

A131616

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

EDEN TOWNSHIP HEALTHCARE DISTRICT,
a California Local Healthcare District,
Cross-Complainant and Appellant,

vs.

SUTTER HEALTH and EDEN MEDICAL CENTER, INC.,
Cross-Defendants and Respondents.

On Appeal From Summary Judgment
Alameda County Superior Court, No. RG09-481573
The Honorable Marshall Whitley, Presiding

**APPLICATION OF CALIFORNIA NURSES ASSOCIATION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF CROSS-COMPLAINANT AND APPELLANT
EDEN TOWNSHIP HEALTHCARE DISTRICT;
BRIEF AMICUS CURIAE**

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APPLICATION TO FILE BRIEF AMICUS CURIAE

INTRODUCTION

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Nurses Association (“CNA”) requests permission to file the accompanying amicus brief in support of Cross-Complainant and Appellant Eden Township Healthcare District (“District”).

INTEREST OF THE AMICUS CURIAE

CNA and its national arm, the National Nurses Organizing Committee (“NNOC”), is a nonprofit professional nursing association of more than 86,000 registered nurses, more than 65,000 of whom practice in the State of California. CNA serves as the exclusive collective bargaining representative of registered nurses employed at more than 200 hospitals and healthcare facilities, including approximately 590 registered nurses employed at the two hospital facilities owned by the Appellant District and currently operated by Respondent Sutter Health, Eden Medical Center in Castro Valley and the San Leandro Hospital Campus in San Leandro.

CNA's primary goals include the promotion of patient protection and a single standard of high quality healthcare for all. CNA is actively engaged in advocacy for public policies supporting access to quality healthcare throughout California so that all residents have access to high standards of healthcare. By California law, registered nurses practicing in this state hold a duty of "patient advocacy" in all settings in which they provide patient care. The professional responsibility of patient advocacy places the interests of the patient above all else, requiring registered nurses to "[a]ct as the [patient's] advocate, as circumstances require, by initiating action to improve health care or to change decisions or activities which are against the interests or wishes of the [patient], and by giving the [patient] the opportunity to make informed decisions about health care before it is provided." (16 C.C.R. § 1443.5(6).)

CNA's interest in this matter stems from a concern that certain contracts relating to operation of the District entered into by the Respondents are not in the best interests of the patients served by the District and were driven by financial interests in violation of Government Code Section 1090. That concern is consistent with the patient advocacy mandate imposed on CNA's members, many of

whom have a personal interest in the outcome of this case because, in addition to their professional concerns for all patients, they live near and obtain healthcare services for themselves and their families at the District's hospital facilities.

Amicus curiae¹ believes that the Court will benefit from additional briefing in this case and submits the attached brief and accompanying request for judicial notice attaching public record copies of certain of the Respondents' Internal Revenue Service filings for relevant years, which it believes support the District's allegations of misconduct. CNA believes the community served by the District deserves to have that misconduct exposed and corrected. To CNA's knowledge, no party has fully addressed this issue in this way in any

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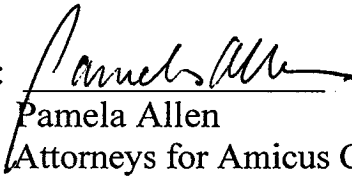
¹ No party or counsel for a party authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, except for Amicus Curiae and its counsel.

brief now before the Court and, accordingly, respectfully requests that the Court accept and file the attached amicus curiae brief.

Dated: August 8, 2011

Respectfully Submitted,

CALIFORNIA NURSES
ASSOCIATION
LEGAL DEPARTMENT

By: 
Pamela Allen
Attorneys for Amicus Curiae
CALIFORNIA NURSES
ASSOCIATION

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

The California Nurses Association (“CNA”) files this amicus curiae brief and accompanying request for judicial notice to inform the Court of relevant facts and circumstances concerning the organizational relationships of the parties and financial interests of District officials George Bischaney and Dr. Francisco Rico not included in the record before the Court, but revealed in judicially noticeable annual returns filed by Sutter Health and Eden Medical Center with the Internal Revenue Service (IRS Form 990, Return of Organization Exempt From Income Tax).

II. ARGUMENT

A. Sutter Health is an Integrated Health Care System of Controlled Affiliates

Sutter Health (“Sutter”) is an integrated health care system in Northern California consisting of tax-exempt affiliates that are controlled and operated by Sutter through formal organizational relationships, functional and financial integration, centralized administration, and day-to-day management by Sutter employed management officials. (*See* Request for Judicial Notice of Amicus Curiae California Nurses Association filed herewith (“Req. for

Judicial Notice”), Exhibit 1, Amended 2008 Form 990, Return of Organization Exempt from Income Tax for Sutter Health (EIN no. 94-2788907), Schedule R-1, Part II – Continuation of Identification of Related Tax-Exempt Organizations, Schedule R-1, Part V – Continuation of Transactions with Related Organizations, and Statement 2, Schedule A, Part I – Information About Supported Organizations). Sutter Health and its controlled affiliate medical and hospital service providers constitute a private commercial enterprise. Like most hospital service providers Sutter and its controlled affiliates were organized and operate as non-profit organizations funded in part by tax subsidies gained from income, property and various other federal, state and local tax exemptions. These tax exemptions reflect public policy decisions by federal, state and local governments to assist and support the provision of a critical social service – health care. The exemptions do not, however, convert Sutter Health to a public entity or government agency. Sutter and its controlled affiliates are proprietary operations seeking private entity gain and surplus revenue in a private commercial market.

B. Eden Medical Center is Controlled by Sutter Health

Eden Medical Center (“EMC”) is a controlled affiliate of Sutter Health. As described in its information tax return, “[t]his corporation is an affiliate of Sutter Health, a California nonprofit public benefit corporation. There are two members. Sutter Health is the corporate member with the right to elect at least a majority of the members of the board of directors, and Eden Township Healthcare District serves as a Community Member with the right to elect members of the board of directors.” (See Request for Judicial Notice, Exhibit 5, 2009 Form 990 for Eden Medical Center, Schedule O, Supplemental Information to Form 990, Identifier “Description of Classes of Persons and Nature of Their Rights,” Return Reference. (“Form 990, Part VI, Line 7A.”))

The filings with the IRS reveal financial transactions of very significant magnitude between Sutter and EMC. (*See, e.g.*, Request for Judicial Notice, Exhibit 1, Amended 2008 Form 990 for Sutter Health: Schedule R-1, Part II, “Eden Medical Center (94-2948100) . . . Direct controlling entity – Sutter Health;” Schedule R-1, Part V, Transactions with Related Organizations, identifying transactions involving payments by and between EMC and Sutter in amounts of \$21,773,127, \$13,555,823, \$61,907,995, \$11,880,697 and

\$12,440,019; and Statement 2, Schedule A, Part I, identifying Sutter financial support to EMC in the amount of \$48,484,774.)

C. Financial Interests of District Officials

1. George Bischaney

The Superior Court found that “[a]t all times since 1998 through the present [November 2010], Mr. George Bishalaney was employed by EMC as its President and CEO [and] . . . and also served as CEO of the District from January, 1998 through June, 2008.” (Order on Sutter Health’s and Eden Medical Center’s Motion for Summary Judgment on the Cross-Complaint of Eden Township Healthcare District and on Eden Township Healthcare District’s Motion for Summary Adjudication of Issues, proposed by Sutter/EMC, adopted in whole by the Superior Court, November 12, 2010 (“Superior Court Order”), p. 4:13-15.) However,

- Sutter **did not disclose** to the lower court that while serving as CEO for the District and as CEO and Director for EMC, Bischaney was an employee of Sutter Health. Sutter’s filings with the IRS do make that disclosure. (*See, e.g.*, Request for Judicial Notice, Exhibit 4, 2008 Form 990 for Eden Medical Center, Schedule J, p. 3, Part III: (Part I,

Question 3): “The CEO of the organization [Bischalaney] is an employee of Sutter Health. The Compensation Committee of the Sutter Health Board of Directors retains ultimate discretionary authority over all elements of compensation to assure that [Sutter Health] organizational purposes are appropriately being served.”

- Sutter Health **did not disclose** that Bischalaney was paid under a Sutter Health Compensation Policy that: “. . . recognize and reward both individual and team performance against performance parameters important to the organization’s success . . . Sutter Health maintains a “total compensation” . . . perspective – this means that base salary, incentives (both annual and long-term) and benefit/perquisite practices are considered . . . incentive compensation has become an increasingly prevalent practice in health care and , therefore, of greater importance in the overall compensation equation at Sutter Health. We believe that a minimum level of incentive compensation should occur if the executive meets the approved budget and planned objectives for his/her position. Higher levels of

incentive pay are obtained by meeting pre-established stretch goals” (See Request for Judicial Notice, Exhibit 3, 2007 Form 990 for Eden Medical Center, TY 2007 General Explanation Attachment, Eden Medical Center (EIN: 94-2948100), Identifier: Sutter Health Compensation Philosophy)

- Sutter Health did not disclose that in 2008, Buschalaney received the following compensation from Sutter entities:

Type of Compensation	From EMC	From Sutter Related Org	TOTAL
(i) base compensation	235,446	146,840	
(ii) bonus & incentive	0	68,100	
(iii) other compensation	0	553	
(C) deferred compensation	0	136,827	
(D) nontaxable benefits	6,759	7,340	
(E) total	\$242,205	\$359,660	\$601,865

(See Request for Judicial Notice, Exhibit 3, 2008 Form 990 for Eden Medical Center, Schedule J, Part II.)

2. Dr. Francisco Rico

In adopting Sutter's proposed Order, the Superior Court found that "Dr. Rico did not stand to gain financially from the 2008 Agreements. It is undisputed that Dr. Rico did not plan to practice at EMC or SLH as of January 1, 2008, that he had started cutting back on his practice in February, 2007 at the age of 69; that he planned to work full-time for Optima commencing January 1, 2008; and that he did so with 2 or 3 exceptions per year through the present [November, 2010], when former patients specifically requested him, which earned him less than \$5,000." (Superior Court Order, p. 16:17-21.)

However,

- Sutter Health did not disclose that Dr. Rico was a party to a transaction in excess of \$2.2 million and is a "56% shareholder of Alameda Anesthesia Associates Medical Group (AAAMG)" (See Request for Judicial Notice, Exhibit 5, 2009 Form 990 for Eden Medical Center, Description of Business Transaction Involving Interested Persons, Schedule L, Part IV and Schedule O, Description of Business Transaction; *see also*, Request for Judicial Notice, Exhibit 3, 2007 Form 990 for Eden Medical Center, TY

2007 Self Dealing Statement, Eden Medical Center (EIN #94-2948100), Line Number 2c: “Francisco Rico, MD, Vice Chair and Director Eden Medical Center (EMC) is also the Secretary Director of Eden Township Hospital District (ETHD). During the year, EMC was paid by ETHD for management services. Doctor Rico is also a shareholder in Alameda Anesthesia Associates Medical Group, Inc. which provided services to EMC during the year via an arms-length agreement.”

- Sutter Health did not disclose that Alameda Anesthesia Associates was paid the following amounts by EMC/Sutter in the years 2007, 2008 and 2009:

2007: \$ 2,206,620

(Request for Judicial Notice, Exhibit 3, Schedule A, Part II-A)

2008: \$ 2,207,750

(Request for Judicial Notice, Exhibit 4, Part VII-Section B)

2009: \$ 2,206,620

(Request for Judicial Notice, Exhibit 5, Part VII-Section B,
Independent Contractors, Schedule L, Part IV, Business
Transactions Involving Interested Persons)

The financial transactions described above as revealed by the Respondents' annual IRS filings were not considered by the Superior Court when summary judgment was entered finding no violation of the strict prohibition against financial conflicts of interest in public contracts. These facts are relevant to the Court's analysis and should be considered in resolving the District's rights in its efforts to provide health care services to the community it serves.


III. CONCLUSION

The decision of the trial court granting summary judgment to the Respondents should be reversed.

Dated: August 8, 2011

Respectfully submitted,

CALIFORNIA NURSES
ASSOCIATION
LEGAL DEPARTMENT



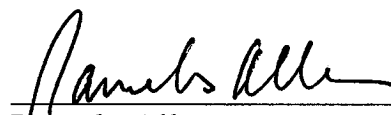
Pamela Allen

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CALIFORNIA NURSES
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**BRIEF FORMAT CERTIFICATION PURSUANT TO RULE
8.204 OF THE CALIFIORNIA RULES OF COURT**

Pursuant to Rule 8.204 of the California Rules of Court, I
certify that this brief is proportionately spaced, has a typeface of 13
points or greater and contains 1,432 words as counted by the
Microsoft Office Word 2007 word processing program used to
generate the brief.

Dated: August 8, 2011



Pamela Allen

PROOF OF SERVICE

*Eden Township Healthcare District v.
Sutter Health and Eden Medical Center, Inc.*, Cal. App. 1 No. A131616

I am over the age of 18 years, employed in the County of Alameda, and not a party to the within action. My business address is 2000 Franklin Street, Oakland, CA 94612.

On the date below, I served the following document:

**APPLICATION OF CALIFORNIA NURSES ASSOCIATION FOR
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One (1) Copy to:
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County of Alameda
1225 Fallon Street
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 8, 2011, at Oakland, California.



Rob Craven