikowsky flagrantly dodged his obligation to produce documents to the West Hills Medical Executive Committee in spite of their repeated requests of him, and orders from the hearing officer that he do so. (OBOM 16 – 22.) The documents concerned actions taken against Dr. Mileikowsky at Cedars-Sinai Medical Center that the hearing officer ruled were clearly relevant to the Notice of Charges in the present matter. After an admirable display of patience, the hearing officer ruled that Dr. Mileikowsky's refusal to produce the documents was not justified and he terminated the hearing. (OBOM 20 – 21.)

Dr. Mileikowsky's evasion of his document production obligations began in late 2000, long before his reappointment at West Hills was denied or formal charges brought in the present matter. (OBOM 12 – 13.) He claimed that Cedars-prevented him from producing the relevant documents in his possession – an argument Dr. Mileikowsky intermittently relied on throughout the pre-hearing proceedings. (OBOM 12 – 13.) (*West Hills*, *supra*, 154 Cal.App.4th 752, 760.)

In upholding Dr. Mileikowsky's appeal in *West Hills,* the Court of Appeal created an unfortunate mechanism by which physicians can make an "end run" around their document production obligations under section

809 subdivision (2) subpart (d) and thereby contravene the legislative intent of the law: providing fair process for all participants. Physicians must not be allowed to disrupt the medical staff hearing process by twisting a third-party-hospital's relucatance to release confidential medical records into an excuse for disregarding the physician's own document production obligations. Dr. Mileikowsky successfully created a production impasse, allowing him to avoid his document production requirements and stall the entire fair hearing process and leaving no practical way to proceed.

If the *West Hills* decision is left undisturbed, it is difficult to imagine what will prevent other physicians from employing similar delaying tactics. The decision would signal to other California physicians undergoing adverse actions that they need not follow the discovery obligations set forth in a peer review body's bylaws or California law. Instead, using the Court of Appeal's rule, such physicians may simply flout those obligations without any consequences. Enabling such behavior cannot have been the Legislature's intent when it codified the elaborate section 809 fair hearing process with the stated aim of "preserving the highest standards of medical practice." (Bus. & Prof. Code § 809(a)(3).)

Further still, except in the case of new applicants, section 809.3 subdivision (b)[2] assigns the burden of proof and persuasion to the peer

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[2] Section 809.3(b) assigns the burden of proof and persuasion as follows:

review body. Yet if the peer review body is stymied in its efforts to obtain relevant documentary information in possession of the subject physician, how can it be reasonably expected to meet that burden? Ensuring patient safety and high quality care requires that all of the parties involved in the peer review process have sufficient access to information relevant to the charges.

Arguably, a physician who, like Dr. Mileikowsky, refuses to provide necessary evidence may well find that the hearing panel rejects his case because of that very refusal. Neither the hearing panel nor the peer review body, however, should be forced to submit to a hearing process that is essentially a charade. Nor should a panel of non-attorney physicians be

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The burden of presenting evidence and proof during the hearing shall be as follows:

(1) The peer review body shall have the initial duty to present evidence which supports the charge or recommended action.

(2) Initial applicants shall bear the burden of persuading the trier of fact by a preponderance of the evidence of their qualifications by producing information which allows for adequate evaluation and resolution of reasonable doubts concerning their current qualifications for staff privileges, membership, or employment. Initial applicants shall not be permitted to introduce information not produced upon request of the peer review body during the application process, unless the initial applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence.

(3) Except as provided above for initial applicants, the peer review body shall bear the burden of persuading the trier of fact by a preponderance of the evidence that the action or recommendation is reasonable and warranted.

forced to decide on the legal effect of the *absence* of evidence and the disciplined physician's reasons for failing to produce the evidence – which are essentially legal decisions that the attorney hearing officer is much better situated to make.

V.
THE HEARING OFFICER MUST HAVE THE POWER AND AUTHORITY TO CONTROL THE HEARING PROCESS.

CHA disputes the Court of Appeal's determination in *West Hills* that the holding in *Tenet HealthSystem* is inapplicable in the present matter. On the contrary, CHA believes that the *Tenet HealthSystem* court correctly held that the hearing officer is vested with the authority to impose terminating sanctions in instances where a party has utterly disregarded his discovery obligations.

Dr. Mileikowsky used similar obstructionist tactics to a greater degree in *Tenet HealthSystems*, where, among other things, he refused to produce the same Cedars-Sinai documents that are at issue here; blatantly refused to comply with the hearing officer's orders; and violated other procedural requirements, all of which the court found to be the proper subject of the hearing officer's procedural ruling to terminate the proceedings. (*Tenet HealthSystem, supra*, 128 Cal.App.4th 531, 550 – 552, 561 – 562.) Even so, in the present matter, by recasting the hearing officer's procedural decision to terminate the proceedings due to the

physician's blatant abuses of discovery as a final decision on the merits, the *West Hills* court mischaracterizes the hearing officer's ruling and role in the proceedings. In the frequent experience of CHA members, not every physician who is the subject of a peer review hearing wishes for an efficient and expeditious outcome. On the contrary, most physicians are able to continue to exercise their medical staff membership and clinical privileges during the pendency of a peer review hearing; the recommended disciplinary action does not take effect until the hearing and internal appeal are over. Thus, the physician has an undeniable interest in delaying an ultimate resolution in the matter in order to maintain the status quo. Too often, CHA's members report, physicians seek to prolong peer review hearings in hopes of wearing down the volunteer hearing panel members and achieving victory by hearing panel attrition.

The holding in *West Hills* has thus created a permissible stalling tactic that can be employed to disrupt the process interminably. With its holding limiting the power and authority of a hearing officer to rule on procedural matters that go to the very heart of procedural fairness, the Court of Appeal in *West Hills* has made the ultimate goal of fair procedure in the peer review arena much more difficult to reach. This is a high-stakes issue for CHA member facilities due to their obligation to provide quality medical care to the California public.

CHA believes that the *Tenet HealthSystem* court struck the right balance by recognizing the hearing officer's authority to impose terminating sanctions. There the court addressed head-on the concern that such authority was ripe for abuse, that terminating sanctions could become "routine or that gratuitous impositions will be upheld" noting that such terminations "will always be reviewable in court." (*Tenet HealthSystem, supra*, 128 Cal.App.4th 531, 562.) Indeed, the decision to terminate a hearing will be closely scrutinized requiring, as noted in *Tenet HealthSystem*, that "an extensive record of misbehavior would have to exist to justify a decision to deprive a practitioner of the peer review afforded by statute." (*Id.*) In light of the courts' ability to police the use of terminating sanctions, no party should be allowed flagrantly to disregard statutorily required discovery obligations. The real threat of terminating sanctions for failing to adhere to production obligations will keep both parties moving forward towards a fair and expeditious conclusion – one that ensures that patient safety is not overshadowed by procedural maneuvering.

VI.
TERMINATION BEFORE A DECISION ON THE MERITS SHOULD NOT BE THE EXCLUSIVE PURVIEW OF THE ULTIMATE TRIER OF FACT.

The *West Hills* decision acknowledges that on a proper showing, a hearing convened pursuant to section 809.2 can be terminated before a decision on the merits. (*West Hills, supra*, 154 Cal.App.4th 752, 773.)

CHA disagrees with the *West Hills* court's assertion that the integrity of the peer review system requires that *only* the trier of fact make such decisions. On the contrary, requiring the trier of fact to be involved in the often frustrating task of disciplining a physician for failing to abide by procedural requirements serves only to *compromise* the integrity of the hearing by creating opportunities for the hearing panel to become biased against the physician. Hearing panel members are not attorneys, and their ability, as physicians, to find the medical facts can easily be eclipsed by frustrating procedural maneuvering.

As Daniel Willick aptly observed in his letter to the Court dated November 8, 2007, urging review of this case, hearing panel members faced with delays caused by physician participants are likely to lose their objectivity and take personally lost time and energy spent on what will likely be viewed as an unnecessary waste of time. Try as it might, the *West Hills* decision does not create a solution for managing a disruptive physician in a section 809 hearing. Rather, it creates a novel theory on which the disruptive physician may claim reversible error, giving the physician new ammunition to argue that an adverse decision against him was the product of the prejudices of self-interested hearing panel members.

The *West Hills* court further held that the hearing officer's decision resulted in *premature termination* of the hearing, which the court defined as

termination "when either one of the parties has not been *afforded the opportunity* to exercise the rights set forth in 809.3(a)." (*West Hills, supra,* 154 Cal.App.4th 752, 764.) (Emphasis in original.) CHA believes this holding flatly contravenes section 809's clear language and intent. Section 809.3 subdivision (a) states:

> During a hearing concerning a final proposed action for which reporting is required to be filed under section 805, both parties shall have all of the following rights:
> (1) To be provided with all of the information made available to the trier of fact.
> (2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the preparation thereof.
> (3) To call, examine, and cross-examine witnesses.
> (4) To present and rebut evidence determined by the arbitrator or presiding officer to be relevant.
> (5) To submit a written statement at the close of the hearing.

Based on the fact that in *West Hills* no hearing sessions on the merits were conducted prior to termination of the hearing, the Court of Appeal there held that Dr. Mileikowsky was not afforded the section 809 rights above. This conclusion is ironic when one considers that Dr. Mileikowsky apparently orchestrated that outcome by committing repeated discovery violations aimed at preventing the medical staff from reaching the phase of the hearing in which it could examine, present and rebut evidence

concerning his termination at Cedars Sinai. Had the hearing proceeded without such evidence, the medical staff would necessarily have been denied the right to present and rebut evidence that the hearing officer clearly thought relevant, as required in section 809.3 subdivision (a) subpart (4). The *West Hills* decision fails to recognize that the hearing officer must balance the rights of *both* parties to the action, which we believe the hearing officer effectively did in this case.

Practically speaking, limiting termination decisions to the trier of fact will be insufficient to control disruptive conduct that occurs prior to the 809.3 subdivision (a) phase of the hearing begins. Under the *West Hills* court's holding, a physician interested in delaying the hearing process need only forestall the 809.3 subdivision (a) phase of a hearing to ensure near-immunity from termination. A physician will have wide latitude to engage in pre-hearing procedural shenanigans in order to do so. As preposterous as it may seem, for example, in *Tenet HealthSystem* Dr. Mileikowsky demonstrated that *voir dire* may be dragged out over eight months. (*Tenet HealthSystem, supra*, 128 Cal.App.4th 531, 546.) If *West Hills* is not reversed, a disruptive physician will have ample opportunity to evade his procedural duties and obligations. The only "punishment" for such efforts will be a continuance, resulting in further delays in the hearing process – too often the very object of a physician's efforts in such situations.

VII.
SECTION 809.2 SUBDIVISION (D) AUTHORIZES THE PRESIDING OFFICER TO CONTROL THE PROCEEDINGS.

By his own conduct, Dr. Mileikowsky has demonstrated how vulnerable to abuse the hearing process can be if the presiding officer is not authorized to control the proceedings. It makes no sense that the California Legislature went to the effort of creating a procedure for peer review hearings more extensive and detailed than that of any other state, only to fail to give the presiding officer the tools to control the process. On the contrary, section 809.2 subdivision (d) provides:

> The arbitrator or presiding officer shall consider and rule upon *any* request for access to information, and may impose *any* safeguards the protection of the peer review process and justice requires. [Emphasis added.]

Dr. Mileikowsky's contention that section 809.2 subdivision (d) does not apply to the parties' discovery obligations is unsustainable. The plain language of the provision and common sense both dictate that the Legislature wanted the presiding officer to have the authority to ensure fair access to information. That is why the statute specifically uses the term "any" twice in the above statutory sentence: first, respecting the universe of information access the presiding officer may consider; and second, respecting the type of safeguard he or she could impose regarding the protection of the peer review process and the requirements of justice.

Instead of limiting the presiding officer's scope, this passage makes plain the presiding officer's implicit authority in a hearing to use whatever tool is reasonably necessary to control the process regarding the parties' information access and production obligations. As discussed above, if either party stalls the process in the pre-809.3 subdivision (a) phase of the proceedings, as Dr. Mileikowsky demonstrated can be done in *Tenet HealthSystem*, and the hearing officer cannot effectively circumvent the stalling tactic, CHA wonders: How may its member hospitals ensure that patient safety and quality care will be preserved when relevant information can be withheld from the process?

VIII.
CONCLUSION

For the above reasons, this Court should reverse the Court of Appeal's decision in *West Hills, supra,* 154 Cal.App.4th 752.

Dated: August 27, 2008

Respectfully submitted,

ARENT FOX LLP
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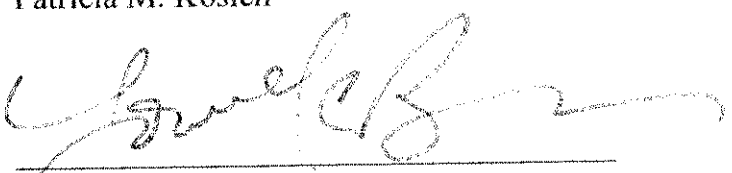

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of California Hospital Association is produced using 13-point Roman type, including footnotes, and contains 4,347 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program, Microsoft Office Word 2003, used to prepare this brief.

Dated: August 27, 2008

Lowell C. Brown
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PROOF OF SERVICE

I, Ann Mierisch, declare:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Arent Fox LLP, and my business address is 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. I am readily familiar with the practice of Arent Fox LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On August 27, 2008, I served the within document entitled **BRIEF OF AMICUS CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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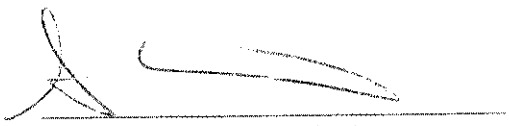
and, following ordinary business practices of Arent Fox LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 555 West Fifth Street, Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 27, 2008, at Los Angeles, California.



Ann Mierisch