APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY RYAN, M.D., an individual, Plaintiff-Appellee, v. BRANT PUTNAM, M.D., an individual; JANINE VINTCH, M.D., an individual, Defendants-Appellants, and ANISH MAHAJAN, M.D.; et al., Defendants.	No. 22-55144 D.C. No. 2:17-cv-05752-CAS-RAO MEMORANDUM*

TIMOTHY RYAN, M.D., an individual, Plaintiff-Appellee, v.	No. 22-55406 D.C. No. 2:17-cv-05752-CAS-RAO

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

CHRISTIAN DE VIRGILIO, M.D.; ROGER LEWIS, M.D.,

Defendants-Appellants,

and

BRANT PUTNAM, M.D., an individual; et al.,

Defendants.

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted June 6, 2023
Pasadena, California

Before: WALLACE and OWENS, Circuit Judges, and FITZWATER,** District Judge.
Concurrence by Judge FITZWATER.

Defendants Brant Putnam, Janine Vintch, Roger Lewis, and Christian de Virgilio appeal from the district court's two denials of summary judgment on their qualified immunity defense to Timothy Ryan's 42 U.S.C. § 1983 action against them. Ryan claims Defendants violated his First Amendment rights by retaliating against his employment for reporting medical fraud. Because the parties are familiar with

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

the facts, we do not recount them here. We affirm the denial of qualified immunity.

We review summary judgment rulings de novo. *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776 (9th Cir. 2022). On interlocutory appeal of the denial of summary judgment on a qualified immunity defense, our jurisdiction is limited to resolving legal questions. *See Plumhoff v. Rickard*, 572 U.S. 765, 771-73 (2014). "Where disputed facts exist, we assume that the version of the material facts asserted by the Plaintiff . . . is correct." *Eng v. Cooley*, 552 F.3d 1062, 1067 (9th Cir. 2009) (cleaned up).

Defendants are not entitled to qualified immunity if their conduct violated Ryan's First Amendment rights and constituted a violation of clearly established law at the time of the incidents. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Clearly established law exists if precedent placed the unconstitutionality of the conduct "beyond debate." *White v. Pauly*, 580 U.S. 73, 78-79 (2017).

1. To establish a First Amendment retaliation claim, Ryan must show that his protected speech motivated Defendants to take an adverse employment action against him. *Eng*, 552 F.3d at 1070. Defendants assert that they are entitled to qualified immunity because there is no clearly established law showing that Ryan suffered an adverse employment action. However, we have previously held that a peer review committee's investigation of a doctor that threatened to revoke his clinical privileges was an adverse employment action. *See Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 977 (9th Cir. 2002). Thus, the initiation of the Focused Professional Performance Evaluation

("FPPE") of Ryan was an adverse employment action under clearly established law. The decision to impose a behavioral contract and revoke clinical privileges in the alternative was also an adverse employment action under clearly established law. The revocation of clinical privileges will necessarily result in termination, a quintessential adverse employment action. *See Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

Defendants argue that these actions are not sufficiently final to constitute adverse employment actions because the FPPE would not necessarily result in discipline and the decision to revoke privileges was subject to appeal. But we have previously held that actions for which the disciplinary outcome is uncertain—such as an investigatory inquiry—are adverse employment actions. *See*, *e.g.*, *Poland v. Chertoff*, 494 F.3d 1174, 1180 (9th Cir. 2007).

Defendants also contend that the actions against Ryan are not attributable to them under clearly established law because their only action was voting as members of the Medical Executive Committee. However, we have previously explained in this context that "[a]nyone who 'causes' any citizen to be subjected to a constitutional deprivation is . . . liable," and that the "requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 n.22 (9th Cir. 2013) (en banc) (citations omitted).

2. To succeed in his claim, Ryan must also show that he spoke as a private citizen instead of as a public employee. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Defendants contend that they are entitled to qualified immunity because there is no clearly established law showing that Ryan spoke as a private citizen. "Statements are made in the speaker's capacity as [a private] citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008) (cleaned up).

Whether Ryan spoke as a private citizen depends on what his employment duties required, which is a factual dispute. *See Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1058-59 (9th Cir. 2013). Defendants contend that Ryan conceded that his speech was within the scope of his job by asking the county to indemnify him in Rodney White's lawsuit. However, the speech at issue here is Ryan's external reports of fraud to the District Attorney's office and the National Institutes of Health, which Ryan argues was not part of his job. Resolving this factual dispute in Ryan's favor, as we must, Eng, 552 F.3d at 1067, reporting suspected fraud externally was beyond the scope of his employment as a physician. And by the time of the adverse employment actions, it was clearly established that speech by a public employee "not made pursuant to [their] official job duties" is made in their capacity as a private citizen. *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1074 (9th Cir. 2012).

3. Even where speech would otherwise be protected, Defendants can defeat Ryan's claim by demonstrating that their "legitimate administrative interests outweigh [Ryan's] First Amendment rights" and the public's interest in Ryan's speech. *Eng*, 552 F.3d at 1071; *see City of San Diego v. Roe*, 543 U.S. 77, 82 (2004). Here, Defendants assert that they are entitled to qualified immunity because there is no clearly established law showing that Ryan's interests outweigh theirs.

We have previously held that the interests of the public employee and the public in whistleblower speech outweigh the employer's interest where the employer shows only the potential for disturbance in the workplace. *See Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009). Here, Defendants have shown no interest in suppressing Ryan's whistleblower speech because they do not argue that Ryan's reports of fraud caused disruption or affected patient care. Instead, they argue that their actions were justified by complaints of Ryan's unprofessional behavior largely unrelated to his reports of fraud. But the balancing inquiry does not allow public employers to suppress speech due to the speaker's other conduct. *See Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 910 (9th Cir. 2021) (noting that the proper inquiry is whether the speech in question threatened the employer's interests).

Because Defendants presented no argument that Ryan's whistleblowing itself harmed or would harm their interests, that they lose in the balancing analysis is "beyond debate" and therefore clearly established. *Pauly*, 580 U.S. at 79.

Whether Defendants would have taken the same adverse employment actions regardless of Ryan's whistleblowing is a separate question on which we express no opinion because it is not before us.

AFFIRMED.

Ryan v. Putnam, 22-55144, 22-55406

FITZWATER, District Judge, concurring:

Considering the district court's decision in light of the record before it, and our limited appellate jurisdiction, *see*, *e.g.*, *Russell v. Lumitap*, 31 F.4th 729, 736 (9th Cir. 2022), I concur in the panel's decision to affirm the denial of qualified immunity for Defendants-Appellants. I write separately to emphasize that our affirmance does not remove qualified immunity from consideration on remand. In the words of another panel of this court, "[t]he result of our affirmance on this interlocutory appeal of the district court's denial of summary judgment motion based upon qualified immunity is to return the qualified immunity issue to the district court for determination on its merits. We express no view on those merits here . . . ." *Thompson v. Mahre*, 110 F.3d 716, 719 n.1 (9th Cir. 1997) (emphasis omitted) (quoting *Thompson v. Mahre and Steen*, 959 F.2d 241 (9th Cir. 1992) (mem.)).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TIMOTHY RYAN, M.D., an individual, Plaintiff-Appellee, v. BRANT PUTNAM, M.D., an individual; JANINE VINTCH, M.D., an individual, Defendants-Appellants, and ANISH MAHAJAN, M.D.; et al., Defendants.	No. 22-55144 D.C. No. 2:17-cv-05752-CAS-RAO Central District of California, Los Angeles ORDER

TIMOTHY RYAN, M.D., an individual, Plaintiff-Appellee, v. CHRISTIAN DE VIRGILIO, M.D.; ROGER LEWIS, M.D., Defendants-Appellants,	No. 22-55406 D.C. No. 2:17-cv-05752-CAS-RAO

and

BRANT PUTNAM, M.D., an individual; JANINE VINTCH, M.D., an individual; ANISH MAHAJAN, M.D.; HAL F. YEE, M.D., an individual; MITCHELL KATZ, M.D.; DOES, 1 through 10, inclusive,

Defendants.

Before: WALLACE and OWENS, Circuit Judges, and FITZWATER,* District Judge.

The panel votes to deny the petition for panel rehearing. Judges Owens votes to deny the petition for rehearing en banc, and Judges Wallace and Fitzwater so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:17-cv-05752-CAS-RAOx Date January 10, 2022
Title Timothy Ryan v. Brant Putnam, et al.

Present: The Honorable CHRISTINA A. SNYDER

D. Rojas	Not Present	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: MOTION OF DEFENDANTS BRANT PUTNAM, M.D., AND JANINE VINTCH, M.D., FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT (Dkt. 61, filed on October 29, 2021)

I. INTRODUCTION

On August 3, 2017, plaintiff Timothy Ryan, M.D., formerly a vascular surgeon at Harbor-UCLA Medical Center ("Harbor-UCLA"), filed this action against defendants Brant Putnam, M.D., Janine Vintch, M.D., Anish Mahajan, M.D., Christian De Virgilio, M.D., Hal F. Yee, M.D, and Does 1-50. Dkt. 1 ("Compl"). On October 6, 2017, Ryan filed the operative first amended complaint ("FAC"), which adds Roger Lewis,

M.D., and Mitchell Katz, M.D., as defendants. Dkt. 14 (FAC). Ryan's FAC alleges that defendants violated his First Amendment rights by disciplining him for reporting physician misconduct at Harbor-UCLA to federal, state, and local government agencies. Id. Ryan's FAC alleges a single claim for relief, against all defendants: retaliation based on exercise of right to free speech, in violation of 42 U.S.C. § 1983. Id. The FAC seeks punitive damages against defendants Putnam, Yee, Lewis, Katz, and DeVirgilio. Id.

On October 27, 2017, defendants moved to dismiss plaintiff's FAC. Dkt. 15. On February 15, 2018, the Hon. Manuel L. Real, now deceased, granted defendants' motion to dismiss, finding that defendants were entitled to qualified immunity. Dkt. 22 ("MTD Order"). On February 23, 2018, Ryan provided notice of his appeal of the MTD Order to the United States Court of Appeals for the Ninth Circuit. Dkt. 23. On September 18, 2019, the Ninth Circuit reversed and remanded the MTD Order, finding that "qualified immunity [was] not warranted at [that] stage." Dkt. 26. Specifically, the Ninth Circuit stated that "[a]n adverse employment action is [an] action 'reasonably likely to deter [the plaintiff] from engaging in protected activity under the First Amendment'" (quoting Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003)), and found that "[s]ince 2002, [the Ninth Circuit has] recognized that an employer's decision to initiate disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects, is enough to satisfy the 'adverse employment action' requirement." Dkt. 26 at 2-3 (citing Ulrich v. City & Cty. of San Francisco, 308 F.3d

968, 977 (9th Cir. 2002)). In light of that background, the Ninth Circuit found Ryan's allegations "sufficiently similar to Ulrich to satisfy the clearly established prong of the qualified immunity analysis at [that] early stage." Dkt. 26 at 3.

On October 15, 2019, the case was randomly reassigned to this Court. Dkt. 28. On April 17, 2020, defendants submitted their answer to the FAC. Dkt. 36.

On October 29, 2021, defendants Putnam and Vintch filed a motion for summary judgment or, alternatively, partial summary judgment. Dkt. 61-1 ("Mot."). Putnam and Vintch also filed a request for judicial notice (Dkt. 61-8 ("RJN")), and a statement of uncontroverted facts (Dkt. 61-2 ("SUF")). On November 15, 2021, Ryan submitted his opposition to defendants' motion for summary judgment. Dkt. 62 ("Opp."). Ryan also submitted a statement of genuine disputes of material fact, which includes additional material facts. Dkt. 62-1 ("GDF"). On November 22, 2021, defendants submitted their reply (Dkt. 63 ("Reply")) and a response to plaintiff's statement of genuine disputes of material fact (Dkt. 63-1 ("SUF Reply")).

The Court held a hearing on December 6, 2021. Thereafter, it permitted the parties to file supplemental briefs on qualified immunity. Defendants submitted their supplemental brief on December 13, 2021. Dkt. 66 ("Defs' Supp."). Plaintiff submitted his supplemental brief on December 20, 2021. Dkt. 67 ("Plf's Supp.").

Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

II. BACKGROUND

Unless otherwise noted, the Court references only facts that are uncontroverted and to which evidentiary objections, if any, have been overruled.[1]

A. The Parties

Ryan was employed by Harbor-UCLA "as a Staff Vascular Surgeon, Physician Specialist, from October 2013 to October 2018, and first obtained medical staff privileges in 2013." SUF No. 9. Harbor-UCLA "is owned by the County of Los Angeles ("County") and operated by the County's Department of Health Services ("DHS")." Id. No. 1.

In order to practice as a physician at Harbor-UCLA, physicians must hold a license issued by the California Medical Board, and separately must hold medical staff privileges that allow physicians to treat patients at Harbor-UCLA. Id. No. 2. Medical staff privileges at Harbor-UCLA are granted by the Credentials Committee, a subcommittee of the Medical Executive Committee ("MEC"), which, in

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[1] "In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 (C.D. Cal. 2010). To the extent that the Court relies on objected-to evidence, it has considered and **OVERRULED** the applicable evidentiary objections because the objected-to-evidence is relevant and admissible. Evidence not considered by the Court is not addressed.

turn, is part of Harbor-UCLA's Professional Staff Association ("PSA"). Id. Medical staff privileges for Harbor-UCLA must be renewed every two years. Id.

Harbor-UCLA's PSA functions in accordance with its Bylaws, and "is tasked with monitoring physicians' compliance with credentialing requirements, and evaluating all members and applicants in accordance with peer review criteria, adopted consistent with the Bylaws and the PSA's peer review process." Id. Nos. 3-4.

Putnam "was a member of the MEC from 2011 to 2021, and served as President of the PSA and Chair of the MEC from July 1, 2015 to June 30, 2018." Id. No. 6. Vintch "has been a member of the MEC since 2006; she was Vice President of the PSA and Vice Chair of the MEC from July 1, 2015 to June 30, 2018, and President of the PSA and Chair of the PSA from July 1, 2018 to June 30, 2021." Id. No. 7.

B. The Best-CLI Trial and Ryan's Concerns that UCLA-Harbor Physicians Falsified their Attestations

In 2014, Ryan "became aware of a clinical trial sponsored by the National Institute of Health ("NIH") called BEST-CLI, which stands for Best Endovascular vs. Best Surgical Therapy in Patients with Critical Limb Ischemia." GDF No. 48. "The clinical trial was designed to evaluate what procedures on patients with critical limb ischemia led to the best results, comparing endovascular surgery (which uses catheters and is less invasive) with open surgery." Id. The trial required physicians to have completed a set number of surgeries to qualify for participation. Id.

No. 49. Ryan "became concerned that some [UCLA-Harbor] surgeons—including Dr. Rodney White [] and Dr. Carlos Donayre []—had not completed the requisite number of surgeries to qualify for the trial, and that they had therefore falsified the attestation in their applications in order to participate." Id. White has stated that the BEST-CLI trial was "a big national trial [that cost] over $20 million dollars." Id. No. 130.

On December 4, 2014, Ryan reported his concerns regarding the possibly falsified attestations to Dr. Timothy Van Natta, Chief Medical Officer at UCLA-Harbor, and De Virgilio, but based on their responses, Ryan did not believe that "they were seriously investigating whether Harbor surgeons had falsely inflated their surgical experience in order to qualify for the BEST-CLI trial." Id. Nos. 50-51. Accordingly, on December 4, 2014, Ryan "contacted the NIH and reported his concerns, providing his basis for believing that Dr. White and Dr. Donayre, among others, had falsified their attestations in their application to participate in the BEST-CLI trial." Id. No. 53. On approximately December 9, 2014, Ryan informed Van Natta that he had made a report to the NIH. Id. No. 54.

On February 12, 2015, the Surgical and Interventional Management Committee ("SIMC") for the BEST-CLI Trial found that "no one at [UCLA-Harbor] currently meets the criteria to serve as an independent endovascular operator" and that until someone on site met the criteria, "the site should no longer enroll patients in the BEST-CLI Trial." Dkt. 62-5 at Ex. 331. On March 30, 2015, SIMC "found that several members of the Harbor-UCLA team

misrepresented their procedural volume histories to meet the criteria of independent endovascular operator." Dkt. 61-7 at Ex. 24. However, despite the finding that members of the Harbor-UCLA team had engaged in misrepresentation, the HHS Office of Research Integrity "advised that the falsification of information in this situation would not constitute research misconduct" and stated that it "will not investigate this matter further." Id.

C. Patient "BH" and Ryan's Concerns Regarding an Alleged Kickback Scheme

In December 2013, Ryan "treated a patient 'BH' for an aortic dissection ... with medication, which he believed to be the appropriate course." GDF No. 57. Shortly after Ryan treated patient BH, "Dr. White's nurse Rowena Buwalda copied Dr. Ryan on an email reporting that she had instructed BH to come to the hospital the following day and to complain of chest pains when she did so." Id. No. 58. Ryan "further learned that Dr. White had performed surgery on BH, implanting a stent graft manufactured by Medtronic," even though Ryan "firmly believed that BH had responded well to non-surgical management and that she had no need for the stent graft procedure." Id. Nos. 60-61. BH "suffered a serious aortic injury as a result of the stent graft surgery, resulting in a major stroke that impaired her ability to speak." Id. No. 62.

Ryan believed that "Dr. White had falsified the medical record to justify the stent graft, describing symptoms inconsistent with what I had observed." Dkt. 62-4 (Declaration of Plaintiff Timothy Ryan, M.D. ("Ryan Decl.")) ¶ 6. Moreover, Ryan "concluded that Dr. White, Dr. Donayre, and others were implanting

stent grafts manufactured by Medtronic in patients where they were not medically warranted, and that they had a financial incentive to do so" because "[t]he device manufacturer Medtronic was paying them thousands of dollars each time they implanted one of Medtronic's stent grafts under the guise that they were conducting a 'teaching course' on how to do so when they implanted the stent graft." Ryan Decl. ¶ 7. Ryan states that he "knew this because in December 2013 Medtronic offered to pay me to participate" in the teaching courses. Id. Ryan states that "[b]ased on my direct observation of the operations associated with these supposed 'courses,' I know there were no physicians present to observe the procedure, so no one to 'learn' from the 'course.'" Id.

Ryan conducted an "investigation," and came to believe that "the doctors received several thousand dollars per implant," and that "Medtronic was paid tens of thousands of dollars per case where Medtronic devices were implanted." Id. Ryan "was gravely concerned by this development, because he believed it represented doctors getting kickbacks from a device manufacturer for using their product, that it compromised medical judgment about whether the devices were medically indicated, and that it threatened the health and safety of patients for whom the stent grafts were not medically indicated, as in the case of BH." GDF No. 68.

Accordingly, Ryan submitted a complaint regarding White, and later was able to confirm that the Harbor-UCLA PSA conducted a Focused Professional Performance Evaluation ("FPPE") of White because Ryan was interviewed by the FPEE

team. SUF No. 13; GDF No. 73. In the interview, Ryan told the FPPE team "about his concerns and conclusions about Dr. White and the Medtronic kickbacks, and provided them with documentation including BH's medical records." GDF No. 73.

D. Ryan Reports the Alleged Kickback Scheme to Criminal Authorities

Ryan was not satisfied with UCLA-Harbor's response to his complaint regarding the alleged Medtronic kickback scheme. GDF No. 74. Accordingly, on approximately January 12, 2015, Ryan "called the Los Angeles District Attorney's Office and spoke to a Deputy District Attorney ... describing his concerns that Harbor physicians were getting kickbacks for implanting devices that were not medically indicated." Id. No. 75. "The Deputy District Attorney told Dr. Ryan that the District Attorney's Office would investigate, and later interviewed Dr. Ryan." Id. Shortly thereafter, Ryan told De Virgilio that "he had reported his concerns to the District Attorney's Office and [that] they would be investigating." Id. No. 76.

E. White's Complaints Regarding Ryan; The MEC's Response

On January 26, 2015, White emailed Human Resources, Van Natta, and DeVirgilio "to report invasion of personal privacy, and potential federal [] and state (California Medical Privacy Act) patient privacy violations by Dr. Timothy Ryan." Dkt. 62-5 at Ex. 341. On February 4, 2015, White submitted an affidavit and several exhibits in support of his report. Id. White's affidavit "complained that Dr. Ryan had improperly reviewed medical records and operative

reports and approached [UCLA-Harbor] personnel to collect information regarding Dr. White and his patients." GDF No. 81. Moreover, White's affidavit "attached a computerized report of surgeries which he claimed Dr. Ryan had asked an assistant to print for him."[2] Id. No. 83. "[A] recognized HIPAA Compliance Officer review[ed] the case and it was found that no [HIPAA] violation occurred on the part of Dr. Ryan." Dkt. 62-5 at Ex. 365.[3]

On August 25, 2015, White made a Request for Corrective Action ("CAR") to be taken against Ryan to the PSA. SUF No. 14. White claimed, inter alia, that Ryan "engaged in conduct detrimental to the delivery of quality patient care," "invaded his personal privacy, and violated both the Health Insurance Portability and Accountability Act ("HIPAA") and California's Confidentiality of Medical Information Act, by accessing confidential patient information in Dr. White's office." Id.; GDF Nos. 96-97. Ryan contends that "Dr. White's [CAR] described Dr. Ryan's activities asking for and reviewing records to make reports to the NIH and District Attorney's Office." Ryan Decl. ¶ 13.

On September 28, 2015, the MEC discussed Dr. White's CAR. SUF No. 15; GDF No. 101. Putnam

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[2] The footer at the bottom of the report is dated January 30, 2015, i.e., after White's complaint. See Dkt. 62-5 at Ex. 341. The parties dispute whether this date refers to the date the report was created or the date the documented was printed or reprinted. See GDF No. 84; SUF Reply No. 84.

[3] Separately, on July 29, 2015, White filed suit against Ryan. SUF No. 41. The lawsuit was later dismissed in exchange for Ryan's dismissal of his own lawsuit against White. Id. No. 42.

presided over the meeting, and Vintch attended at least a portion of the meeting. GDF No. 101; SUF Reply No. 101. The draft meeting minutes noted that "Dr. Ryan considers himself a whistleblower because he thought this bad thing happened and he wanted to do right." Dkt. 62-5 at Ex. 365. They further noted that "[t]o take corrective action beyond the investigation could be considered retaliation because we feel this issue has been investigated adequately," but, "[o]n the other hand, it is not necessarily under the purview of the whistleblower to do their own investigation and start digging into whatever they want." Id. The draft meeting minutes also stated that "[t]he PSA spent months and worked very diligently on this and ultimately there was no resolution," "now we are being asked to investigate this again," and that "these complaints were taken seriously and went appropriately to HR Performance Management and the HIPAA compliance Officer and the difference now is that there are attorneys involved and litigation." Id. Finally, they stated that "a recognized HIPAA Compliance Officer review[ed] the case and it was found that no HIPAA violation occurred on the part of Dr. Ryan." Id.[4]

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[4] Ryan contends that the version of the September 28, 2015 MEC meeting minutes Putnam "circulated to be used in litigation" were "substantially altered," including by "remov[ing] references to a previous investigation determining that Dr. Ryan did not violate HIPAA" and "omitt[ing] the statement that proceeding against Dr. Ryan could be retaliation because the PSA feels the matter was already adequately investigated." GDF No. 103. In response, Putnam and Vintch emphasize that the draft meeting minutes were only a draft, and that therefore the final version "does not represent substantially altered minutes." SUF Reply No. 103, Moreover, Putnam and Vintch contend that "[a]ll of the

In November or December 2015, White submitted an addendum to his CAR. SUF No. 16; GDF No. 117. The addendum stated, in part, that:

> "On November 19, 2015 I was advised by the County's Intake Specialist Unit that Dr. Ryan filed a complaint against me. On November 24, 2015, I received another letter from that same unit, that the complaint had been initially investigated, that the allegations would not be investigated further and that the matter was considered closed. Enclosed are copies of both letters. This continuing pattern of harassment, and unscrupulous conduct by Dr. Ryan, is having a severe adverse impact on me, as a member of the medical staff, and on my personal and professional life."

SUF No. 16; GDF No. 117.[5] On December 28, 2015, Putnam presided over an MEC meeting to discuss White's addendum to his CAR. SUF No. 19; GDF No. 120. At the meeting, the MEC "noted the next step would be to complete an FPPE on Dr. Ryan because of the allegations of questionable conduct." SUF No. 19.[6]

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topics Plaintiff depicts as 'omitted' from the non-draft minutes for September 2015 were discussed in other MEC documents 'used in litigation' and included with Defendants' moving papers, thus refuting Plaintiff's baseless assertion that Defendants sought to conceal such items." Id.

[5] Similarly, on December 31, 2015, White wrote to De Virgilio complaining that Ryan had violated HIPAA by gathering data "to initiate the Fraud investigation against Harbor (me) with the trial Steering Committee, and the NIH." GDF No. 121 (quoting Dkt. 62-5 at Ex. 371).

[6] Whereas Putnam stated in his deposition that "typically when there are concerns brought forward either from a department

Accordingly, on December 28, 2015, the MEC directed a FPPE be undertaken by an "Ad Hoc Committee." Id. No. 21. The members of the committee were chosen by De Virgilio as Department Chair. Id.; GDF No. 122. While defendants contend that the MEC directed the FPPE "[p]ursuant to the PSA bylaws" (SUF No. 21), Ryan claims that it was not pursuant to the bylaws because the MEC "believed it [had] investigated the issue 'adequately' and the previous investigation determined 'no HIPAA violation occurred on the part of Dr. Ryan.'" (GDF No. 21 (quoting Dkt. 62-5 at Ex. 365 (draft of September 28, 2015 MEC meeting minutes))).

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chair or independently to the PSA leadership about unprofessional behavior, our first approach is always to make sure the staff member's correct supervisor has been involved, has done the appropriate counseling, and the department chair would definitely get involved if the initial supervisor counseling had not improved things" (Putnam Depo. at 75:9-76:4), nobody counseled Ryan about yelling at people prior to the imposition of the FPPE. GDF Nos. 139-140. Moreover, Ryan notes that Putnam has yelled in the operating room and has not been counseled or subject to a PSA proceeding as a result. GDF No. 142; SUF Reply No. 142. The PSA Bylaws state that "[t]hese bylaws encourage[ ] the use of progressive steps by Association leaders and Medical Center management, beginning with collegial and educational efforts, to address questions relating to an Association Member's clinical practice and/or professional conduct. The goal of these efforts is to arrive at voluntary, responsive actions by the individual to resolve questions that have been raised." GDF No. 138. The PSA Bylaws also state that "collegial intervention efforts are encouraged but are not mandatory, and shall be within the discretion of the appropriate Association and Medical Center management." SUF Reply No. 138.

F. The FPPE Investigation and Findings; The Behavioral Agreement

Ryan refused to meet with the Ad Hoc Committee after it rejected his request to be provided all questions in writing or be allowed to bring in his lawyer. SUF No. 23. Ryan stated that he feared he would not be treated fairly by the Ad Hoc Committee. GDF No. 23. After engaging in fact-finding and interviewing 13 witnesses, on February 26, 2016, "the Ad Hoc Committee issued a FPPE report for the MEC's review, which included unanimous committee findings and recommendations with respect to Dr. Ryan's conduct, which it found to be unprofessional." SUE No. 24. The FPPE report, generated by the Ad Hoc Committee, included the following summary:

> "The Ad Hoc Committee believes that Dr. Ryan's behavior is well below expected standards for professional conduct. Further, the committee believes that Dr. Ryan's behavior has had serious adverse impacts on the wellbeing of many health care professionals including attending physicians, physician trainees, nurses and other ancillary staff. His unauthorized access of the files of patients enrolled in studies or under the care of other physicians may constitute a violation of HIPAA. Finally, it appears that despite Dr. Ryan's acknowledged technical expertise, he is adversely impacting patient care through his behavior. The MEC is advised that the Ad Hoc committee believes that disciplinary action is justified to safe guard Harbor employees, trainees, and patients. We recommend that MEC should explore possible actions to remedy the underlying chaotic situation

> in vascular division created by Dr. Ryan's unprofessional behavior. Dismissal from the medical staff or discontinuation of medical privileges are options that can [be] considered but the committee is not knowledgeable regarding standards or precedents for such as action based solely on a lack of professionalism. At a minimum, we believe that Dr. Ryan should receive professional counseling regarding his behavior, that behavioral limits should be set, and that ongoing monitoring of his interactions with others should take place until the problem is believed to be resolved. The Department Chair, residency/fellowship program directors and nursing directors are suggested as the monitoring team for such action. This report reflects a unanimous consensus among committee members."

Dkt. 61-7 at Ex. 5. Ryan contends that the FPEE "accused him of accessing and requesting medical records improperly, but did not discuss or disclose that he was doing so to gather information to provide to the NIH, even though the MEC had previously acknowledged this." GDF No. 127. Moreover, Ryan points out that the FPPE did not disclose the Ryan's report to the NIH "had resulted in Dr. White and Dr. Donayre being disqualified for participation in endovascular procedures in the BEST-CLI trial." Id. No. 128. According to Donayre's witness statement in Ryan's FPPE, "Dr. Donayre felt the need to constantly look over his shoulders all the time because of Dr. Ryan.... For this reason Dr. Donayre decided to leave Harbor-UCLA." Id. No. 134. White left Harbor-UCLA

at the end of April 2016, two months after the FPPE report was issued. SUF Reply No. 128.

Following the completion of the FPPE report, "[t]he MEC discussed [it] at its meetings on March 28 and April 25, 2016, rejected issuing a summary suspension of Dr. Ryan's privileges at the March 28 meeting, voted unanimously at the April 25 meeting to inform Dr. Ryan that it was contemplating taking action against him, and asked Dr. Ryan to appear before the MEC to give his perspective and answer questions." SUF No. 26. On July 25, 2016, Ryan attended a MEC meeting with his attorney, and responded to the FPPE report as follows:

> "[Ryan] did not yell at a patient; he may have spoken sternly to fellows because he expects more from them; he corrected fellows when they did something wrong; without specific dates he could not answer regarding lack of communication with other vascular surgeons; he believed he communicated well; he was not responsible for Dr. White's retirement or the departure of another vascular surgeon (Carlos Donayre, M.D.); and he would consider a behavioral or anger management program."

SUF No. 28. After Ryan and his counsel left the July 25, 2016 meeting, the MEC deliberated and voted on its next course of action, but De Virgilio left before this vote took place. SUF No. 29. "[A] majority of the MEC voted to recommend a Behavioral Contract and proceed with revocation of Dr. Ryan's privileges and membership only if he either did not agree to the Behavioral Contract or breached its terms." Id. No. 30. While the MEC has offered behavioral agreements to

other Harbor-UCLA practitioners, the parties dispute whether UCLA-Harbor has offered Behavioral Agreements with the same terms as Ryan's to other practitioners. Id. No. 31; GDF No. 31. In any event, on September 6, 2016, Ryan was provided with the behavioral agreement (the "Agreement" or "Behavioral Agreement"), which:

- "Listed specific behavioral requirements, including that he not access computers or other documents belonging to other PSA members, faculty, or others without authorization, or medical records of patients for whom he is not directly involved in treatment without express permission by his Department Chair;
- Required Plaintiff to address concerns regarding individuals at Harbor-UCLA 'in private to the appropriate supervisor, administrator, faculty or PSA leader in a courteous manner, or in written reports using the established Hospital reporting forms and procedures,' and prohibited 'unconstructive criticism' calculated 'to intimidate, undermine confidence, belittle or imply stupidity or incompetence';
- Required Dr. Ryan to participate in one of two listed anger management programs;
- Included a waiver of 'claims[7] resulting' from any actions or communications 'consistent with

[7] The wavier of claims stated that Ryan "agrees to hold free and harmless the Hospital, members of the EC or authorized committees of the Hospital's Professional Staff, the Programs, and any and all representatives of any of them, from and against

the terms of this Agreement,' or regarding the anger management program;

- Required Dr. Ryan to cooperate with the PSA's Well-Being Committee as specified;
- Required Dr. Ryan to 'consult with a psychologist or psychiatrist' (or use a therapist if he is currently engaged with one) 'for the purposes of discussing the scope of the evaluation and the therapeutic goals,' and 'to undertake therapy if recommended by the consultant,' and required any consulted mental health clinician 'to provide progress reports' to the Well-Being Committee;
- Provided that upon Dr. Ryan's failure to comply with the Agreement, he 'shall be subject to corrective action' as authorized by the PSA Bylaws, 'subject to any hearing rights provided in Article VII of the Bylaws, or its successor, for such corrective action,' provided that a single arbitrator qualified to serve as a hearing officer under Article VII may serve as trier of fact in the MEC's discretion;
- [Provided that] the Agreement may be terminated by either party; and

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any and all claims resulting from any and all actions taken, or communications made, consistent with the terms of this Agreement. Dr. Ryan further acknowledges that there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, the EC, members of the EC or authorized committees of the PSA, the Hospital, or any and all representatives of any of them, for any acts performed or communications made regarding the subject matter of this Paragraph 3.2(ii)." Dkt. 61-7 at Ex. 7.

- [Provided that] entering into the Agreement would 'not constitute an action or recommendation taken for a medical disciplinary cause or reason' and would not 'in and of itself ... require a report to the Medical Board of California or any other federal or state agency.'"

SUF No. 32 (quoting Dkt. 61-7 at Ex. 7 (Behavioral Agreement as of September 6, 2016)). Ryan did not sign the Agreement; he believed that he could not sign it because "it required [him] to admit to things that were not true, that it was illegal in that it purported to restrict [him] from reporting misconduct to entities outside of Harbor, and that it was illegal because it forced [him] to waive claims against the MEC and Hospital." Ryan Decl. ¶ 21; see also SUF No. 33. Putnam and Vintch could not recall any other behavioral agreements that included a waiver of claims. GDF No. 156; SUF Reply No. 156. In at least one instance, another UCLA-Harbor physician "was offered a behavioral contract for unprofessional, intimidating, and disruptive behavior" that "did not include the waiver of claims or psychiatric counseling they demanded of Dr. Ryan." GDF No. 157.

G. The MEC's Proposed Action to Revoke Ryan's Staff Membership and Privileges

"Based on Dr. Ryan's refusal to sign a Behavioral Agreement, and in accordance with the MEC's decision at the July 25, 2016 meeting, the PSA issued Dr. Ryan the MEC's Notice of Proposed Action and Hearing Rights, dated October 5, 2016, which stated, in part, that:

- "The FPPE report found Dr. Ryan 'acted aggressively' and was 'verbally abusive to other practitioners, nurses, fellows, and in some instances, patients,' that he created 'a hostile work environment' where some people 'felt threatened' and 'intimidated' to the point where they desired to leave 'the vascular work team' or their jobs, and that he publicly criticized 'the patient management of other members of the team,' which adversely affected well-being of other healthcare officials;
- The FPPE report found Dr. Ryan's behavior was 'well below expected standards for professional conduct' and violated the PSA Bylaws (§§ 2.2-2.2, 2.4-2, 2.4-3, 2.4-7, 2.5-2, and 2.5-2.4), and that disciplinary action was justified to safeguard employees, trainees, and patients;
- Because Dr. Ryan did not sign and return the Behavioral Agreement, the MEC proceeded with the final proposed action to revoke Dr. Ryan's professional staff membership and privileges at Harbor-UCLA pursuant to Article VI of the PSA Bylaws;
- This action would not become final until Dr. Ryan exhausted or waived his hearing and appeal rights under Article VII of the Bylaws, and that his membership and privileges would remain in place until the action became final; and
- If the action became final, California Business & Professions Code § 805 would require the

> filing of a report with the Medical Board of California, and a report also would be filed with the National Practitioner Data Bank ("NPDB") pursuant to 42 U.S.C. § 11101 et seq."

SUF No. 34. Ryan "exercised his appeal rights in October 2016 and requested a hearing before a Judicial Review Committee ("JRC") on the recommendation to revoke his privileges." Id. No. 35. On November 10, 2016, PSA sent Ryan a "Notice of Charges" outlining the PSA's accusations against him. Id. No. 36; GDF No. 162. The Notice of Charges accused Ryan of "[o]penly threaten[ing] to call external agencies to conduct investigations," and included other accusations related to Ryan's allegedly unprofessional and "angry manner," but did not reference any HIPAA violations. SUF No. 36; GDF No. 162. The Notice of Charges also stated that Ryan made "unfounded accusations in an angry manner," but at deposition Putnam could not remember any unfounded accusations made by Ryan. SUF No. 36; GDF Nos. 162-163, 168; SUF Reply No. 163. On February 27, 2017, Putnam sent Ryan a First Amended Notice of Charges that deleted the accusations related to threatening to call external agencies and making unfounded accusations in an angry manner. GDF No. 165.

On June 20, 2018, counsel for Ryan and the PSA "jointly submitted a letter ... which requested dismissal of the JRC hearing on Dr. Ryan's appeal without determination of the merits, and stated that the matter became moot because Dr. Ryan's PSA membership and privileges had lapsed." SUF No. 39.

After deeming Dr. Ryan's privileges and membership to have lapsed, the PSA did not file a report regarding Dr. Ryan with the California Medical Board, although it did submit a report to the National Practitioner Data Bank ("NPDB") in November 2020 because Vintch believed "an NPDB databank report was required because Dr. Ryan was deemed to have voluntarily surrendered his clinical privileges while the JRC proceeding was pending." SUF Reply No. 40; see also SUF No. 40; GDF No. 40.

Ryan contends that he has been unable to secure a surgeon position ever since the PSA's proceedings against him, despite dozens of applications, at least in part because the applications "require him to disclose whether he [has] ever been investigated by a Professional Staff Association." GDF No. 169. Ryan believes that "hospitals and practices will not hire surgeons who are the subject of peer review investigations regarding their privileges." Id. No. 170.

III. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the opposing party must then set out "specific facts showing a genuine issue for trial" in order to defeat

the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Fed. R. Civ. P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 empowers a court to take judicial notice of facts that are either "(1)

generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); see also Mullis v. U. S. Bankr. Court for Dist. of Nevada, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987).

Here, defendants submit an unopposed request that the Court take judicial notice of two facts and two exhibits. See RJN. The facts are (1) that "The National Institutes of Health is part of the Department of Health and Human Services, and is the world's largest biomedical research agency," and (2) that "The National Institutes of Health funds the 'Best Endovascular vs. Best Surgical Therapy in Patients with Critical Limb Ischemia,' also known as the 'BEST-CLI Trial,' which 'is an international research study' that is 'aimed at figuring out the best treatment for people with peripheral arterial disease,' i.e., 'poor blood flow.'" Id. at 2. Defendants state that the two facts are "readily ascertainable by accessing ... the National Institutes of Health['s] official website." Id.

Defendants also request that the Court take judicial notice of two exhibits, namely the "Recommended Decision in the matter of Discharge of Timothy Ryan, Case No. 18-240, dated June 21, 2019," and "Order of the Civil Service Commission, Case No. 18-240, dated January 15, 2020." Id.

The Court finds judicial notice of the facts submitted by defendants is appropriate, as they are capable of accurate and ready determination by reference to government websites. See Laccinole v. Appriss, Inc., 453 F. Supp. 3d 499, 503 n.2 (D.R.I. 2020) ("Federal courts can take judicial notice of facts

on government websites where those facts are 'not subject to reasonable dispute.'") (quoting Fed. R. Evid. 201(b)). Moreover, judicial notice of the two documents attached as exhibits, which are records from the Civil Service Commission of the County of Los Angeles, is warranted because "a court may take judicial notice of matters of public record." Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). While the Court takes judicial notice of the defendants' exhibits, it does not necessarily accept them for the truth of the matters asserted therein. Lee, 250 F.3d at 688–89.

In accordance with the foregoing, defendants' request for judicial notice is **GRANTED.**

V. DISCUSSION

Drs. Putnam and Vintch ("defendants") move for summary judgment or partial summary judgment as to the claims set forth by Dr. Ryan ("plaintiff") in the FAC on the grounds that Ryan's claim under 42 § U.S.C. § 1983 fails as a matter of law because Ryan "cannot satisfy his burden of showing that speech protected by the First Amendment was a substantial or motivating factor in any adverse employment action." Dkt. 61 at 2. Defendants also claim that they are entitled to qualified immunity because "both of them reasonably could have believed their conduct was lawful in light of clearly established law and the information they possessed." Id. Finally, defendants argue that Ryan "cannot recover punitive damages against Dr. Putnam, because he has no evidence Dr. Putnam acted with malice or conscious disregard for Plaintiff's rights." Id. at 3.

The Court addresses defendants' arguments in turn.

A. First Amendment Retaliation

The framework set forth in Eng v. Cooley governs First Amendment retaliation claims. See Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 822 (9th Cir. 2017) (citing Eng, 552 F.3d at 1070–72 (9th Cir. 2009). To overcome summary judgment on his retaliation claim, Ryan must demonstrate that there is a triable issue of material fact that (1) he spoke on a matter of public concern; (2) he spoke as a private citizen rather than as a public employee; and (3) the relevant speech was a substantial or motivating factor in the adverse employment action(s). See Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 (9th Cir. 2016) (citing Eng, 552 F.3d at 1070–71).

"[I]f the plaintiff has passed the first three steps, the burden shifts to the government to show that 'under the balancing test established by [Pickering], the [state]'s legitimate administrative interests outweigh the employee's First Amendment rights.'" Eng, 552 F.3d at 1071 (quoting Thomas v. City of Beaverton, 379 F.3d 802, 808 (9th Cir. 2004)). "[F]inally, if the government fails the Pickering balancing test, it alternatively bears the burden of demonstrating that it 'would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct.'" Eng, 552 F.3d at 1072 (quoting Thomas, 379 F.3d at 808).

1. Matter of Public Concern

Defendants argue that Ryan's report to the NIH that Harbor-UCLA physicians falsely inflated their surgical experience in order to qualify for the BEST-CLI trial does not constitute a matter of public concern because the ORI found that the "falsification of information ... [did not] constitute research misconduct" and because NIH "continued to fund the trial at Harbor-UCLA." Mot at 18-19. Moreover, defendants argue that "[e]ven if Plaintiff had reasonably believed NIH should have revoked funding, his NIH report did not involve a public concern similar to those found in other cases." Id.

In opposition, Ryan contends that defendants' argument that Ryan "did not speak on a subject of public concern when he made his report to the NIH and the DA's office ... is clearly wrong as a matter of law." Opp. at 16. Plaintiff notes that "when speech 'can be fairly considered to relate to any matter of political, social, or other concern to the community,' it is a matter of public concern." Opp. at 16 (citing Ellins v. City of Sierra Madre, 710 F.3d 1049, 1057 (9th Cir. 2013)). Plaintiff also argues that even if Ryan's complaints were mistaken or exaggerated, "[i]n considering whether a government employee's complaints about misconduct are matters of public concern, courts do not consider whether they were reckless or false." Opp. at 17-18 (citing Johnson v. Multnomah Cty., Or., 48 F.3d 420, 424 (9th Cir. 1995)).

In reply, defendants refer the Court their argument in their moving papers that "Plaintiff's

report to the NIH did not address a matter of public concern." Reply at 9 (citing Mot. at 18-19).

The Court finds that plaintiff spoke on issues of public concern. "The scope of the public concern element is defined broadly in recognition that one of the fundamental purposes of the first amendment is to permit the public to decide for itself which issues and viewpoints merit its concern. It is only when it is clear that the information would be of no relevance to the public's evaluation of the performance of governmental agencies that speech of government employees receives no protection under the First Amendment." Ulrich, 308 F.3d at 978 (9th Cir. 2002) (internal quotation marks, alterations, and citations omitted). Moreover, "[s]peech involves a matter of public concern when it can fairly be considered to relate to any matter of political, social, or other concern to the community." Johnson, 48 F.3d at 422 (citation and internal quotation marks omitted)

Here, it cannot be said that the Ryan's complaints to the NIH and to the Los Angeles District Attorney's Office would be of "no relevance to the public's evaluation of the performance" of Harbor-UCLA. Rather, Ryan's statements to the NIH and to the Los Angeles District Attorney's Office implicated possible physician misconduct and conflicts of interest, and therefore directly implicated the performance of Harbor-UCLA hospital. See Coszalter, 320 F.3d at 973 ("Speech that concerns issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection.") (internal

quotations and citations omitted); see also Connick v. Myers, 461 U.S. 138, 148 (1983) (speech merits stronger protection when employee seeks "to bring to light actual or potential wrongdoing or breach of public trust"). To the extent defendants claim that Ryan's concerns were overstated, on March 30, 2015, the SIMC for the BEST-CLI trial "found that several members of the Harbor-UCLA team misrepresented their procedural volume histories to meet the criterial of independent endovascular operator." Dkt. 61-7 at Ex. 24. This suggests that while Ryan's concerns were not baseless or meritless, even if they were, "recklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern." Johnson, 48 F.3d at 424. In sum, the Court finds Ryan's statements to the NIH and the Los Angeles District Attorney's Office were clearly on matters of public concern.

2. Private Citizen Rather Than Public Employee

Defendants contend that Ryan's "internal reports fell within the scope of his employment," and as such are not protected by the First Amendment. Mot at 19-20. In opposition, plaintiff argues that the FAC makes clear that "those purely internal reports are not the basis of [plaintiff's] claim ... [r]ather, his claim is based on the retaliation for his reports to the NIH, the DA's Office, and Attorney General's Office." Opp. at 18 (citing FAC ¶ 41).

"Statements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid

to perform." Eng, 552 F.3d at 1071. Moreover, where speech is directed at bringing wrongdoing to light, "the public employee does not forfeit protection against governmental retaliation because he chose to press his cause internally." Ulrich, 308 F.3d at 979. Here, it is undisputed that Ryan eventually reported his concerns outside of Harbor-UCLA, and there is no evidence that demonstrates that Ryan's external reports were submitted pursuant to his professional duties at Harbor-UCLA.

While defendants' supplemental brief argues that "Plaintiff himself asserted his external reports of alleged fraud fell 'well within the scope' of his employment, and on [that] basis he successfully sought indemnity from the County for defending against the lawsuit filed against him by Rodney White," (Defs' Supp. at 5 (citing SUF No. 42)), White's lawsuit did not address Ryan's external reports (see Dkt. 61-7 at Ex. 25), and instead focused on allegations that "Dr. Ryan 'engaged in a course of conduct of seeking out and viewing Dr. White's personal records and the private records of Dr. White's patients'" (SUF Reply No. 41 (quoting Dkt. 61-7 at Ex. 25)).

Accordingly, at a minimum, there is a triable issue of fact regarding whether Ryan spoke as a private citizen, and therefore granting summary judgment on this basis would be inappropriate.

3. Substantial Factor in Adverse Employment Action

Ryan can show that retaliation was a substantial or motivating factor behind defendants' adverse

employment actions in three ways: (1) "proximity in time between the protected action and the allegedly retaliatory employment decision, from which a jury logically could infer [that the plaintiff] was terminated in retaliation for his speech," (2) "evidence that his employer expressed opposition to his speech, either to him or to others," and (3) "evidence that his employer's proffered explanations for the adverse employment action were false and pre-textual." Coszalter, 320 F.3d at 977 (cleaned up).

Defendants argue that there is no casual nexus between Ryan's reports to the District Attorney and the FPPE because the gap in time between the two—at least eight months—is "'too great to support an inference' of causality.'" Mot. at 20-21 (quoting Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1035 (9th Cir. 2006). Likewise, defendants contend that the at least nine-month gap between the resolution of Ryan's NIH report and the FPPE "is legally insufficient to support a finding of causality." Mot. at 21. Defendants also argue that "no inference of retaliation is warranted because 'other evidence provides a reasonable basis for inferring that adverse action was not retaliatory.'" Id. (quoting Knickerbocker v. City of Stockton, 81 F.3d 907, 912 (9th Cir. 1997)). Defendants cite evidence that suggests that "[t]he MEC directed the FPPE because Dr. White's Corrective Action Request fit the Bylaws' criteria for an investigation," that "[t]he neutral Ad Hoc Committee issued the FPPE report, based on which the MEC asked Plaintiff to sign the Behavioral Agreement, and [that] only when Plaintiff refused did the MEC propose revoking [Ryan's] privileges." Mot at 21 (citing SUF 22-34). Defendants also argue that

plaintiff "has alleged no occasion when Drs. Vintch or Putnam 'expressed opposition' to any speech he claims to be protected." Mot. at 21.

Finally, defendants argue that plaintiff has no evidence of pretext; even though Ryan "may dispute Dr. White's credibility or motives, [] that hardly means the MEC was required or even permitted to ignore Dr. White's [CAR]—just as it did not ignore Plaintiff's own 2014 complaint against Dr. White." Mot. at 22. Defendants emphasize that "[t]he MEC rejected moving immediately to revoke Plaintiff's medical staff membership and privileges, and instead voted to recommend revocation only as a last resort if Plaintiff refused to agree to a Behavioral Agreement, or breached it." Id. Defendants add that the Behavioral Agreement "did not provide for an unlawfully broad waiver of rights to recourse for wrongful conduct, but only waived liability for 'claims resulting' from actions or communications 'consistent with the terms of [the] Agreement' or 'the subject matter' of the Anger Management Program." Mot at 23 (quoting SUF No. 32).

In opposition, plaintiff argues that "[s]ubstantial evidence creates genuine disputes of material fact regarding Defendants' motives," and that "[p]roof of motive 'may be met with either direct or circumstantial evidence, and involves questions of fact that normally should be left for trial.'" Opp. at 18 (quoting Ulrich, 308 F.3d at 979-80). Plaintiff also argues that defendants have expressed opposition to Ryan's speech, including through the Notice of Charges against him, which initially included accusations that Ryan "[o]penly threaten[ed] to call

external agencies to conduct investigations" and "[o]penly ma[de] unfounded accusations in an angry manner," before subsequently deleting those allegations. Opp. at 20 (quoting GDF Nos. 162, 165). Moreover, plaintiff contends that he has "presented extensive evidence that the reasons Drs. Putnam and Vintch offered to investigate Dr. Ryan, order a FPPE of him, demand[ed] he sign a Behavioral Agreement, and [sought] to suspend him for not signing it were all pretextual." Opp. at 21. This includes evidence that "Drs. Putnam and Vintch participated in altering minutes to conceal the MEC's knowledge that it was acting out of retaliation," that "Drs. Putnam and Vintch abandoned the PSA's normal approach to physician discipline in pursuing Dr. Ryan," that "Dr. Putnam and Dr. Vintch led the MEC's investigation of Dr. Ryan even though they knew that by doing so they were advancing Dr. White's retaliatory scheme against him," and, finally, evidence that the Behavioral Contract would have "required Dr. Ryan to admit to wrongdoing that he had not committed," "prevent[ed] the very reports to outside authorities that Dr. Ryan made in this case," and "waiv[ed] [] claims against everyone involved in the Agreement." Opp. at 21-25.

In reply, defendants argue that Dr. White's CAR "negates causation, rather than support[s] it, because that Request is one of several intervening events [] that provide 'a reasonable basis for inferring that adverse action was not retaliatory.'" Reply at 11 (quoting Knickerbocker, 81 F.3d at 912). Accordingly, defendants contend that "the undisputed evidence establishes the MEC was motivated at least in part by Plaintiff's unprotected behavior, and Plaintiff has no

other proof to establish retaliatory motive." Reply at 11. Defendants also argue that "Plaintiff offers no examples of Drs. Putnam or Vintch opposing his ostensibly-protected reports to the DAO or NIH, which he was required to do to establish retaliatory motive on this basis." Reply at 12. Finally, defendants argue that Plaintiff "lacks 'specific' or 'substantial' evidence of pretext sufficient to withstand summary judgment." Reply at 13 (citing Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1111 (9th Cir. 2011)). In particular, defendants argue that no MEC minutes were altered to conceal knowledge of retaliatory motive, that the FPPE complied with PSA bylaws and did not abandon the PSA's normal approach to physician discipline, and that the Behavioral Agreement does not suggest pretext. See Reply at 13-23.

As the party opposing summary judgment, Ryan must demonstrate a triable issue of material fact as to one of three methods of showing that the protected speech was a substantial or motivating factor in the adverse employment decision, namely proximity in time, employer opposition to the speech, and pretextual justification associated with the adverse employment action. See Coszalter, 320 F.3d at 977. This analysis is "purely a question of fact." Eng, 552 F.3d at 1071. Evidence of pretext may be "direct or circumstantial" because "[d]efendants who articulate a nondiscriminatory explanation for a challenged employment decision may have been careful to construct an explanation that is not contradicted by known direct evidence." Davis v. Team Elec. Co., 520 F.3d 1080, 1091 (9th Cir. 2008) (citations and quotation marks omitted). Accordingly, Ryan may

show pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). "Where evidence of pretext is circumstantial, rather than direct, the plaintiff must produce 'specific' and 'substantial' facts to create a triable issue of pretext." Earl, 658 F.3d at 1113. However, "a plaintiff's burden to raise a triable issue of pretext is 'hardly an onerous one.'" Id. (quoting Noyes v. Kelly Servs., 488 F.3d 1163, 1170 (9th Cir. 2007).

The Court finds that plaintiff has met his burden on summary judgment of raising a triable issue of material fact regarding defendants' motives in taking adverse employment actions against Ryan. See Mabey v. Reagan, 537 F.2d 1036, 1045 (9th Cir. 1976) ("Since questions of motive predominate in the inquiry about how big a role the protected behavior played in the decision, summary judgment will usually not be appropriate."). Plaintiff offers evidence that suggests defendants' explanations for the adverse employment actions of directing the FPPE, voting to propose a Behavioral Agreement, and voting to revoke Ryan's clinical privileges if he refused the Behavioral Agreement, were pretextual. This includes "comparative evidence" that "similarly situated employees," including Putnam, were treated "more favorably" than plaintiff (see Earl, 658 F.3d at 1113) for unprofessional conduct such as yelling, and evidence that defendants failed to take intermediate steps such as counseling prior to imposing the FPPE, even though "progressive steps" are recommended by

the PSA Bylaws. Moreover, Putnam and Vintch, who voted in favor of the Behavioral Agreement and conditioned Ryan's privileges at Harbor-UCLA on Ryan's acceptance of the Behavioral Agreement, could not recall another Behavioral Agreement that included a waiver of claims. Finally, to the extent the issues with Ryan were associated with HIPPA violations, "a recognized HIPAA Compliance Officer review[ed] the case and it was found that no HIPAA violation occurred on the part of Dr. Ryan." Dkt. 62-5 at Ex. 365. Nonetheless,

Accordingly, the Court finds that there is a triable issue of fact regarding whether the adverse employment actions directed at Ryan were based solely on his "unprofessional conduct," or whether in fact his external reports regarding alleged misconduct and Harbor-UCLA were a substantial factor in those actions. The initial Notice of Charges against Ryan, which included accusations that Ryan "[o]penly threaten[ed] to call external agencies to conduct investigations" and made "unfounded accusations in an angry manner," even though at deposition Putnam and Vintch could not remember any unfounded accusations made by Ryan, further suggest that there is a triable issue of material fact regarding defendants' motives in undertaking the adverse employment actions.[8] See Mabey, 537 F.2d at 1045.

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[8] At oral argument, defendants argued that the evidence that the Court found raises a triable issue of material fact regarding pretext is insufficient because of Ryan's "extraordinary" behavioral issues mean that he is not similarly situated to Putnam, because Dr. Virgilio engaged in collegial efforts to address Ryan's behavior, because the lawyers, and not defendants, put the waiver in the Behavioral Agreement, because

And, while defendants argue that the length in time between Ryan's speech and the adverse actions is too great to support an inference of causality, "[t]here is no set time beyond which acts cannot support an inference of retaliation, and there is no set time within which acts necessarily support an inference of retaliation." Coszalter, 320 F.3d at 978.

In sum, given the evidence of pretext offered by Ryan, summary judgment on this "purely fact[ual]" element (see Eng, 552 F.3d at 1071) would be inappropriate.

4. Adequate Justification

Defendants contend that "[a] government employer establishes adequate justification for treating an employee differently from the public at large if its actions 'promote the efficiency of the public services it performs through its employees.'" Mot. at 25 (citing Pickering, 391 U.S. at 568). Defendants argue that its actions "were reasonably calculated to promote the efficiency and effectiveness of the provision of healthcare services to Harbor-UCLA patients" and that "it was the loud and disruptive nature of Plaintiff's threats and other workplace conduct—not

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the adverse actions taken against Ryan were for his behavioral issues rather than for HIPPA violations, and because threatening to call external agencies and making unfounded accusations in an angry manner is not protected activity. Defendants' arguments underscore the inherently factual nature of the pretext inquiry, in which summary judgment is disfavored. While defendants argue that their actions were justified and were not pretextual, the evidence presented to the Court raises a triable issue of fact regarding whether defendants' actions were justified and were not pretextual.

the substance of Plaintiff's reports outside of work to external agencies—for which he was to be disciplined." Mot. at 25-26. At bottom, defendants argue that "[t]he MEC's interests clearly outweigh Plaintiff's asserted free speech interest" and that "Pickering balancing decisively weighs in favor of Drs. Putnam and Vintch, and is a further basis for granting summary judgment." Mot at 26.

In opposition, plaintiff argues that "the same facts [] that create a genuine dispute of material fact about motive also create a genuine dispute of material fact" as to adequate justification. Opp. at 25. Plaintiff also argues that the adequate justification inquiry presents questions of fact that are not appropriate for summary judgment where the record on them is not undisputed. Opp. at 25 (citing Ellins, 710 F.3d at 1064).

In reply, defendants contend that "the Pickering balancing inquiry is ultimately a legal question, and summary judgment is appropriate absent underlying factual disputes." Reply at 24 (cleaned up) (citing Ohlson v. Brady, 9 F.4th 1156, 1161 (9th Cir. 2021)). Moreover, defendants reiterate that "the Behavioral Agreement and the subsequent proposal to revoke Plaintiff's medical staff privileges were reasonably calculated to promote the efficiency and effectiveness of the provision of healthcare services to Harbor-UCLA patients," which is an interest that "clearly outweighs [plaintiff's] asserted free speech interests." Reply at 24.

The Court finds that, in this case, the adequate justification inquiry implicates "underlying factual disputes" that are inappropriate for resolution on

summary judgment. Eng, 552 F.3d at 1071. Defendants fail to explain how their proffered interest of "promot[ing] the efficiency and effectiveness of the provision of healthcare services to Harbor-UCLA patients" could not have been served by intermediate steps such as counseling intended to address Ryan's unprofessional behavior. Moreover, defendants' argument that "it was the loud and disruptive nature of Plaintiff's threats and other workplace conduct—not the substance of Plaintiff's reports outside of work to external agencies—for which he was to be disciplined" is inherently factual, and implicates the same evidence of pretext the Court previously discussed. Accordingly, the Court finds that it is not "clearly established" that the outcome of the balancing test favors defendants, and therefore cannot grant summary judgment on this basis. See Francisco Jose Rivero v. City & Cty. of San Francisco, 316 F.3d 857, 866 (9th Cir. 2002).

5. Inevitability

Defendants claim that "[t]he undisputed facts establish the MEC would have engaged in the same actions challenged by Plaintiff—direct the FPPE proceeding, ask Plaintiff to sign the Behavioral Agreement, and move to revoke his privileges upon his rejection of that Agreement []—regardless of whether or not Plaintiff engaged in any protected speech." Mot at 26. Defendants emphasize that instead of launching a disciplinary investigation in response to White's CAR, it "directed a neutral Ad Hoc Committee to conduct an FPPE, which is a non-disciplinary peer review process." Mot. at 27. Then, "[a]fter obtaining the FPPE report and hearing from Plaintiff, the MEC

again voted in favor of the least onerous of the options before it—a Behavioral Agreement, which the MEC has successfully used with other practitioners." Mot. at 27. In sum, defendants argue that "[p]laintiff has no evidence—let alone enough evidence to raise a triable issue of material fact—that the MEC would not have taken these measures but for his allegedly protected speech." Mot. at 27.

In opposition, plaintiff argues that "the same facts [] that create a genuine dispute of material fact about motive also create a genuine dispute of material fact" as to adequate justification. Opp. at 25. Plaintiff also argues that the inevitability inquiry presents questions of fact that are not appropriate for summary judgment where the record on them is not undisputed. Opp. at 25 (citing Ellins, 710 F.3d at 1064).

In reply, defendants reiterate that "the MEC would have directed the FPPE and recommended revoking Plaintiff's clinical privileges upon his rejection of the Behavioral Agreement [] regardless of whether or not Plaintiff engaged in protected speech," and that "[t]his is another issue on which summary judgment is appropriate absent any material factual dispute." Reply at 25 (citing Eng, 552 F.3d at 1072).

The Ninth Circuit has stated the inevitability inquiry is "purely a question of fact." Eng, 552 F.3d at 1072. For the same reasons articulated above, the Court finds that there is a triable dispute of material fact regarding whether defendants would have directed the FPPE, voted to propose a Behavioral Agreement, or voted to revoke Ryan's clinical privileges if he refused the Behavioral Agreement absent Ryan's reports to the NIH and the District

Attorney's Office. Accordingly, granting summary judgment on this basis would be inappropriate.

B. Qualified Immunity

Generally, courts follow a two-step inquiry in determining whether a government official is entitled to qualified immunity. Saucier v. Katz, 533 U.S. 194, 201 (2001). "First, a court must decide whether the facts that a plaintiff has alleged ... or shown ... make out a violation of a constitutional right." Pearson v. Callahan, 555 U.S. 223, 232 (2009). Second, "the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Id.

"To be 'clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Acosta v. City of Costa Mesa, 718 F.3d 800, 824 (9th Cir. 2013) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "Defendants are entitled to qualified immunity, even if they violated [plaintiff's] First Amendment rights, if they reasonably could have believed that their conduct was lawful 'in light of clearly established law and the information [that they] possessed.'" Demers v. Austin, 746 F.3d 402, 417 (9th Cir. 2014) (quoting Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 973 (9th Cir. 1996)).

A "case directly on point" is not required, "but existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). The determination of whether the law was clearly established "must be undertaken in light of the specific context of the case."

Saucier, 533 U.S. at 201. The qualified immunity standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). In other words, the law must provide officials with "fair warning" that their conduct is unconstitutional. Hope v. Pelzer, 536 U.S. 730 (2002). "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." Pearson, 555 U.S. at 232.

In their motion, defendants acknowledge that the Ninth Circuit previously reversed the grant of defendants' motion to dismiss on the basis of qualified immunity, and note that "the Ninth Circuit relied on the principle 'that an employer's decision to initiate disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects, is enough to satisfy the adverse employment action requirement.'" Mot. at 31 (quoting Ryan v. Putnam, 777 F. App'x 245, 246 (9th Cir. 2019)). Defendants add that although Vintch and Putnam "attended the meeting where the MEC voted to ask Plaintiff to enter into a Behavioral Agreement and to recommend revocation of his PSA membership and privileges if he rejected the Agreement, ... Plaintiff has offered no authority—let alone clearly established law—holding that individual committee members' votes regarding an FPPE, behavioral contract, or even revocation of privileges may constitute actionable adverse employment actions." Mot. at 31. In particular, defendants claim that there is "no clearly established law under which Drs. Vintch or Putnam would have known they engaged in adverse employment actions"

because their status as voting members in a committee "contrasts with the unilateral adverse actions taken by the medical director in Ulrich." Mot at 31.

Defendants also contend that "there is no clearly established law suggesting Plaintiff's report to the NIH addressed a matter of public concern" and that "there is no clearly established law under which the gap in time between Plaintiff's speech and any allegedly adverse action was sufficient to raise an inference of retaliation." Mot. at 32. Defendants add that "Plaintiff does not—and cannot—explain how any reasonable person in the position of Drs. Vintch or Putnam could have known it would be unlawful to propose a Behavioral Agreement, and alternatively recommend revocation of Plaintiff's PSA privileges and membership, in light of the FPPE report's findings." Mot. at 32. Finally, defendants contend that "Pickering balancing further entitles Drs. Vintch and Putnam to qualified immunity" because this is not a case "where Pickering balancing favors Plaintiff under clearly established law" given that "Drs. Vintch and Putnam plainly had adequate justification for any votes on recommended treatment of Plaintiff, which outweighs his asserted free speech rights." Mot. at 32-33.

In opposition, plaintiff argues that the Ninth Circuit has "already rejected Defendants' [qualified immunity] argument in this very case" and that "[n]othing material has changed." Opp. at 26-27. With respect to the first prong of the qualified immunity analysis, plaintiff argues that Ryan's "evidence demonstrates that Defendants violated his First

Amendment rights by retaliating against him for petitioning the government, an activity the First Amendment protects," which is "more than sufficient to defeat summary judgment." Opp. at 27. With respect to prong two, plaintiff argues that "it is clearly established that hospital officials violate the First Amendment by 'initiat[ing] disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects in retaliation for protected speech.'" Opp. at 27 (quoting Ryan, 777 F. App'x at 246).

Plaintiff adds he has shown "that the investigation destroyed his career, and that being forced to disclose it in employment applications has led to rejection of dozens of job applications." Opp. at 27 (citing GDF No. 170). With respect to defendants' argument that it is not clearly established that they can be held responsible for their votes as members of a committee, plaintiffs respond that "the facts, viewed in the light most favorable to Dr. Ryan" also show that defendants "led the MEC actions against Dr. Ryan as President and Vice-President of the PSA, altered minutes of MEC meetings to hide damaging admissions showing that the MEC knew its actions were retaliatory, deliberately ignored information in the FPPE they knew misstated the evidence, proceeded against Dr. Ryan without engaging in the counseling extended to other doctors, and proceeded against Dr. Ryan in the face of indications that he was singled out for protected speech." Opp. at 28 (citations omitted). Finally, plaintiff claims that defendants' "attempt to spin the qualified immunity inquiry into an extended discussion of whether Defendants were aware they

were violating each and every element of Section 1983 based on specific precedent regarding each element" misstates the qualified immunity inquiry, which asks "'not whether an earlier case mirrors the specific facts here,'" but whether "'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" Opp. at 28 (quoting Ellins, 710 F.3d at 1064).

In reply, defendants argue that "Plaintiff's primary argument against qualified immunity is that the Ninth Circuit reversed the grant of Defendant's motion to dismiss on [the basis of qualified immunity] ... [but plaintiff] obscures the fact that the Ninth Circuit only reviewed the issue 'at the pleading stage' under Fed. R. Civ. P. 12(b)(6)." Reply at 25-26 (citing Ryan, 777 F. App'x at 246). Defendants also contend that "'the clearly established law must be particularized to the facts of the case,' to avoid distorting qualified immunity 'into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" Reply at 26 (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017)). Moreover, defendants' claim that, in their motion, they "cited numerous applicable cases holding qualified immunity is appropriate where no clearly established law exists in connection with specific elements of the legal standard—including whether the plaintiff spoke as a private citizen or on an issue of public concern, or was subjected to an adverse employment action; whether any 'temporal nexus' existed between protected speech and the adverse action; and whether Pickering balancing favors the plaintiff's claim." Reply at 27.

Defendants reiterate that the Ninth Circuit's holding in the prior appeal regarding whether plaintiff's allegations are sufficient to state a claim for an adverse employment action only "construed Plaintiff's pleadings" and is "not what the undisputed evidence shows on summary judgment." Reply at 27. Defendants point out that even if "Dr. Putnam's [] as PSA President and Dr. Vintch's as Vice-President ... 'led' the MEC's actions," "Plaintiff offers no clearly established law—or authority of any kind—holding that 'leading' such meetings plus any votes taken on the FPPE, Behavioral Agreement, or privilege revocation constitute adverse employment actions." Reply at 27-28. Defendants again attempt to distinguish Ulrich and plaintiff's other authority by arguing that they "involved individuals who acted unilaterally." Reply at 28 (citing Ulrich, 308 F.3d at 972-74; Poland v. Chertoff, 494 F.3d 1174, 1177-78 (9th Cir. 2007)). Finally, defendants argue that "Plaintiff ignores the Ninth Circuit authority cited by Defendants which requires him to establish this case is 'one of those rarities' where Pickering balancing favors a public employee's free speech interests under clearly established law in order to defeat qualified immunity." Reply at 30 (quoting Dible v. City of Chandler, 515 F.3d 918, 930 (9th Cir. 2008)).

In their supplemental brief, defendants argue that "[u]nder post-Ellins precedent, for public officials to receive sufficiently 'fair warning that their conduct is unconstitutional,'" Defs' Supp. at 2 (quoting Ellins, 710 F.3d at 1049), "the case cannot be 'materially distinguishable' or state the law in abstract terms." Defs' Supp. at 2 (quoting Rivas-Villegas v. Cortesluna, 211 L. Ed. 2d 164, 168-69 (2021)). Defendants add that

plaintiff's whistleblowing should not "immunize him for corrective action," because doing so "replace qualified immunity with 'unqualified liability'—contrary to Supreme Court precedent." Defs' Supp. at 2 (citing Pauly, 137 S. Ct. at 552). Defendants also argue that the allegations upon which the Ninth Circuit relied in finding qualified immunity was not warranted in this case have been negated by undisputed evidence. Defs' Supp. at 2-4. Finally, defendants argue that there is no "clearly established law that individual MEC members' votes may constitute an adverse employment action under § 1983," and that the Court must address the absence of clearly established law on the private citizen and adequate justification issues. Id. at 4-6.

In his supplemental brief, plaintiff argues that defendants' attempts to distinguish the Ninth Circuit's previous ruling in this case fail because they are premised on facts that are disputed, and because "at the summary judgment stage '[f]or purposes of qualified immunity, we resolve all factual disputes in favor of the party asserting the injury.'" Plf's Supp. at 3 (quoting Ellins, 710 F.3d at 1064). Plaintiff also argues that defendants' emphasis on their votes as members of a committee ignores the other actions they took against Ryan, including proceeding against Ryan "without engaging in the counseling extended to other doctors" and "in the face of indications that he was singled out for protected speech." Plf's Supp at 3-4.

The Court finds that defendants' argument that the qualified immunity analysis requires that the Court find that "clearly established law exists in connection with [each of] elements of the

Pickering/Eng standard," Mot. at 29, "frames the inquiry much too narrowly." Ellins, 710 F.3d at 1064. This is because "[t]he question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'" Id. (quoting Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 1003 (9th Cir.2010)); see also White v. Lee, 227 F.3d 1214, 1238 (9th Cir. 2000) ("Closely analogous preexisting case law is not required to show that a right was clearly established.").

In reversing the grant of defendants' motion to dismiss in this case, the Ninth Circuit found that qualified immunity was not warranted because "[s]ince 2002, [it has] recognized that an employer's decision to initiate disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects, is enough to satisfy the 'adverse employment action' requirement." Dkt. 26 at 2-3 (citing Ulrich, 308 F.3d at 977). In conjunction with the law clearly established by Ulrich, the Ninth Circuit's decision was based on Ryan's allegations that "the doctors initiated disciplinary proceedings which sought to revoke his staff privileges, voted to revoke those privileges, [] served him with a notice of intent to suspend ... [and] that these decisions will permanently impair [his] ability to seek and secure employment in the future." Dkt. 26 at 3 (internal quotation marks omitted). Defendants argue that several of the allegations relied upon by the Ninth Circuit have been negated by "undisputed evidence." They contend that the FPPE "[was] a strictly

confidential peer review process with no preordained course" that "did not 'seek to revoke' Plaintiff's staff privileges" because "[i]t was only after the FPPE Committee completed its fact-finding, and issued its report recommending corrective action, that the MEC required Plaintiff to agree to a Behavioral Agreement in lieu of revoking his clinical privileges." Defs' Supp. at 3-4. Despite defendants' argument, the fact remains that the FPPE is a disciplinary proceeding that "threatens" (Ulrich, 308 F.3d at 977) to revoke staff privileges, as evidenced by the fact Ryan's FPPE report stated the following:

> "We recommend that MEC should explore possible actions to remedy the underlying chaotic situation in vascular division created by Dr. Ryan's unprofessional behavior. Dismissal from the medical staff or discontinuation of medical privileges are options that can considered but the committee is not knowledgeable regarding standards or precedents for such as action based solely on a lack of professionalism."

Dkt. 61-7 at Ex. 5. While it is true that "the 'notice of intent to suspend' referenced by the Ninth Circuit did not involve the MEC, or Drs. Vintch or Putnam" (Defs' Supp. at 4), defendants did vote on July 25, 2016 "to recommend a Behavioral Contract and proceed with revocation of Dr. Ryan's privileges and membership [] if he either did not agree to the Behavioral Contract or breached its terms." SUF No. 30. When resolving factual disputes in favor of plaintiff, the Court cannot conclude that defendants' have negated the key allegations relied upon by the Ninth Circuit or demonstrated that, following Ulrich,

defendants did not have fair warning that their conduct was unconstitutional.

To the extent that defendants argue that they are entitled to qualified immunity because they acted in concert rather than individually, they fail to explain why this fact should exonerate them. Rather, courts apply the qualified immunity analysis in the same manner to defendants acting in concert, without examining whether the underlying case that clearly established the right at issue involved an individual defendant or a group of defendants. See Gaalla v. Brown, 460 F. App'x 469, 479 (5th Cir. 2012) (finding that "the Board members are not entitled to qualified immunity, and the district court properly denied them summary judgment on this claim" because "it is without question clearly established that the Cardiologists have a right to be free from racial discrimination"); Strinni v. Mehlville Fire Prot. Dist., 681 F. Supp. 2d 1052, 1082–83 (E.D. Mo. 2010) (denying defendants' motion for summary judgment because "genuine issues of fact exist to preclude a finding that Board Member Defendants are entitled to qualified immunity to the extent Plaintiffs' First Amendment rights are pursued against these Defendants in their individual capacities"); Waddell v. Forney, 108 F.3d 889, 895 (8th Cir. 1997) ("[I]n light of the record before us, we affirm the district court's denial of qualified immunity for each of the named defendants."). While defendants argue that there is no consensus regarding "whether individual committee members' votes may constitute an actionable adverse employment action under § 1983" (Defs' Supp. at 5), this argument frames the inquiry too narrowly. Ellins, 710 F.3d at 1064. Notably, on appeal in this case, the

Ninth Circuit found plaintiff's allegations "sufficiently similar to Ulrich to satisfy the clearly established prong of the qualified immunity analysis," even though those allegations corresponded to the collective actions of defendant "doctors." Dkt. 26 at 3.

As discussed, it is clearly established that statements are made in one's capacity as a private citizen "if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." Eng, 552 F.3d at 1071. Here, there is no indication that Ryan's external reports were part of his employment duties. Likewise, Ryan's "right to speak [is] so 'clearly established'—that is, that the Pickering balance so clearly weigh[s] in [his] favor—that [defendants] could not have 'reasonably believed'" (Moran v. State of Wash., 147 F.3d 839, 850 (9th Cir. 1998)) that "the MEC's interests in promoting the efficiency and effectiveness of the provision of healthcare services to Harbor-UCLA patients" (Defs' Supp. at 6) outweigh Ryan's free speech interests. In Robinson v. York, the Ninth Circuit stated that "the public's interest in learning about illegal conduct by public officials and other matters at the core of First Amendment protection outweighs a state employer's interest in avoiding a mere potential disturbance to the workplace." 566 F.3d 817, 824 (9th Cir. 2009) (citations and quotations omitted). Similarly, in Francisco Jose Rivero v. City & Cty. of San Francisco, the Ninth Circuit stated that "[w]histleblowing is a particular kind of speech on matters of public concern. It was already the law of this circuit in 1993 that the state's legitimate interest in 'workplace efficiency and avoiding workplace disruption' does not weigh as

heavily against whistleblowing speech as against other speech on matters of public concern. 316 F.3d 857, 866 (9th Cir. 2002) (finding that appellants were not entitled to qualified immunity).

Accordingly, the Court finds that qualified immunity is not warranted at this stage.

C. Punitive Damages

Defendants claim that Ryan's punitive damages claim, which he brings against Putnam but not Vintch, is not supported by any facts suggesting that Putnam "acted with malice and conscious disregard for Plaintiff's rights." Mot. at 33. Accordingly, defendants contend that "Plaintiff's punitive damages claim against Dr. Putnam should be summarily dismissed." Id.

In opposition, plaintiff claims that "if [he] proves intentional discrimination based on his speech, he will have 'by definition have satisfied the requirement of showing the 'reckless indifference' required for an award of punitive damages.'" Opp. at 29 (quoting Stender v. Lucky Stores, Inc., 803 F.Supp. 259, 324 (N.D. Cal. 1992)). In other words, plaintiff contends that "[a] finding of retaliation is sufficient to support punitive damages." Opp. at 29 (citing Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1199 (9th Cir. 2002)).

In reply, defendants argue that Plaintiffs' argument "is a tacit concession that if he cannot prove retaliation [], he cannot recover punitive damages from Dr. Putnam." Reply at 31. Defendants also contend that "Plaintiff is wrong to suggest punitive damages are automatic whenever First Amendment retaliation is found" (citing Stender, 803 F.Supp.at

324), and that there is a "total absence of evidence that Dr. Putnam harbored 'evil motive or intent' or consciously chose to disregard Plaintiff's First Amendment rights." Reply at 32.

The law is clear that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983); see also Dang v. Cross, 422 F.3d 800, 807 (9th Cir. 2005) ("The standard for punitive damages under § 1983 mirrors the standard for punitive damages under common law tort cases.... malicious, wanton, or oppressive acts or omissions are within the boundaries of traditional tort standards for assessing punitive damages and ... are therefore all proper predicates for punitive damages under § 1983.") (internal citations and quotation marks omitted).

Here, Putnam presided over the September 28, 2015 MEC meeting where the draft meeting minutes noted that "Dr. Ryan considers himself a whistleblower because he thought this bad thing happened and he wanted to do right," and that "[t]o take corrective action beyond the investigation could be considered retaliation because we feel this issue has been investigated adequately." Dkt. 62-5 at Ex. 365. Despite understanding that taking corrective action could be considered retaliation, Putnam proceeded to vote in favor of the FPPE and the Behavioral Agreement, and to authorize the revocation of Ryan's privileges if he refused the

Behavioral Agreement. The text of Ninth Circuit Model Civil Jury Instruction 5.5 (2017 ed.) specifically notes that "[c]onduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law." Accordingly, because a jury could find that Putnam's decision to proceed was recklessly indifferent to Ryan's rights, summary judgment on Ryan's claim for punitive damages against Putnam is inappropriate.

VI. CONCLUSION

In accordance with the foregoing, the Court **DENIES** the motion of defendants Putnam and Vintch for summary judgment or partial summary judgment.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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Case No. 2:17-cv-05752-CAS-RAOx Date March 21, 2022
Title TIMOTHY RYAN V. BRANT PUTNAM, ET AL.

Present: The Honorable CHRISTINA A. SNYDER

Catherine Jeang	Laura Elias	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Kenneth White	John Manier Linda Hurevitz

Proceedings: MOTION OF DEFENDANTS HAL YEE, JR., M.D., ANISH MAHAJAN, M.D., MITCHELL KATZ, M.D., CHRISTIAN DE VIRGILIO, M.D., AND ROGER LEWIS, M.D., FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT (Dkt. 75, filed on February 14, 2022)

I. INTRODUCTION

On August 3, 2017, plaintiff Timothy Ryan, M.D., formerly a vascular surgeon at Harbor-UCLA Medical Center ("Harbor-UCLA"), filed this action against

defendants Brant Putnam, M.D., Janine Vintch, M.D., Anish Mahajan, M.D., Christian De Virgilio, M.D., Hal F. Yee, M.D, and Does 1-50. Dkt. 1 ("Compl"). On October 6, 2017, Ryan filed the operative first amended complaint ("FAC"), which adds Roger Lewis, M.D., and Mitchell Katz, M.D., as defendants. Dkt. 14 (FAC). Ryan's FAC alleges that defendants violated his First Amendment rights by disciplining him for reporting physician misconduct at Harbor-UCLA to federal, state, and local government agencies. Id. Ryan's FAC alleges a single claim for relief, against all defendants: retaliation based on exercise of right to free speech, in violation of 42 U.S.C. § 1983. Id. The FAC seeks punitive damages against defendants Putnam, Yee, Lewis, Katz, and De Virgilio. Id.

On October 27, 2017, defendants moved to dismiss plaintiff's FAC. Dkt. 15. On February 15, 2018, the Hon. Manuel L. Real, now deceased, granted defendants' motion to dismiss, finding that defendants were entitled to qualified immunity. Dkt. 22 ("MTD Order"). On February 23, 2018, Ryan provided notice of his appeal of the MTD Order to the United States Court of Appeals for the Ninth Circuit. Dkt. 23. On September 18, 2019, the Ninth Circuit reversed and remanded the MTD Order, finding that "qualified immunity [was] not warranted at [that] stage." Dkt. 26. Specifically, the Ninth Circuit stated that "[a]n adverse employment action is [an] action 'reasonably likely to deter [the plaintiff] from engaging in protected activity under the First Amendment'" (quoting Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003)), and found that "[s]ince 2002, [the Ninth Circuit has] recognized that an employer's decision to initiate disciplinary proceedings against a

doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects, is enough to satisfy the 'adverse employment action' requirement." Dkt. 26 at 2-3 (citing Ulrich v. City & Cty. of San Francisco, 308 F.3d 968, 977 (9th Cir. 2002)). In light of that background, the Ninth Circuit found Ryan's allegations "sufficiently similar to Ulrich to satisfy the clearly established prong of the qualified immunity analysis at [that] early stage." Dkt. 26 at 3.

On October 15, 2019, the case was randomly reassigned to this Court. Dkt. 28. On April 17, 2020, defendants submitted their answer to the FAC. Dkt. 36.

On October 29, 2021, defendants Putnam and Vintch filed a motion for summary judgment or, alternatively, partial summary judgment. Dkt. 61. On January 10, 2022, the Court denied the motion of defendants Putman and Vintch for summary judgment or partial summary judgment. Dkt. 70. On February 4, 2022, Putnam and Vintch informed the Court of their appeal, to the Ninth Circuit, of the Court's January 10, 2022 summary judgment order. Dkt. 72.

On February 14, 2022, defendants Yee, Mahajan, Katz, de Virgilio, and Lewis ("defendants") filed the instant motion for summary judgment. Dkt 75-1 ("Mot."). Defendants also filed a statement of uncontroverted facts. Dkt. 75-2 ("SUF"). On February 28, 2022, Ryan submitted his opposition to defendants' motion for summary judgment. Dkt. 79 ("Opp."). Ryan also submitted a statement of genuine disputes of material fact, which includes additional material

facts. Dkt. 79-1 ("GDF"). On March 7, 2022, defendants submitted their reply (Dkt. 80 ("Reply")) and a response to plaintiff's statement of genuine disputes of material fact (Dkt. 80-1 ("SUF Reply")).

The Court held a hearing on March 21, 2022. Having carefully considered the parties' arguments and submissions, the Court finds and concludes as follows.

II. BACKGROUND

Unless otherwise noted, the Court references only facts that are uncontroverted and to which evidentiary objections, if any, have been overruled.[1]

A. The Parties

Ryan was employed by Harbor-UCLA "as a Staff Vascular Surgeon, Physician Specialist, from October 2013 to October 2018, and first obtained medical staff privileges in 2013." SUF No. 9. Harbor-UCLA "is owned by the County of Los Angeles ("County") and operated by the County's Department of Health Services ("DHS")." Id. No. 1.

In order to practice as a physician at Harbor-UCLA, physicians must hold a license issued by the California Medical Board, and separately must hold

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[1] "In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 (C.D. Cal. 2010). To the extent that the Court relies on objected-to evidence, it has considered and **OVERRULED** the applicable evidentiary objections because the objected-to-evidence is relevant and admissible. Evidence not considered by the Court is not addressed.

medical staff privileges that allow physicians to treat patients at Harbor-UCLA. Id. No. 2. Medical staff privileges at Harbor-UCLA are granted by the Credentials Committee, a subcommittee of the Medical Executive Committee ("MEC"), which, in turn, is part of Harbor-UCLA's Professional Staff Association ("PSA"). Id. Medical staff privileges for Harbor-UCLA must be renewed every two years. Id.

Harbor-UCLA's PSA functions in accordance with its Bylaws, and "is tasked with monitoring physicians' compliance with credentialing requirements, and evaluating all members and applicants in accordance with peer review criteria, adopted consistent with the Bylaws and the PSA's peer review process." Id. Nos. 3-4. "The PSA's MEC includes the PSA's Officers and the Chair of each PSA Department (e.g., Roger Lewis, M.D., as Chair of Emergency Medicine from 2013 to 2020), among others, as well as several ex officio members without voting privileges, including Harbor-UCLA's Chief Medical Officer ("CMO")—but did not include Hal Yee, Jr., M.D. after 2013, or Mitchell Katz, M.D. at any time." Id. No. 5.

De Virgilio "has been Chair of Harbor-UCLA's Department of Surgery since January 2016, after serving one year as Interim Chair, and has been a member of the MEC as Chair and Interim Chair." Id. No. 8. Yee "has served as CMO of the County's DHS since 2011." Id. No. 46. Katz "was Director of the County's DHS from 2010 to September 2017." Id. No. 47. Mahajan "has served as Harbor-UCLA's CMO since August 2016, at which time he became an ex officio (nonvoting) member of the MEC." Id. No 48. Lewis was Chair of Emergency Medicine at Harbor-

UCLA from 2013 to 2020, and was part of the MEC during that time period. Id. No. 5.

Putnam "was a member of the MEC from 2011 to 2021, and served as President of the PSA and Chair of the MEC from July 1, 2015 to June 30, 2018." Id. No. 6. Vintch "has been a member of the MEC since 2006; she was Vice President of the PSA and Vice Chair of the MEC from July 1, 2015 to June 30, 2018, and President of the PSA and Chair of the PSA from July 1, 2018 to June 30, 2021." Id. No. 7.

Yee, Mahajan, and Katz did not attend any MEC meetings during which Ryan was discussed. Id. No. 49.

B. The Best-CLI Trial and Ryan's Concerns that UCLA-Harbor Physicians Falsified their Attestations

In 2014, Ryan "became aware of a clinical trial sponsored by the National Institute of Health ("NIH") called BEST-CLI, which stands for Best Endovascular vs. Best Surgical Therapy in Patients with Critical Limb Ischemia." GDF No. 100. "The clinical trial was designed to evaluate what procedures on patients with critical limb ischemia led to the best results, comparing endovascular surgery (which uses catheters and is less invasive) with open surgery." Id. The trial required physicians to have completed a set number of surgeries to qualify for participation. Id. No. 101. Ryan "became concerned that some [UCLA-Harbor] surgeons—including Dr. Rodney White [] and Dr. Carlos Donayre []—had not completed the requisite number of surgeries to qualify for the trial, and that they had therefore falsified the attestation in

their applications in order to participate." Id. White has stated that the BEST-CLI trial was "a big national trial [that cost] over $20 million dollars." Id. No. 182.

On December 4, 2014, Ryan reported his concerns regarding the possibly falsified attestations to Dr. Timothy Van Natta, Chief Medical Officer at UCLA-Harbor, and De Virgilio, but based on their responses, Ryan did not believe that "they were seriously investigating whether Harbor surgeons had falsely inflated their surgical experience in order to qualify for the BEST-CLI trial." Id. Nos. 102-103. Accordingly, on December 4, 2014, Ryan "contacted the NIH and reported his concerns, providing his basis for believing that Dr. White and Dr. Donayre, among others, had falsified their attestations in their application to participate in the BEST-CLI trial." Id. No. 105. On approximately December 9, 2014, Ryan informed Van Natta that he had made a report to the NIH. Id. No. 106.

On February 12, 2015, the Surgical and Interventional Management Committee ("SIMC") for the BEST-CLI Trial found that "no one at [UCLA-Harbor] currently meets the criteria to serve as an independent endovascular operator" and that until someone on site met the criteria, "the site should no longer enroll patients in the BEST-CLI Trial." Dkt. 62-5 at Ex. 331. On March 30, 2015, SIMC "found that several members of the Harbor-UCLA team misrepresented their procedural volume histories to meet the criteria of independent endovascular operator." Dkt. 61-7 at Ex. 24. However, despite the finding that members of the Harbor-UCLA team had engaged in misrepresentation, the HHS Office of

Research Integrity "advised that the falsification of information in this situation would not constitute research misconduct" and stated that it "will not investigate this matter further." Id.

C. Patient "BH" and Ryan's Concerns Regarding an Alleged Kickback Scheme

In December 2013, Ryan "treated a patient 'BH' for an aortic dissection ... with medication, which he believed to be the appropriate course." GDF No. 109. Shortly after Ryan treated patient BH, "Dr. White's nurse Rowena Buwalda copied Dr. Ryan on an email reporting that she had instructed BH to come to the hospital the following day and to complain of chest pains when she did so." Id. No. 110. Ryan "further learned that Dr. White had performed surgery on BH, implanting a stent graft manufactured by Medtronic," even though Ryan "firmly believed that BH had responded well to non-surgical management and that she had no need for the stent graft procedure." Id. Nos. 112-113. BH "suffered a serious aortic injury as a result of the stent graft surgery, resulting in a major stroke that impaired her ability to speak." Id. No. 114.

Ryan believed that "Dr. White had falsified the medical record to justify the stent graft, describing symptoms inconsistent with what I had observed." Dkt. 62-4 (Declaration of Plaintiff Timothy Ryan, M.D. ("Ryan Decl.")) ¶ 6. Moreover, Ryan "concluded that Dr. White, Dr. Donayre, and others were implanting stent grafts manufactured by Medtronic in patients where they were not medically warranted, and that they had a financial incentive to do so" because "[t]he device manufacturer Medtronic was paying them thousands of dollars each time they implanted one of

Medtronic's stent grafts under the guise that they were conducting a 'teaching course' on how to do so when they implanted the stent graft." Ryan Decl. ¶ 7. Ryan states that he "knew this because in December 2013 Medtronic offered to pay me to participate" in the teaching courses. Id. Ryan states that "[b]ased on my direct observation of the operations associated with these supposed 'courses,' I know there were no physicians present to observe the procedure, so no one to 'learn' from the 'course.'" Id.

Ryan conducted an "investigation," and came to believe that "the doctors received several thousand dollars per implant," and that "Medtronic was paid tens of thousands of dollars per case where Medtronic devices were implanted." Id. Ryan "was gravely concerned by this development, because he believed it represented doctors getting kickbacks from a device manufacturer for using their product, that it compromised medical judgment about whether the devices were medically indicated, and that it threatened the health and safety of patients for whom the stent grafts were not medically indicated, as in the case of BH." GDF No. 120.

Accordingly, Ryan submitted a complaint regarding White, and later was able to confirm that the Harbor-UCLA PSA conducted a Focused Professional Performance Evaluation ("FPPE") of White because Ryan was interviewed by the FPEE team. SUF No. 13; GDF No. 125. In the interview, Ryan told the FPPE team "about his concerns and conclusions about Dr. White and the Medtronic kickbacks, and provided them with documentation including BH's medical records." GDF No. 125.

By September 2014, Yee was aware of the FPPE against White, that Ryan was threatening to blow the whistle to federal authorities, and that Ryan felt that White was retaliating against him. GDF No. 227.

D. Ryan Reports the Alleged Kickback Scheme to Criminal Authorities

Ryan was not satisfied with UCLA-Harbor's response to his complaint regarding the alleged Medtronic kickback scheme. GDF No. 126. Accordingly, on approximately January 12, 2015, Ryan "called the Los Angeles District Attorney's Office and spoke to a Deputy District Attorney ... describing his concerns that Harbor physicians were getting kickbacks for implanting devices that were not medically indicated." Id. No. 127. "The Deputy District Attorney told Dr. Ryan that the District Attorney's Office would investigate, and later interviewed Dr. Ryan." Id. Shortly thereafter, Ryan told de Virgilio that "he had reported his concerns to the District Attorney's Office and [that] they would be investigating." Id. No. 128.

On January 15, 2015, Dr. Yee learned from Dr. Van Natta that Dr. Ryan's reports to the District Attorney's office had resulted in an apparent investigation, and that Dr. Ryan had made a report to the NIH. GDF No. 229.

Defendants contend that Lewis was not aware that Ryan made any reports to persons or entities outside of Harbor-UCLA. SUF No. 93. However, it appears that Lewis was present at a April 25, 2016 MEC meeting during which Yee gave input regarding whether action by the PSA against Ryan could be seen

as retaliation for whistleblowing, and the participants discussed that one aspect of Ryan's lawsuit involves "patient concerns and whistleblowing." Dkt. 62-5 at Ex. 360.

E. White's Complaints Regarding Ryan; The MEC's Response

On January 26, 2015, White emailed Human Resources, Van Natta, and de Virgilio "to report invasion of personal privacy, and potential federal [] and state (California Medical Privacy Act) patient privacy violations by Dr. Timothy Ryan." Dkt. 62-5 at Ex. 341. On February 4, 2015, White submitted an affidavit and several exhibits in support of his report. Id. White's affidavit "complained that Dr. Ryan had improperly reviewed medical records and operative reports and approached [UCLA-Harbor] personnel to collect information regarding Dr. White and his patients." GDF No. 133. Moreover, White's affidavit "attached a computerized report of surgeries which he claimed Dr. Ryan had asked an assistant to print for him."[2] Id. No. 135. "[A] recognized HIPAA Compliance Officer review[ed] the case and it was found that no [HIPAA] violation occurred on the part of Dr. Ryan." Dkt. 62-5 at Ex. 365.[3]

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[2] The footer at the bottom of the report is dated January 30, 2015, i.e., after White's complaint. See Dkt. 62-5 at Ex. 341. The parties dispute whether this date refers to the date the report was created or the date the documented was printed or reprinted. See GDF No. 136; SUF Reply No. 136.

[3] Separately, on July 29, 2015, White filed suit against Ryan. SUF No. 41. The lawsuit was later dismissed in exchange for Ryan's dismissal of his own lawsuit against White. Id. No. 42.

On August 25, 2015, White made a Request for Corrective Action ("CAR") to be taken against Ryan to the PSA. SUF No. 14. White claimed, inter alia, that Ryan "engaged in conduct detrimental to the delivery of quality patient care," "invaded his personal privacy, and violated both the Health Insurance Portability and Accountability Act ("HIPAA") and California's Confidentiality of Medical Information Act, by accessing confidential patient information in Dr. White's office." Id.; GDF Nos. 148-149. Ryan contends that "Dr. White's [CAR] described Dr. Ryan's activities asking for and reviewing records to make reports to the NIH and District Attorney's Office." Ryan Decl. ¶ 13.

On September 28, 2015, the MEC discussed Dr. White's CAR. SUF No. 15; GDF No. 153. The draft meeting minutes noted that "Dr. Ryan considers himself a whistleblower because he thought this bad thing happened and he wanted to do right." Dkt. 62-5 at Ex. 365. They further noted that "[t]o take corrective action beyond the investigation could be considered retaliation because we feel this issue has been investigated adequately," but, "[o]n the other hand, it is not necessarily under the purview of the whistleblower to do their own investigation and start digging into whatever they want." Id. The draft meeting minutes also stated that "[t]he PSA spent months and worked very diligently on this and ultimately there was no resolution," "now we are being asked to investigate this again," and that "these complaints were taken seriously and went appropriately to HR Performance Management and the HIPAA compliance Officer and the difference now is that there are attorneys involved and litigation." Id.

Finally, they stated that "a recognized HIPAA Compliance Officer review[ed] the case and it was found that no HIPAA violation occurred on the part of Dr. Ryan." Id.

In November or December 2015, White submitted an addendum to his CAR. SUF No. 16; GDF No. 169. The addendum stated, in part, that:

> "On November 19, 2015 I was advised by the County's Intake Specialist Unit that Dr. Ryan filed a complaint against me. On November 24, 2015, I received another letter from that same unit, that the complaint had been initially investigated, that the allegations would not be investigated further and that the matter was considered closed. Enclosed are copies of both letters. This continuing pattern of harassment, and unscrupulous conduct by Dr. Ryan, is having a severe adverse impact on me, as a member of the medical staff, and on my personal and professional life."

SUF No. 16; GDF No. 169.[4] On December 28, 2015, Putnam presided over an MEC meeting to discuss White's addendum to his CAR. SUF No. 19; GDF No. 172. At the meeting, the MEC "noted the next step would be to complete an FPPE on Dr. Ryan because of the allegations of questionable conduct." SUF No. 19.[5]

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[4] Similarly, on December 31, 2015, White wrote to de Virgilio complaining that Ryan had violated HIPAA by gathering data "to initiate the Fraud investigation against Harbor (me) with the trial Steering Committee, and the NIH." GDF No. 173.

[5] Whereas Putnam stated in his deposition that "typically when there are concerns brought forward either from a department chair or independently to the PSA leadership about

Accordingly, on December 28, 2015, the MEC directed a FPPE be undertaken by an "Ad Hoc Committee." Id. No. 21. The members of the committee were chosen by de Virgilio as Department Chair; none of the committee members are parties to this litigation. Id.; GDF No. 174. While defendants contend that the MEC directed the FPPE "[p]ursuant to the PSA bylaws," SUF No. 21, Ryan claims that the FPPE was not directed pursuant to the PSA bylaws because the MEC "believed it [had] investigated the issue 'adequately' and the previous investigation determined 'no HIPAA violation occurred on the part of Dr. Ryan.'" GDF No. 21 (quoting Dkt. 62-5 at Ex. 365 (draft of September 28, 2015 MEC meeting minutes)).

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unprofessional behavior, our first approach is always to make sure the staff member's correct supervisor has been involved, has done the appropriate counseling, and the department chair would definitely get involved if the initial supervisor counseling had not improved things" (SUF Reply No. 189), Ryan was not counseled about yelling at people prior to the imposition of the FPPE. GDF Nos. 191-192. On the other hand, de Virgilio stated in deposition that he spoke to Ryan about his temper, and about being more positive and collaborative, but added that speaking to Ryan was difficult because he was "intimidating." SUF No. 95; SUF Reply No. 189. The PSA Bylaws state that "[t]hese bylaws encourage[] the use of progressive steps by Association leaders and Medical Center management, beginning with collegial and educational efforts, to address questions relating to an Association Member's clinical practice and/or professional conduct. The goal of these efforts is to arrive at voluntary, responsive actions by the individual to resolve questions that have been raised." GDF No. 190. The PSA Bylaws also state that "collegial intervention efforts are encouraged but are not mandatory, and shall be within the discretion of the appropriate Association and Medical Center management." SUF Reply No. 190.

Yee, Mahajan, and Katz had no involvement in the MEC's decision to direct an FPPE regarding Ryan. SUF No. 50. Plaintiff contends that "The PSA involved Drs. Yee, Mahajan, and Katz in its actions against Dr. Ryan throughout its process of retaliation, including prior to and during the time the PSA ordered the FPPE, and Drs. Yee, Mahajan, and Katz deliberately participated in the PSA's responses." GDF No. 50. However, the Court reviewed the evidence submitted by plaintiff, and that evidence does not establish that Yee, Mahajan, or Katz participated in the decision to direct an FPPE regarding Ryan. See Dkt. 79-2 ("Supp. White Decl."), Exs. H-K, L-O, Q-V.

F. The FPPE Investigation and Findings; The Behavioral Agreement

Ryan refused to meet with the Ad Hoc Committee after it rejected his request to be provided all questions in writing or be allowed to bring in his lawyer. SUF No. 23. Ryan stated that he feared he would not be treated fairly by the Ad Hoc Committee. GDF No. 23. After engaging in fact-finding and interviewing 13 witnesses, on February 26, 2016, "the Ad Hoc Committee issued a FPPE report for the MEC's review, which included unanimous committee findings and recommendations with respect to Dr. Ryan's conduct, which it found to be unprofessional." SUE No. 24. The FPPE report, generated by the Ad Hoc Committee, included the following summary:

> "The Ad Hoc Committee believes that Dr. Ryan's behavior is well below expected standards for professional conduct. Further, the committee believes that Dr. Ryan's behavior has had serious adverse impacts on the wellbeing of many health

> care professionals including attending physicians, physician trainees, nurses and other ancillary staff. His unauthorized access of the files of patients enrolled in studies or under the care of other physicians may constitute a violation of HIPAA. Finally, it appears that despite Dr. Ryan's acknowledged technical expertise, he is adversely impacting patient care through his behavior. The MEC is advised that the Ad Hoc committee believes that disciplinary action is justified to safe guard Harbor employees, trainees, and patients. We recommend that MEC should explore possible actions to remedy the underlying chaotic situation in vascular division created by Dr. Ryan's unprofessional behavior. Dismissal from the medical staff or discontinuation of medical privileges are options that can [be] considered but the committee is not knowledgeable regarding standards or precedents for such as action based solely on a lack of professionalism. At a minimum, we believe that Dr. Ryan should receive professional counseling regarding his behavior, that behavioral limits should be set, and that ongoing monitoring of his interactions with others should take place until the problem is believed to be resolved. The Department Chair, residency/fellowship program directors and nursing directors are suggested as the monitoring team for such action. This report reflects a unanimous consensus among committee members."

Dkt. 61-7 at Ex. 5. Ryan contends that the FPEE "accused him of accessing and requesting medical records improperly, but did not discuss or disclose that

he was doing so to gather information to provide to the NIH, even though the MEC had previously acknowledged this." GDF No. 179. Moreover, Ryan points out that the FPPE did not disclose the Ryan's report to the NIH "had resulted in Dr. White and Dr. Donayre being disqualified for participation in endovascular procedures in the BEST-CLI trial." Id. No. 180. According to Donayre's witness statement in Ryan's FPPE, "Dr. Donayre felt the need to constantly look over his shoulders all the time because of Dr. Ryan.... For this reason Dr. Donayre decided to leave Harbor-UCLA." Id. No. 186. White left Harbor-UCLA at the end of April 2016, two months after the FPPE report was issued. SUF Reply No. 180.

In or around April 2016, MEC members met with Yee to discuss whether any action taken against Dr. Ryan might compromise the County's own actions, or might create "a medical-legal action" against the MEC; Dr. Yee suggested the MEC "proceed with caution because there was concern about whistleblowing," but stated the PSA was "within its rights to take action" and "should proceed" as it sees fit. SUF No. 52.

Following the completion of the FPPE report, "[t]he MEC discussed [it] at its meetings on March 28 and April 25, 2016, rejected issuing a summary suspension of Dr. Ryan's privileges at the March 28 meeting, voted unanimously at the April 25 meeting to inform Dr. Ryan that it was contemplating taking action against him, and asked Dr. Ryan to appear before the MEC to give his perspective and answer questions." SUF No. 26.

On July 25, 2016, Ryan attended a MEC meeting with his attorney, and responded to the FPPE report as follows:

> "[Ryan] did not yell at a patient; he may have spoken sternly to fellows because he expects more from them; he corrected fellows when they did something wrong; without specific dates he could not answer regarding lack of communication with other vascular surgeons; he believed he communicated well; he was not responsible for Dr. White's retirement or the departure of another vascular surgeon (Carlos Donayre, M.D.); and he would consider a behavioral or anger management program."

SUF No. 28. After Ryan and his counsel left the July 25, 2016 meeting, the MEC deliberated and voted on its next course of action, but de Virgilio left before this vote took place. SUF No. 29. "[A] majority of the MEC voted to recommend a Behavioral Contract and proceed with revocation of Dr. Ryan's privileges and membership only if he either did not agree to the Behavioral Contract or breached its terms." Id. No. 30. Yee, Mahajan, Katz, and de Virgilio did not participate in the MEC's decisions to ask Ryan to sign a Behavioral Agreement and recommend a revocation of Ryan's clinical privileges upon his refusal to sign the Behavioral Agreement. Id. No. 54.[6] Pursuant to the PSA bylaws, the DHS Director (Katz) and CMO (Yee),

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[6] The Court finds that the evidence submitted by plaintiff does not support a dispute of this fact, because it does not demonstrate that Yee, Mahajan, Katz, and de Virgilio were involved in those MEC decision to offer the Behavioral Contract and revoke Ryan's privileges if he refused it. See GDF No. 54; SUF Reply No. 54.

and the CMO of Harbor-UCLA (Mahajan), have no role in any MEC determination of medical disciplinary action, except to be notified of any recommended corrective action, and the Governing Body's only roles are to either adopt the MEC's recommendation or decide any appeal after a hearing and decision by the JRC. Id. No. 55.

While the MEC has offered behavioral agreements to other Harbor-UCLA practitioners, the parties dispute whether UCLA-Harbor has offered Behavioral Agreements with the same terms as Ryan's to other practitioners. Id. No. 31; GDF No. 31. In any event, on September 6, 2016, Ryan was provided with the behavioral agreement (the "Agreement" or "Behavioral Agreement"), which:

- "Listed specific behavioral requirements, including that he not access computers or other documents belonging to other PSA members, faculty, or others without authorization, or medical records of patients for whom he is not directly involved in treatment without express permission by his Department Chair;
- Required Plaintiff to address concerns regarding individuals at Harbor-UCLA 'in private to the appropriate supervisor, administrator, faculty or PSA leader in a courteous manner, or in written reports using the established Hospital reporting forms and procedures,' and prohibited 'unconstructive criticism' calculated 'to intimidate, undermine confidence, belittle or imply stupidity or incompetence';

- Required Dr. Ryan to participate in one of two listed anger management programs;
- Included a waiver of 'claims[7] resulting' from any actions or communications 'consistent with the terms of this Agreement,' or regarding the anger management program;
- Required Dr. Ryan to cooperate with the PSA's Well-Being Committee as specified;
- Required Dr. Ryan to 'consult with a psychologist or psychiatrist' (or use a therapist if he is currently engaged with one) 'for the purposes of discussing the scope of the evaluation and the therapeutic goals,' and 'to undertake therapy if recommended by the consultant,' and required any consulted mental health clinician 'to provide progress reports' to the Well-Being Committee;
- Provided that upon Dr. Ryan's failure to comply with the Agreement, he 'shall be subject to corrective action' as authorized by

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[7] The wavier of claims stated that Ryan "agrees to hold free and harmless the Hospital, members of the EC or authorized committees of the Hospital's Professional Staff, the Programs, and any and all representatives of any of them, from and against any and all claims resulting from any and all actions taken, or communications made, consistent with the terms of this Agreement. Dr. Ryan further acknowledges that there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, the EC, members of the EC or authorized committees of the PSA, the Hospital, or any and all representatives of any of them, for any acts performed or communications made regarding the subject matter of this Paragraph 3.2(ii)." Dkt. 61-7 at Ex. 7.

the PSA Bylaws, 'subject to any hearing rights provided in Article VII of the Bylaws, or its successor, for such corrective action,' provided that a single arbitrator qualified to serve as a hearing officer under Article VII may serve as trier of fact in the MEC's discretion;

- [Provided that] the Agreement may be terminated by either party; and
- [Provided that] entering into the Agreement would 'not constitute an action or recommendation taken for a medical disciplinary cause or reason' and would not 'in and of itself ... require a report to the Medical Board of California or any other federal or state agency.'"

SUF No. 32 (quoting Dkt. 61-7 at Ex. 7 (Behavioral Agreement as of September 6, 2016)).[8] On September 7, 2016, when Putnam informed Ryan that the MEC was demanding that he accept a Behavioral Contract, union representative Jake Baxter wrote to DHS officials asserting that the MEC's actions against Dr. Ryan were retaliatory and illegal. GDF No. 239. On September 8, 2016, Mahajan responded to Baxter's email, asserting that the PSA was independent of DHS, and that DHS had no role in the PSA's actions. GDF No. 240. In discussing Baxter's claims, Mahajan noted to Yee that county counsel was "involved in earlier aspects of this related to concerns about

[8] Lewis has never provided input into the contents of a behavioral contract, other than to vote on whether to offer such a contract, and has not been involved in discussion of any waiver provision in such an agreement. SUF No. 96.

retaliation vis-á-vis whisteblow." Dkt. 79-2 at Ex. S. On September 9, 2016, Yee stated in an email to Mahajan that "[y]ou may need to help [county counsel] educate the PSA that they are indeed indemnified by the County for their appropriate and approved work as physicians at Harbor, and as such are covered for their work on the PSA as medical staff themselves." Id. Ex. T.

In any event, Ryan did not sign the Agreement; he believed that he could not sign it because "it required [him] to admit to things that were not true, that it was illegal in that it purported to restrict [him] from reporting misconduct to entities outside of Harbor, and that it was illegal because it forced [him] to waive claims against the MEC and Hospital." Ryan Decl. ¶ 21; see also SUF No. 33. Putnam and Vintch could not recall any other behavioral agreements that included a waiver of claims. GDF No. 208; SUF Reply No. 208. In at least one instance, another UCLA-Harbor physician "was offered a behavioral contract for unprofessional, intimidating, and disruptive behavior" that "did not include the waiver of claims or psychiatric counseling they demanded of Dr. Ryan." GDF No. 209.

G. The MEC's Proposed Action to Revoke Ryan's Staff Membership and Privileges

"Based on Dr. Ryan's refusal to sign a Behavioral Agreement, and in accordance with the MEC's decision at the July 25, 2016 meeting, the PSA issued Dr. Ryan the MEC's Notice of Proposed Action and Hearing Rights, dated October 5, 2016, which stated, in part, that:

- "The FPPE report found Dr. Ryan 'acted aggressively' and was 'verbally abusive to other practitioners, nurses, fellows, and in some instances, patients,' that he created 'a hostile work environment' where some people 'felt threatened' and 'intimidated' to the point where they desired to leave 'the vascular work team' or their jobs, and that he publicly criticized 'the patient management of other members of the team,' which adversely affected well-being of other healthcare officials;
- The FPPE report found Dr. Ryan's behavior was 'well below expected standards for professional conduct' and violated the PSA Bylaws (§§ 2.2-2.2, 2.4-2, 2.4-3, 2.4-7, 2.5-2, and 2.5-2.4), and that disciplinary action was justified to safeguard employees, trainees, and patients;
- Because Dr. Ryan did not sign and return the Behavioral Agreement, the MEC proceeded with the final proposed action to revoke Dr. Ryan's professional staff membership and privileges at Harbor-UCLA pursuant to Article VI of the PSA Bylaws;
- This action would not become final until Dr. Ryan exhausted or waived his hearing and appeal rights under Article VII of the Bylaws, and that his membership and privileges would remain in place until the action became final; and
- If the action became final, California Business & Professions Code § 805 would require the

> filing of a report with the Medical Board of California, and a report also would be filed with the National Practitioner Data Bank ("NPDB") pursuant to 42 U.S.C. § 11101 et seq."

SUF No. 34. Ryan "exercised his appeal rights in October 2016 and requested a hearing before a Judicial Review Committee ("JRC") on the recommendation to revoke his privileges." Id. No. 35. On November 10, 2016, PSA sent Ryan a "Notice of Charges" outlining the PSA's accusations against him. Id. No. 36; GDF No. 214. The Notice of Charges accused Ryan of "[o]penly threaten[ing] to call external agencies to conduct investigations," and included other accusations related to Ryan's allegedly unprofessional and "angry manner," but did not reference any HIPAA violations. SUF No. 36; GDF No. 214. The Notice of Charges also stated that Ryan made "unfounded accusations in an angry manner," but at deposition Putnam could not remember any unfounded accusations made by Ryan. SUF No. 36; GDF Nos. 168, 214-215; SUF Reply No. 215. On February 27, 2017, Putnam sent Ryan a First Amended Notice of Charges that deleted the accusations related to threatening to call external agencies and making unfounded accusations in an angry manner. GDF No. 217.

On June 20, 2018, counsel for Ryan and the PSA "jointly submitted a letter ... which requested dismissal of the JRC hearing on Dr. Ryan's appeal without determination of the merits, and stated that the matter became moot because Dr. Ryan's PSA membership and privileges had lapsed." SUF No. 39.

After deeming Dr. Ryan's privileges and membership to have lapsed, the PSA did not file a report regarding Dr. Ryan with the California Medical Board, and did not file such a report with the NPDB until 2020 after determining it was required to do so." SUF No. 40.

Ryan contends that he has been unable to secure a surgeon position ever since the PSA's proceedings against him, despite dozens of applications, at least in part because the applications "require him to disclose whether he [has] ever been investigated by a Professional Staff Association." GDF No. 221. Ryan believes that "hospitals and practices will not hire surgeons who are the subject of peer review investigations regarding their privileges." Id. No. 222.

H. DHS Investigations into Ryan for Privacy Violations and Professional Discourtesy

White's privacy complaint against Ryan to DHS in January and February of 2015 (Case # HU15004) accused Ryan of invading his personal privacy and potentially violating HIPAA and state privacy laws. SUF No. 59. Initially, Harbor-UCLA's privacy coordinator determined that the allegation of unauthorized access in Dr. White's privacy complaint to DHS (Case # HU15004) was not substantiated, because DHS policy permits physicians to obtain de-identified information for research purposes. Id. No. 61. However, Harbor-UCLA's Privacy Coordinator was instructed to reopen the investigation of Case # HU15004 on January 19, 2016. Id. No. 65. Thereafter, the privacy coordinator determined that Dr. Ryan inappropriately requested and received PHI on patients for whom he had no authority, without obtaining prior approval of the Internal Review Board

as required by DHS policy. Id. No. 66. While Ryan acknowledges that this was the conclusion, he contends that it was legally incorrect because the report did not address that Ryan was gathering the information to make a report of misconduct. GDF No. 66.

Additionally, three registered nurses ("RNs") alleged that Dr. Ryan engaged in discourteous conduct towards them before July 7, 2015. Id. No. 58. Accordingly, on July 7, 2015, Joi Williams, then the Chair of DHS's Performance Management ("PM") Unit, sent an email stating that "PM will review issues related to ... discourtesy by Dr. Ryan, and allegations of inappropriate comments by Dr. Ryan related to Dr. White." Id. No. 57. Dr. Ryan and one of his attorneys, Mark Quigley, met with two PM Investigators, Cathy Yoo and Nairi Gevorki, on January 26, 2017, for an administrative interview; Dr. Ryan was given the opportunity to provide an affidavit, but he did not do so. Id. No. 68. Several other witnesses were interviewed, and several affidavits obtained. Id. No. 69. After completing its investigation, the PM team drafted a Notice of Intent to Suspend for Dr. Ryan for Dr. Mahajan's review, which proposed suspending Plaintiff for 25 calendar days. Id. No. 70. Dr. Mahajan reviewed the draft Notice of Intent to Suspend to Dr. Ryan, and approved it without making any changes. Id. No. 71. Mahajan issued the Notice of Intent to Suspend, dated April 4, 2017, to Dr. Ryan on or about April 7, 2017. Id. No. 73. It cited, inter alia, disruptive behavior, ethical conflicts, and misuse of confidential patient information. Id.; see also SUF No. 74 (investigative evidence cited in support of the Notice of Intent to Suspend, including evidence of

professional discourtesy, false statements during the investigation, and inappropriate access of personal health information). The Notice of Intent to Suspect made the following conclusion;

> "Dr. Ryan, your unauthorized access to a list of surgical procedures that included procedures conducted by other surgeons with protected patient information was unnecessary and not related to a legitimate business reason. In addition to reflecting poor judgment, this unauthorized access was a violation of departmental guidelines and policies meant to safeguard the private medical information of patients who place their trust in the County. You then continued to show a disregard for Department policy by provide false information to the Department during an administrative investigation and completely denying receiving information contained in the report that you requested. Your conduct caused concern to the Department due to actions and your lack of accountability. Also, your angry behavior and threatening body language not only violates the Department's written policy and procedures but also creates a disruptive environment and is not conducive in creating a healthy, professional workplace. Due to your unauthorized access of PHI and your discourteous behavior, the Department intends to suspend you for twenty-five (25) calendar days from your permanent position of Physician Specialist."

SUF No. 77. Ryan and Mahajan first met fact-to-face in April 2017, when Mahajan issued the Notice of

Intent to Suspend to Ryan. Id. No. 79. On April 12, 2017, Ryan submitted a response to the Notice of Intent to Suspend, in order to "refute [its] findings and object to any proposed suspension." Id. No. 81. Therein, Ryan stated, in part:

> "I have been and continue to be the victim of a pattern of harassment ever since I reported the practices of Dr's White and Donayre, and your proposed action continues this harassment. Your review of my use of confidential information ignores the law. California's Confidentiality of Medical Information Act specifically allows a provider of healthcare to disclose information without consent in a number of circumstances.... [including] public agencies[.]

SUF No. 81. Mahajan and the PM team received, reviewed, and discussed Dr. Ryan's response to the Notice of Intent to Suspend, and agreed there was no merit to Ryan's response. Id. No. 82. On August 14, 2017, Mahajan issued Ryan a Notice of Suspension, which stated that Ryan was being suspended for 25 calendar days, from September 1 through September 25, 2017. Id. No. 83. Ryan's suspension was not reported to the California Medical Board. Id. No. 84; GDF No. 84.

In his briefing before the Ninth Circuit, Ryan stated that "Dr. Ryan's section 1983 claim does not rely on the PSA Bylaws nor the Suspension Notice. The only references to the PSA Bylaws are in setting out the series of events leading to Defendants' retaliatory actions underlying this action." GDF No. 92.

III. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets its initial burden, the opposing party must then set out "specific facts showing a genuine issue for trial" in order to defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Fed. R. Civ. P. 56(c), (e). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Celotex, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Abromson v. Am. Pac. Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from

the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DISCUSSION

Drs. Yee, Katz, Mahajan, de Virgilio and Lewis ("defendants") move for summary judgment or partial summary judgment as to the retaliation claim set forth by Dr. Ryan ("plaintiff") in the FAC. Mot. at 9. Defendants argue Yee, Katz, and Mahajan "were not voting members of the MEC at the relevant time, and never participated in MEC votes or actions regarding plaintiff." Id. With respect to Mahajan, defendants point out that plaintiff's Section 1983 claim is not based on Mahajan's decision to suspend Ryan, and that the FAC does not mention the suspension. Id. at 10. Finally, defendants argue that de Virgilio's involvement in directing the FPPE was not an adverse employment action, and that although Lewis participated in relevant the MEC vote to offer the Behavioral Agreement in lieu of suspending Ryan's privileges, Lewis was not aware of plaintiff's reports to the NIH or law enforcement and therefore did not harbor any retaliatory motive. Id. at 10-11. Finally, defendants argue that they are entitled to qualified immunity. Id. at 9-11.

The Court addresses defendants' arguments in turn.

A. First Amendment Retaliation

The framework set forth in Eng v. Cooley governs First Amendment retaliation claims. See Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 822 (9th Cir. 2017) (citing Eng, 552 F.3d at 1070–72 (9th Cir. 2009). To overcome summary judgment on his retaliation claim, Ryan must demonstrate that there is a triable issue of material fact that (1) he spoke on a matter of public concern; (2) he spoke as a private citizen rather than as a public employee; and (3) the relevant speech was a substantial or motivating factor in the adverse employment action(s). See Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 (9th Cir. 2016) (citing Eng, 552 F.3d at 1070-71).

"[I]f the plaintiff has passed the first three steps, the burden shifts to the government to show that 'under the balancing test established by [Pickering], the [state]'s legitimate administrative interests outweigh the employee's First Amendment rights.'" Eng, 552 F.3d at 1071 (quoting Thomas v. City of Beaverton, 379 F.3d 802, 808 (9th Cir. 2004)). "[F]inally, if the government fails the Pickering balancing test, it alternatively bears the burden of demonstrating that it 'would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct.'" Eng, 552 F.3d at 1072 (quoting Thomas, 379 F.3d at 808).

1. Yee and Katz

a. Adverse Employment Action

Defendants argue that Yee and Katz never took any adverse employment action against Ryan, i.e., any "action that was 'reasonably likely to deter employees

from engaging in protected activity.'" Mot. at 22 (quoting Dahlia v. Rodriguez, 735 F.3d 1060, 1078 (9th Cir. 2013)). Defendants point out that the only adverse employment action specifically alleged in the FAC was the vote to revoke plaintiff's PSA membership and privileges, but Yee and Katz never attended the MEC meetings at which votes related to Ryan were taken. Mot. at 23. Moreover, they note that, under the PSA's Bylaws, Yee (CMO of the County's DHS) and Katz (Director of the Country's DHS) have "no role in any MEC determination of medical disciplinary action, except to be notified of recommendations." Id. at 23-24. Accordingly, defendants argue that "Yee and Katz cannot be liable for an 'adverse employment action' as a matter of law, and are entitled to summary judgment." Id. at 24.

In opposition, plaintiff argues that he has presented sufficient evidence to create a genuine dispute of material fact "about whether Dr. Yee and Dr. Katz approved and endorsed adverse employment actions against him." Opp. at 15. Plaintiff argues that Yee "approved" the MEC's adverse employment action of investigating Ryan and threatening to suspend his privileges on the basis of evidence the plaintiff contends suggests that "MEC members consistently sought Dr. Yee's input about their ongoing efforts to investigate Dr. Ryan." Opp. at 15-16. This evidence includes Yee's April 2016 statement that the MEC should "proceed with caution" in taking action against Ryan "because there was concern about whistleblowing," but is "within its rights to take action." Dkt. 62-5 at Ex. 362. Plaintiff also points to Yee's suggestions that County Counsel reassure PSA members that they are indemnified for their work on

the PSA. Opp. at 17. With respect to Katz, plaintiff argues that because Katz was aware of Ryan's external reports and complaints, the Court may infer that "Dr. Katz joined Dr. Yee in endorsing the MEC's adverse employment actions." Id. at 17-18.

In reply, defendants argue that "Plaintiff offers no evidence Dr. Katz had contemporaneous knowledge of the MEC's votes, let alone that he was actively involved," and that, in any event, "inaction and tacit encouragement have not been upheld as bases for [Section 1983] liability." Reply at 9-10. In sum, defendants claim that "[b]ecause Plaintiff offers no evidence that Dr. Katz initiated 'disciplinary proceedings,' 'threatened to revoke' Plaintiff's staff privileges, or acted with 'a negative effect on employment prospects'—the pleading bases for the earlier Ninth Circuit decision—Dr. Katz is entitled to summary judgment." Id. at 10 (quoting Ryan v. Putnam, 777 F. App'x 245, 246 (9th Cir. 2019)). With respect to Yee, defendants reiterate that the evidence fails to suggest that Yee participated in any adverse employment action, and note that "the PSA Bylaws require the MEC to coordinate and cooperate with Drs. Yee, Mahajan, and Katz regarding matters of 'mutual concern'—which naturally included Plaintiff, given his ongoing litigation against the County—but otherwise give DHS no role in any MEC medical disciplinary action." Reply at 17. In sum, with respect to Yee, defendants argue that "Plaintiff lacks any evidence that Dr. Yee 'initiated disciplinary proceedings' or took other action that threatened Plaintiff's privileges or negatively impacted his employment prospects, so Dr. Yee can't be liable under § 1983." Id. at 18 (quoting Ryan, 777 F. App'x at 246).

The Court finds that summary judgment as to Yee and Katz is appropriate, as neither took any adverse employment action reasonably likely to deter Ryan from engaging in protected activity under the First Amendment. Coszalter, 320 F.3d at 976. It is undisputed that Yee and Katz did not participate in the MEC votes to initiate the FPPE, or offer the Behavioral Agreement, or revoke plaintiff's PSA privileges, as Yee and Katz were not members of the MEC during those votes. See SUF No. 5. Pursuant to the PSA's Bylaws, Yee and Katz "have no role in any MEC determination of medical disciplinary action, except to be notified of any recommended corrective action." Id. No. 55. Given this undisputed evidence, plaintiff argues that Yee and Katz "approved" the MEC's adverse employment actions of investigating Ryan and threatening to suspend his privileges. Opp. at 15-16. While affirmative approval of a retaliatory adverse employment action can give rise to Section 1983 liability, Freitag v. Ayers, 468 F.3d 528, 543 (9th Cir. 2006), Yee and Katz had no authority to "approve" the adverse employment actions against Ryan.

Plaintiff principally relies upon evidence that, at an MEC meeting in April 2016, Yee suggested the PSA "proceed with caution [with respect to Ryan] because there was concern about whistleblowing," and added the PSA was "within its rights to take action" and "should proceed" as it sees fit. SUF No. 52. These statements fail to raise any genuine dispute of material fact that Yee approved any particular course of action, and plaintiff points to no authority suggesting the imposition of liability on Yee based on his deference to the MEC is appropriate. The same is true for Yee's suggestions that County Counsel

reassure PSA members that they are indemnified for their work on the PSA, which does not constitute "approval" of the MEC's adverse employment actions. In sum, the evidence fails to suggest that Yee participated in or approved the MEC's adverse employment actions against Ryan. See Freitag, 468 F.3d at 543, n.8 (reversing judgment as to official who did not contribute to, and was not responsible for, adverse employment actions).

With respect to Katz, plaintiff argues that because Katz was aware of Ryan's external reports and complaints about White's retaliation, the Court may infer that "Dr. Katz joined Dr. Yee in endorsing the MEC's adverse employment actions." Opp. at 17-18. This argument fails to raise a triable issue that Katz approved or participated in the MEC's adverse employment actions, and plaintiff points to no authority suggesting that unofficial endorsement of an adverse employment action is a basis for Section 1983 liability.

Accordingly, the Court **GRANTS** summary judgment to Yee and Katz on the basis that they took no adverse employment actions against Ryan, and need not address the parties' other arguments with respect to Yee and Katz.

2. Mahajan

a. Adverse Employment Action

Defendants note that "Plaintiff declared in his reply brief to the Ninth Circuit that his § 1983 claim 'does not rely on ... the Suspension Notice' which Dr. Mahajan issued," and that "the FAC does not even mention the [] Notice of Suspension." Mot. at 31 (citing

SUF No. 92). Accordingly, defendants argue that "Dr. Mahajan's undisputed lack of involvement in the MEC's vote on Plaintiff's clinical privileges []—the only adverse employment action alleged in the FAC []—is a sufficient basis for granting summary judgment for Dr. Mahajan under § 1983." Mot. at 31.

In opposition, plaintiff argues that defendants' focus on the Notice of Suspension is a "red herring," as "Dr. Ryan has presented evidence that Dr. [Mahajan], like Dr. Yee and Dr. Katz, approved and endorsed the MEC's retaliatory investigation of him." Opp. at 23-24. Plaintiff points to evidence that "[w]hen a union representative protested that the MEC was retaliating against Dr. Ryan by demanding he sign a Behavioral Contract, Dr. Mahajan responded, claiming that the MEC's actions were independent of DHS -yet Dr. Mahajan also forwarded the complaint to Dr. Yee." Id. at 24 (citing GDF Nos. 240-41). Plaintiff also argues that Mahajan and Yee "discussed the claims of retaliation, and Dr. Mahajan acknowledged that they had previously discussed concerns about retaliation with counsel." Opp. at 24.

In reply, defendants contend that plaintiff's argument that Mahajan approved and endorsed the adverse employment actions is frivolous given that "[t]he earliest email on which Plaintiff relies which Dr. Mahajan received or sent was dated September 7, 2016—more than six weeks after the MEC voted to offer Plaintiff a Behavioral Agreement and recommend revoking his clinical privileges if he rejected that Agreement, and more than one month after Dr. Mahajan became CMO of Harbor-UCLA." Reply at 12.

The Court finds that summary judgment as to Mahajan is appropriate, as he did not take any adverse employment action reasonably likely to deter Ryan from engaging in protected activity under the First Amendment. Coszalter, 320 F.3d at 976. Plaintiff does not contend that the Mahajan's decision to suspend Ryan was an adverse employment action resulting in injury in this case, and it is undisputed that Mahajan did not participate in the MEC's adverse employment actions. Accordingly, plaintiff argues that Mahajan "approved and endorsed" the MEC's adverse employment actions. Opp. at 23-24. However, the only evidence upon which plaintiff relies to show that Mahajan approved and endorsed the MEC's adverse employment actions is a series of September 2016 emails in which Mahajan responded to union representative Jake Baxter's allegations that the MEC's actions against Ryan were retaliatory. In response to Baxter, Mahajan stated:

> "Thank you for your message. I am the new CMO at Harbor. We haven't had an opportunity to meet yet. I look forward to doing so and working with you. Re the matter below, as I understand it (admittedly, I am new, so please correct me if I am wrong), the PSA is a body independent of hospital/ medical administration and is authorized by the Joint Commission to be the sole arbiter of a physician's peer review and clinical privileges. As you know, the PSA is governed by the physician staff themselves, most of whom are your members. Harbor/DHS Medical Administration including myself and the Associate Medical Directors explicitly do not participate in PSA voting and decision-making to honor the PSA's independence

> in these matters. You may want to speak directly with your membership at Harbor and/or PSA President Dr. Brant Putnam regarding the decision the PSA arrived at re Dr. Ryan. Please let me know if I can be of further assistance."

Dkt. 79-2 at Ex. S. Mahajan then forwarded Baxter's email to Yee, and stated that county counsel should participate in a meeting regarding how to handle Baxter's email, given that county counsel "was involved in earlier aspects of this related to concerns about retaliation vis-a-vis whisteblow." Id. This evidence does not raise a triable issue of material fact as to whether Mahajan approved or endorsed the MEC's adverse employment actions. Rather, in his response to Baxter, Mahajan makes clear that "Harbor/DHS Medical Administration including myself and the Associate Medical Directors explicitly do not participate in PSA voting and decision-making to honor the PSA's independence in these matters." Id. Plaintiff submits no authority suggesting that Mahajan's deference to the PSA/MEC is a valid basis for Section 1983 liability.

Accordingly, the Court **GRANTS** summary judgment to Mahajan on the basis that he took no adverse employment actions against Ryan, and need not address the parties' other arguments with respect to Mahajan.

3. De Virgilio and Lewis

a. Adverse Employment Action

Defendants argue that de Virgilio "did not participate in the only adverse employment action alleged in the FAC—the MEC's vote to recommend

revoking Plaintiff's PSA membership and privileges," and that "Plaintiff's failure to identify any adverse employment action by Dr. de Virgilio is a sufficient basis, by itself, to grant summary judgment in his favor." Mot. at 34. While defendants acknowledge that de Virgilio participated in initiating the FPPE process, they claim that it "was not predestined to result in discipline, and instead was designed to evaluate Plaintiff's behavior and develop a recommended course of action." Id. at 35. Moreover, defendants argue that the initiation of the FPPE process was not "sufficiently final" to constitute an adverse employment action, and that de Virgilio was not involved in any subsequent disciplinary proceedings or actions that had a negative effect on Ryan's employment prospects. Id. (quoting Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000)).

In opposition, plaintiff argues that de Virgilio "supervised the FPPE process himself," and that "[t]his Court has already found that the FPPA itself was an adverse employment action." Opp. at 26. Plaintiff also notes that de Virgilio "participated in subsequent MEC meetings at which the MEC decided to revoke Dr. Ryan's privileges when he did not accept the Behavioral Contract." Id. Plaintiff claims that "[t]his is more than enough to create a genuine dispute of material fact about whether Dr. de Virgilio took an adverse employment action." Id.

In reply, defendants contend that the Court's prior summary judgment order never found that the FPPE was an adverse employment action, because "Dr. Vintch was absent for that vote, and she and Dr. Putnam both attended the ultimate vote on the

Agreement and privilege revocation." Reply at 25. In other words, de Virgilio "is the only Defendant who Plaintiff seeks to hold liable" for the FPPE itself, which de Virgilio did not supervise, although he appointed the Committee that undertook the investigation. Id. Based on this evidence, and de Virgilio's lack of involvement in the vote to revoke plaintiff's privileges upon his rejection of the Behavioral Agreement, defendants contend that plaintiff's retaliation claim against de Virgilio fails given that "retaliation liability cannot be premised on allegedly adverse actions that are not 'sufficiently final.'" Id. at 26 (quoting Brooks, 229 F.3d at 930).

The Court finds that de Virgilio's participation in the initiation of the FPPE represents an adverse employment action. In this case, the Ninth Circuit has stated that "[s]ince 2002, [it has] recognized that an employer's decision to initiate disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects, is enough to satisfy the 'adverse employment action' requirement." Dkt. 26 at 2-3 (citing Ulrich, 308 F.3d at 977). Here, the FPPE is a disciplinary proceeding that "threatens" (Ulrich, 308 F.3d at 977) to revoke staff privileges, as evidenced by the fact that Ryan's FPPE report stated the following:

> "We recommend that MEC should explore possible actions to remedy the underlying chaotic situation in vascular division created by Dr. Ryan's unprofessional behavior. Dismissal from the medical staff or discontinuation of medical privileges are options that can [be] considered but the committee is not knowledgeable regarding

> standards or precedents for such as action based solely on a lack of professionalism."

Dkt. 61-7 at Ex. 5.[9] Although defendants cite Brooks in support of an argument that the initiation of the FPPE was not "sufficiently final" to constitute an adverse employment action, the Court finds that Brooks is distinguishable. In Brooks, which was a Title VII case, the evaluation at issue "was not an adverse employment action because it was subject to modification by the city" and "the evaluation could well have been changed on appeal." Brooks, 229 F.3d at 930 (9th Cir. 2000). Here, the Ninth Circuit has confirmed that an "employer's decision to initiate disciplinary proceedings against a doctor," when privileges and employment prospects are threatened, is enough to satisfy the adverse employment action requirement. Moreover, defendants present no evidence that suggests the decision to initiate the FPPE could have been appealed or was subject to modification.

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[9] At oral argument, counsel for defendants claimed that the FPPE, as defined in the PSA Bylaws, is not considered an investigation, and that the results of any FPPE are not preordained. See Dkt. 61-7 at Ex. 301 (PSA Bylaws), § 6.1-3 ("FPPE is not considered an investigation as defined in these Bylaws"). Despite this argument, the Court finds that, at a minimum, the evidence raises a triable issue of material fact as to whether the FPPE against Ryan "threatened to revoke his clinical privileges." Ulrich, 308 F.3d at 977. This conclusion in supported by the fact that the PSA Bylaws themselves note that a possible outcome of an FPPE is "recommending corrective action under these bylaws." Dkt. 61-7 at Ex. 301 (PSA Bylaws), § 6.1-5.1-e.

Accordingly, the Court finds that summary judgment on the basis that de Virgilio did not participate in an adverse employment action would be inappropriate.

b. Retaliatory Motive

Defendants also argue that retaliatory motive cannot be imputed as to de Virgilio or Lewis. Mot. at 35. Defendants claim that Lewis had no knowledge that Ryan made any external reports of alleged misconduct, and accordingly cannot be liable for retaliation. Id. Moreover, defendants contend that de Virgilio's participation in directing the FPPE "only three months after he made a decision favorable to Plaintiff—approving his application for renewal of his medical staff privileges—even though Dr. de Virgilio allegedly knew all along of Plaintiff's protected speech.... raises 'the same-actor inference'—'a strong inference' that Dr. de Virgilio did not act out of retaliatory motive." Id. at 36-37 (citing Schechner v. KPIX-TV, 686 F.3d 1018, 1026 (9th Cir. 2012)). Otherwise, defendants argue that the timing raises no inference of retaliation, that de Virgilio and Lewis never opposed protected speech, and that plaintiff lacks specific, substantial evidence of pretext as to de Virgilio and Lewis. Mot. at 36-39.

In opposition, plaintiff notes that whether Lewis knew Ryan had reported misconduct to outside authorities is disputed, because Lewis was present at multiple MEC meetings at which Ryan's reports to outside authorities were discussed. Opp. at 27. Additionally, plaintiff argues that the proximity in time between "Dr. White demanding that the MEC punish Dr. Ryan's protected speech, and the [MEC's

actions] (including Dr. Lewis and Dr. de Virgilio) [] was only a few months, short enough to support an inference of retaliation." Id. Additionally, plaintiff argues that de Virgilio and Lewis have opposed Ryan's protected speech, and that there is sufficient evidence of pretext to overcome summary judgment. Id. at 27-29.

In reply, with respect to Lewis, defendants claim that the "[u]ndisputed evidence shows Dr. Lewis did not attend the meetings when the MEC voted to convene the FPPE or when the FPPE Report was read aloud (and that Report didn't mention outside reports in any event), and that Plaintiff's outside reports were not discussed at the few meetings Dr. Lewis did attend." Reply at 23. Moreover, defendants argue that even if is assumed that Lewis was present at MEC meetings where plaintiff's external reports were discussed, the time period between the allegedly protected activity and the MEC's July 2015 vote are too great to support an inference of causality without other evidence of retaliatory motive. Id. at 23-24. Finally, defendants claim that no evidence of pretext, causality, or retaliatory motive exists, because the evidence of pretext the Court cited with respect to Putnam and Vintch do not apply to Lewis, and that therefore summary judgment is appropriate. Id. at 24-25.

With respect to de Virgilio, defendants point out that plaintiff failed to acknowledge their "same-actor inference" argument. Reply at 26. Otherwise, defendants reiterate that there isn't sufficient evidence to support causation, given that de Virgilio "was not allegedly involved in any of the events on

which this Court found a triable issue of pretext as to Drs. Vintch and Putnam—more favorable treatment for allegedly similarly-situated persons, deviation from usual MEC practices on discipline, or the Notice of Charges." Id. at 27.

As the party opposing summary judgment, Ryan must demonstrate a triable issue of material fact as to one of three methods of showing that the protected speech was a substantial or motivating factor in the adverse employment decision, namely proximity in time, employer opposition to the speech, and pretextual justification associated with the adverse employment action. See Coszalter, 320 F.3d at 977. This analysis is "purely a question of fact." Eng, 552 F.3d at 1071. Evidence of pretext may be "direct or circumstantial" because "[defendants who articulate a nondiscriminatory explanation for a challenged employment decision may have been careful to construct an explanation that is not contradicted by known direct evidence." Davis v. Team Elec. Co., 520 F.3d 1080, 1091 (9th Cir. 2008) (citations and quotation marks omitted). Accordingly, Ryan may show pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). "Where evidence of pretext is circumstantial, rather than direct, the plaintiff must produce 'specific' and 'substantial' facts to create a triable issue of pretext." Earl, 658 F.3d at 1113. However, "a plaintiff's burden to raise a triable issue of pretext is 'hardly an onerous one.'" Id. (quoting

Noyes v. Kelly Servs., 488 F.3d 1163, 1170 (9th Cir. 2007).

The Court finds that, as to De Virgilio and Lewis, plaintiff has met his burden on summary judgment of raising a triable issue of material fact regarding defendants' motives in taking the adverse employment actions against Ryan. See Mabey v. Reagan, 537 F.2d 1036, 1045 (9th Cir. 1976) ("Since questions of motive predominate in the inquiry about how big a role the protected behavior played in the decision, summary judgment will usually not be appropriate.").

With respect to Lewis, the evidence raises a triable issue of fact regarding whether he was aware of Ryan's external reports, because Lewis was present at the April 25, 2016 MEC meeting in which Yee gave input regarding whether any action by the PSA against Ryan might be seen as potential retaliation for whistleblowing. Dkt. 62-5 at Ex. 360. Otherwise, at least some of the evidence indicative of pretext that applied to Putnam and Vintch applies to Lewis, including the "comparative evidence" that "similarly situated employees," including Putnam, were treated "more favorably" than plaintiff (see Earl, 658 F.3d at 1113) for unprofessional conduct such as yelling, and the fact that the evidence from Putnam and Vintch's depositions suggests that no other Behavioral Agreement has included a waiver of claims. Additionally, Lewis was present at the September 28, 2015 MEC meeting where the minutes reflect that, to the extent the issues with Ryan were associated with HIPAA violations, "a recognized HIPAA Compliance Officer review[ed] the case and it was found that no

HIPAA violation occurred on the part of Dr. Ryan." Dkt. 62-5 at Ex. 365. The minutes from the same meeting state that "[t]o take a corrective action beyond the investigation could be considered retaliation because we feel this issue has been investigated adequately." Id. Nonetheless, Lewis proceeded to vote in favor of the Behavioral Agreement, and condition Ryan's privileges on his acceptance of that Agreement. Accordingly, the Court finds that there is a triable issue of fact regarding whether the adverse employment actions directed at Ryan by Lewis were based solely on his "unprofessional conduct," or whether in fact Ryan's external reports were a substantial factor in those actions. See Ulrich, 308 F.3d at 977 ("Although these [adverse employment] decisions by the hospital could have been taken for a number of reasons, if they were in retaliation for his protected speech activity then the First Amendment was violated.").

With respect to de Virgilio, the evidence raises a triable issue of material fact that de Virgilio expressed opposition to Ryan's speech. For example, de Virgilio was interviewed as part of the FPPE into Ryan. Dkt. 62-5 at Ex. 356. Therein, de Virgilio stated that "Dr. Ryan accused Dr. White without evidence of wrongdoing;" that "Dr. Ryan looked at private patient information that belonged to Drs. White, Donayre and de Virgilio for the purpose of finding information to shut down the [BEST-CLI] study at Harbor-UCLA," but "[t]he NIH subsequently investigated Dr. Ryan's complaint and determined that it was unfounded;" and that "according to many people ... files have gone missing from their desks and they feel Dr. Ryan 'snoops around' looking and taking things away." Id.

These statements suggest opposition to Ryan's external reports. For example, although de Virgilio contends that Ryan acted "without evidence of wrongdoing" and harbored a purpose "of finding information to shut down the [BEST-CLI] study," Ryan external reports were partially vindicated when, on February 12, 2015, the Surgical and Interventional Management Committee ("SIMC") for the BEST-CLI Trial found that "no one at [UCLA-Harbor] currently meets the criteria to serve as an independent endovascular operator," and that until someone on site met the criteria, "the site should no longer enroll patients in the BEST-CLI Trial." Dkt. 62-5 at Ex. 331. Additionally, on March 30, 2015, SIMC "found that several members of the Harbor-UCLA team misrepresented their procedural volume histories to meet the criteria of independent endovascular operator." Dkt. 61-7 at Ex. 24. This suggests that, contrary to de Virgilio's statements. Ryan acted with some evidence of wrongdoing.

Additionally, de Virgilio participated in the December 28, 2015 MEC decision to direct an FPPE against Ryan, even though the HIPAA compliance officer had previously "determined there was no HIPAA violation," Dkt. 61-7 at Ex. 12, and even though, as previously discussed, "comparative evidence" suggests that "similarly situated employees" were were treated "more favorably" than plaintiff for unprofessional conduct. See Earl, 658 F.3d at 1113. This raises a triable issue of material fact regarding whether the initiation of the FPPE was pretextual. Moreover, the December 28, 2015 MEC meeting minutes explicitly state that "we have completed an FPPE on Dr. White, so our next step would be to

complete an FPPE on Dr. Ryan because the conduct that was implied by his search for negative information on Dr. White is questionable." Dkt. 61-7 at Ex. 12. This suggests that the initiation of the FPPE may have been based, in part, on Ryan's external reports.

Defendants argue that de Virgilio is entitled to the "'the same-actor inference'—'a strong inference' that Dr. de Virgilio did not act out of retaliatory motive," based on the fact that de Virgilio approved plaintiff's application for renewal of medical staff privileges only three months before de Virgilio participated in the initiation of the FPPE. The Court is not convinced. See Mot. at 36-37. In Schencher, the case relied upon by defendants, the Ninth Circuit noted that "'[w]here the same actor is responsible for both the hiring and the firing of a *discrimination* plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.'" Schechner, 686 F.3d at 1026 (emphasis added) (quoting Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996)). The same-actor doctrine reflects the belief that [a]n individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class.'" Bradley, 104 F.3d at 271 (quoting Buhrmaster v. Overnite Transp, Co., 61 F.3d 461, 464 (6th Cir. 1995)). Even assuming that the same actor-doctrine is relevant in first amendment retaliation cases, the evidence of opposition and pretext discussed herein rebut the same-actor inference, which "may be weakened by other evidence and is 'insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of

material fact.'" Tumbling v. Merced Irrigation Dist., No. CV F 08-1801 LJO DLB, 2010 WL 11450406, at *11 (E.D. Cal. Sept. 27, 2010) (quoting Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 573–574 (6th Cir. 2003)).

Finally, to the extent defendants argue that the length in time between Ryan's speech and the adverse actions is too great to support an inference of causality, "[t]here is no set time beyond which acts cannot support an inference of retaliation, and there is no set time within which acts necessarily support an inference of retaliation." Coszalter, 320 F.3d at 978.

In sum, given the evidence of pretext and opposition to protected speech offered by Ryan, summary judgment on this "purely fact[ual]" element (see Eng, 552 F.3d at 1071) would be inappropriate.

c. Adequate Justification

Defendants argue that de Virgilio and Lewis had adequate justification in that even though "Plaintiff's disruptive behavior at Harbor-UCLA was found by the neutral Ad Hoc Committee to have created a hostile work environment and to have a negative impact on patient care," "[o]nly when Plaintiff rejected [the Behavioral] Agreement, without explanation or discussion, did the MEC vote to propose revoking Plaintiff's privileges." Mot. at 39. Defendants argue that these actions "were reasonably calculated to promote the efficiency and effectiveness of the provision of healthcare services to Harbor-UCLA patients," and "clearly outweigh plaintiff's asserted free speech interest." Id. Accordingly, defendants claim that "Pickering balancing weighs in favor of Drs.

de Virgilio and Lewis, and further supports summary judgment." Id. at 40.

In opposition, plaintiff argues that there is a genuine dispute of fact as to adequate justification, and therefore summary judgment is inappropriate. Opp. at 29.

The Court finds that, in this case, the adequate justification inquiry implicates "underlying factual disputes" that are inappropriate for resolution on summary judgment. Eng, 552 F.3d at 1071. Defendants fail to explain how their proffered interest of "promot[ing] the efficiency and effectiveness of the provision of healthcare services to Harbor-UCLA patients" could not have been served by intermediate steps such as counseling intended to address Ryan's unprofessional behavior. Additionally, defendants' argument that "[b]oth the minutes explaining the convening of the FPPE and the PSA's initial Notice of Charges make clear on their face that it was the loud and disruptive nature of Plaintiff's threats and other workplace conduct—not the substance of Plaintiff's actual reports outside of work to external agencies—which caused the MEC to act," Mot. at 39, is inherently factual, and implicates the same evidence of pretext and opposition that the Court previously discussed. Accordingly, the Court finds that summary judgment on this basis is inappropriate.

d. Inevitability

Finally, defendants contend that the undisputed facts establish that defendants would have initiated the FPPE, asked Ryan to sign the Behavioral Agreement, and moved to revoke Ryan's privileges if

he rejected the Agreement, "regardless of whether or not Plaintiff engaged in any protected speech." Mot. at 40. In sum, defendants contend that "Plaintiff has no evidence—let alone enough evidence to raise a triable issue of material fact—that Drs. de Virgilio and Lewis would not have taken their respective measures but for his allegedly protected speech," and that therefore "[s]ummary judgment is compelled on this additional basis." Id.

In opposition, plaintiff argues that there is a genuine dispute of fact as to inevitability, and therefore summary judgment is inappropriate. Opp. at 29.

The Ninth Circuit has stated the inevitability inquiry is "purely a question of fact." Eng, 552 F.3d at 1072. For the same reasons articulated above, the Court finds that there is a triable dispute of material fact regarding whether de Virgilio and Lewis would have taken the adverse employment actions described herein absent Ryan's reports to the NIH and the District Attorney's Office. Accordingly, granting summary judgment on this basis would be inappropriate.

B. Qualified Immunity

Generally, courts follow a two-step inquiry in determining whether a government official is entitled to qualified immunity. Saucier v. Katz, 533 U.S. 194, 201 (2001). "First, a court must decide whether the facts that a plaintiff has alleged ... or shown ... make out a violation of a constitutional right." Pearson v. Callahan, 555 U.S. 223, 232 (2009). Second, "the court must decide whether the right at issue was 'clearly

established' at the time of defendant's alleged misconduct." Id.

"To be 'clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Acosta v. City of Costa Mesa, 718 F.3d 800, 824 (9th Cir. 2013) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "Defendants are entitled to qualified immunity, even if they violated [plaintiff's] First Amendment rights, if they reasonably could have believed that their conduct was lawful 'in light of clearly established law and the information [that they] possessed.'" Demers v. Austin, 746 F.3d 402, 417 (9th Cir. 2014) (quoting Cohen v. San Bernardino Valley Coll., 92 F.3d 968, 973 (9th Cir. 1996)).

A "case directly on point" is not required, "but existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). The determination of whether the law was clearly established "must be undertaken in light of the specific context of the case." Saucier, 533 U.S. at 201. The qualified immunity standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). In other words, the law must provide officials with "fair warning" that their conduct is unconstitutional. Hope v. Pelzer, 536 U.S. 730 (2002). "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." Pearson, 555 U.S. at 232.

1. De Virgilio and Lewis

Defendants contend that de Virgilio and Lewis are entitled to qualified immunity because there is no clearly established law suggesting that they committed any adverse employment action. Mot. at 41. With respect to de Virgilio, defendants claim that "Plaintiff has offered no authority—let alone clearly established law—holding that convening an FPPE committee to conduct fact-finding and issue a report is 'sufficiently final' to constitute an adverse employment action." Id. (citing Brooks, 229 F.3d at 929-30). With respect to Lewis, defendants contend that there is no clearly established law providing that "individual committee members' alleged votes regarding an FPPE, behavioral contract, or even revocation of privileges, may constitute actionable adverse employment actions." Mot. at 41. Additionally, defendants argue that there is no clearly established law on temporal nexus, and that there is no other evidence that would raise a triable issue on causation. Mot. at 41-42. Finally, defendants argue that there is no clearly established law on adequate justification, as "[n]o clearly established law provides a quasi-judicial body such as the MEC cannot evaluate the results of a fact-finding committee, vote on proposed remedial action, or attempt to administratively regulate a disruptive physician's conduct." Id. at 42.

In opposition, plaintiff argues that the Ninth Circuit's MTD order and the Court's order on Putnam and Vintch's motion for summary judgment counsel against qualified immunity, and that Ninth Circuit authority makes clear that Ryan "had a First

Amendment right to make reports to government authorities without retaliation." Opp. at 21-23, 29 (citing Dahlia, 735 F.3d at 1067).

In reply, defendants reiterate that "Plaintiff offers no clearly established law, or any authority at all, holding that convening an FPPE committee to conduct fact-finding and issue a report is 'sufficiently final' to constitute an adverse employment action." Reply at 28. Otherwise, defendants contend that plaintiff "fails to rebut the other reasons discussed in the moving papers that show both Drs. de Virgilio and Lewis are entitled to qualified immunity." Id.

In reversing the grant of defendants' motion to dismiss in this case, the Ninth Circuit found that qualified immunity was not warranted because "[s]ince 2002, [it has] recognized that an employer's decision to initiate disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects, is enough to satisfy the 'adverse employment action' requirement." Dkt. 26 at 2-3 (citing Ulrich, 308 F.3d at 977). Here, although defendants argue that there is no clearly established law holding that "convening an FPPE committee to conduct fact-finding and issue a report is "sufficiently final" to constitute an adverse employment action," Mot. at 41, as discussed, the Court finds that the decision to initiate the FPPE was a "decision to initiate disciplinary proceedings" that threatened to revoke staff privileges, and was combined with a negative effect on employment prospects, as evidenced by the fact Ryan's FPPE report stated the following:

> "We recommend that MEC should explore possible actions to remedy the underlying chaotic situation in vascular division created by Dr. Ryan's unprofessional behavior. Dismissal from the medical staff or discontinuation of medical privileges are options that can [be] considered but the committee is not knowledgeable regarding standards or precedents for such as action based solely on a lack of professionalism."

Dkt. 61-7 at Ex. 5. This places the decision to initiate the FPPE squarely within the Ninth Circuit's previous ruling that qualified immunity was not warranted in this case.[10]

To the extent that defendants argue that Lewis is entitled to qualified immunity because he acted in concert with other MEC members, rather than individually, defendants fail to explain why this fact should exonerate Lewis. Rather, courts apply the qualified immunity analysis in the same manner to defendants acting in concert, without examining whether the underlying case that clearly established

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[10] At oral argument, counsel for defendants attempted to distinguish Ulrich on the basis that the investigation in that case was a "formal" investigation, whereas, pursuant to the PSA Bylaws, the FPPE is not an investigation, and is not disciplinary in nature. On this basis, defendants' counsel argued that de Virgilio's initiation of the FPPE cannot be considered an adverse employment action under clearly established law. The Court finds that the attempt to distinguish between the "formal" investigation at issue in Ulrich and the FPPE is unavailing. Even if an FPPE is not defined as an investigation by the PSA's Bylaws, Ryan's FPPE did in fact investigate Ryan's conduct, and recommended the MEC "explore ... [d]ismissal from the medical staff or discontinuation of medical privileges." Dkt. 61-7 at Ex. 5.

the right at issue involved an individual defendant or a group of defendants. See Gaalla v. Brown, 460 F. App'x 469, 479 (5th Cir. 2012) (finding that "the Board members are not entitled to qualified immunity, and the district court properly denied them summary judgment on this claim" because "it is without question clearly established that the Cardiologists have a right to be free from racial discrimination"); Strinni v. Mehlville Fire Prot. Dist., 681 F. Supp. 2d 1052, 1082–83 (E.D. Mo. 2010) (denying defendants' motion for summary judgment because "genuine issues of fact exist to preclude a finding that Board Member Defendants are entitled to qualified immunity to the extent Plaintiffs' First Amendment rights are pursued against these Defendants in their individual capacities"); Waddell v. Forney, 108 F.3d 889, 895 (8th Cir. 1997) ("[I]n light of the record before us, we affirm the district court's denial of qualified immunity for each of the named defendants."). Notably, on appeal in this case, the Ninth Circuit found plaintiff's allegations "sufficiently similar to Ulrich to satisfy the clearly established prong of the qualified immunity analysis," even though those allegations corresponded to the collective actions of defendant "doctors." Dkt. 26 at 3.

Defendants also argue that "[t]he absence of clearly established law on the temporal nexus issue [] entitles Drs. de Virgilio and Lewis to qualified immunity." Mot. at 41-42. As a preliminary matter, this argument this argument frames the qualified immunity inquiry too narrowly. Ellins, 710 F.3d at 1064. This is because "[t]he question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials

fair warning that their conduct is unconstitutional.'" Id. (quoting Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 1003 (9th Cir.2010)); see also White v. Lee, 227 F.3d 1214, 1238 (9th Cir. 2000) ("Closely analogous preexisting case law is not required to show that a right was clearly established."). In any event, this argument is premised on defendants' contention that "Plaintiff has no other evidence that would raise a triable issue of causation," Mot. at 42, which the Court has already rejected.

Finally, while defendants argue that there is no clearly established law on adequate justification, Mot. at 42, Ryan's "right to speak [is] so 'clearly established'—that is, that the Pickering balance so clearly weigh[s] in [his] favor—that [defendants] could not have 'reasonably believed'" (Moran v. State of Wash., 147 F.3d 839, 850 (9th Cir. 1998)) that their "adequate justification for their respective votes on the FPPE and recommended treatment of Plaintiff [] outweigh[] Plaintiff's asserted free speech rights." Mot. at 42. In Robinson v. York, the Ninth Circuit stated that "the public's interest in learning about illegal conduct by public officials and other matters at the core of First Amendment protection outweighs a state employer's interest in avoiding a mere potential disturbance to the workplace." 566 F.3d 817, 824 (9th Cir. 2009) (citations and quotations omitted). Similarly, in Francisco Jose Rivero v. City & Cty. of San Francisco, the Ninth Circuit stated that "[w]histleblowing is a particular kind of speech on matters of public concern. It was already the law of this circuit in 1993 that the state's legitimate interest in 'workplace efficiency and avoiding workplace disruption' does not weigh as heavily against

whistleblowing speech as against other speech on matters of public concern." 316 F.3d 857, 866 (9th Cir. 2002) (finding that appellants were not entitled to qualified immunity).

Accordingly, the Court finds that de Virgilio and Lewis are not entitled to qualified immunity at this stage.

C. Punitive Damages

Defendants argue that plaintiff's request for punitive damages against de Virgilio, and Lewis should be summarily dismissed because de Virgilio and Lewis did not act with malice, or with a conscious disregard for plaintiff's rights. Mot. at 43.

In opposition, with respect to Lewis, Ryan contends that he has "presented evidence that even though Dr. Lewis was exposed to repeated statements showing that Dr. Ryan was being targeted for making reports to outside authorities, he still participated in the MEC's actions of initiating the FPPE, demanding that Dr. Ryan sign the Behavioral Contract, and revoking his privileges when he did not." Opp. at 30. With respect to de Virgilio, Ryan argues de Virgilio "led the creation of the FPPE, provided quotes to the FPPE complaining that Dr. Ryan had made reports to the NIH and falsely stating that the NIH had found them unfounded, presented the FPPE (complete with its repeated references to Dr. Ryan's protected speech) to the MEC, and participated in subsequent meetings at which the MEC affirmed that Dr. Ryan's privileges should be revoked for not accepting the Behavioral Contract." Id. In sum, Ryan contends that the evidence creates a genuine dispute of material fact

regarding whether defendants were recklessly indifferent to Ryan's rights. Id. at 30-31.

In reply, defendants argue that plaintiff's claim for punitive damages is based on "demonstrably false pretenses," and asks to Court to "emphatically reject Plaintiff's deceitful tactics and summarily dismiss all of his punitive damages claims." Reply at 29.

The law is clear that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983); see also Dang v. Cross, 422 F.3d 800, 807 (9th Cir. 2005) ("The standard for punitive damages under § 1983 mirrors the standard for punitive damages under common law tort cases.... malicious, wanton, or oppressive acts or omissions are within the boundaries of traditional tort standards for assessing punitive damages and ... are therefore all proper predicates for punitive damages under § 1983.") (internal citations and quotation marks omitted).

Here, Lewis was present at the September 28, 2015 MEC meeting where the draft meeting minutes noted that "Dr. Ryan considers himself a whistleblower because he thought this bad thing happened and he wanted to do right," and that "[t]o take corrective action beyond the investigation could be considered retaliation because we feel this issue has been investigated adequately." Dkt. 62-5 at Ex. 365. Despite understanding that taking corrective action could be considered retaliation, Lewis proceeded to

vote in favor the Behavioral Agreement, and to authorize the revocation of Ryan's privileges if he refused the Behavioral Agreement. Similarly, de Virgilio was present at the December 28, 2015 MEC executive meeting wherein the minutes reflect that "Dr. Ryan now believes he is protected as a whistleblower," but nevertheless participated in the initiation of the FPPE against Ryan. Dkt. 61-7 at Ex. 12. The text of Ninth Circuit Model Civil Jury Instruction 5.5 (2017 ed.) specifically notes that "[c]onduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law." Accordingly, because a jury could find that de Virgilio and Lewis's adverse employment actions against Ryan were recklessly indifferent to Ryan's rights, summary judgment on Ryan's claim for punitive damages against de Virgilio and Lewis is inappropriate.

V. CONCLUSION

In accordance with the foregoing, the Court **GRANTS** summary judgment to Katz, Yee, and Mahajan, and **DENIES** summary judgment to de Virgilio and Lewis.

IT IS SO ORDERED.

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Initials of Preparer CMJ

[ER 8:1539]

FOCUSED PROFESSIONAL PRACTICE EVALUATION (FPPE)

This report is generated by the ad hoc Committee that was appointed by Dr. Chris de Virgilio to investigate Dr. Rodney White's request for corrective action against Dr. Tim Ryan. (letter dated 8/25/2015)

The members are:

Dr. Jeanette Derdemezi. Department of Anesthesia
Dr. Adam Jonas, Department of Pediatrics
Dr. Bob Hockberger, Emergency Department
Dr. Ravin Kumar, Department of Surgery
Dr. Bassam Omari, Department of Surgery

Dr. White's request for corrective action has several components.

- Dr. White stated that Dr. Ryan had invaded the personal privacy of his patients thereby violating both HIPAA and CMIA rights of physician-patient privacy.
- Dr. Ryan read Dr. White's personal files, mails, patient operative reports and patient reports without permission to do so.
- Dr. Ryan requested confidential patient information under various CPT codes in order to obtain privileged patient information on Dr. White's patients.
- Dr. Ryan approached various Vascular Division members such as secretaries, OR personnel and ancillary staff to obtain

personal information on Dr. White and his patients.

- Dr. Ryan falsely accused Dr. White of plagiarism of research.
- Dr. White stated that Dr. Ryan's unscrupulous conduct had adversely affected his personal and professional life.
- In an addendum request, Dr. White also stated that Dr. Ryan continues to engage in conduct that is detrimental to the delivery of quality of patient care, disruptive and deleterious to operations of the medical center, and below applicable professional standards. Dr. White stated that a continuing pattern of harassment by Dr. Ryan is having a severe adverse impact on his personal and professional life.

The MEC expressed concern that if Dr. White's complaints were validated this could mean that Dr. Ryan's behavior could be viewed as unprofessional. The ad Hoc committee was appointed to investigate the complaints.

PSA BYAWS:

A corrective action can be requested when a practitioner with clinical privileges engage in any act, statement, demeanor, or professional conduct, either within or

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outside the Medical Center, which is or is reasonably likely to be detrimental to patient safety or to the delivery of quality of patient care, or to be disruptive

or deleterious to the operations of the Medical Center or improper use of medical center resources, or below applicable professional standards.

The ad Hoc committee initially met to determine the approach and plan for this investigation. Following this, the committee met with Dr. White to allow him to present his complaints and provide the names of witnesses that could corroborate his statements.

The Ad Hoc committee met with the following members of Division of Vascular Surgery.

- Dr. Rodney White, (Chief, Vascular Surgery)
- Amanda Flores (OR Scheduler)
- Dr. Chris de Virgilio (Chair, Department of Surgery)
- George Kopchok (Research Director, Vascular Lab)
- Kim Bradley (Nurse Practitioner)
- Dr. Matt Koopmann (Vascular Surgery)
- Dr. Amir EI-Sergany (1st Year Vascular Fellow)
- Dr. Carlos Pineda (2nd year Vascular Fellow)
- Rowena Buwalda (Vascular Nurse)
- Dr. Ankur Gupta (Former Vascular Fellow)
- Dr. Carlos Donayre (Vascular Surgery)
- Carla Michell (OR Nurse)
- Mabel Rodriguez (OR Nurse)

The details of these interviews are summarized in a lengthy report which will provided to the MEC along with any evidentiary documents that were provided during the interview process. The following summarizes the Ad Hoc committee's assessment of the facts and possible recommendations.

Alleged violations of privacy:

Multiple members of the Vascular Division indicated that they had witnessed Dr. Ryan looking at Dr. White's personal files, mail, and private patient information without authorization. The OR scheduler provided the committee with documents given to her by Dr. Ryan requesting information regarding patients under the care of Dr. White and other physicians. Dr. Ryan was neither authorized to perform quality assurance reviews of the care of these patients nor did he have privileges for research studies involving these patients. Dr. Ryan is not a member of LA Biomed and thus cannot perform research on the Harbor-UCLA campus. Dr. Ryan's efforts to view, collect, or alter medical records of patients under the care of Dr. White appear to be well below applicable professional standards. Because the information accessed by Dr. Ryan is protected patient information and this

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was not sanctioned as either quality assurance or research, there is concern that Dr. Ryan's actions in this regard may constitute a violation of HIPAA.

Collegiality and work environment:

Almost all interviewees described Dr. Ryan's behavior as aggressive and verbally abusive to nurses, fellows and, at times, to patients. They described a hostile work environment where some members felt threatened and did not desire to be part of the vascular work team. Several of those interviewed stated that they feel very intimated and often think about leaving their jobs. Nurses and nurse practitioners who were

interviewed felt that they can't continue to work with Dr. Ryan unless he changes his behavior. Dr. Ryan was reported to have a pattern of publicly criticizing the patient management of other members of the team. Multiple interviewees expressed the opinion that they had lost a valuable longstanding member (Dr. Carlos Donayre) of the Vascular Section due to Dr. Ryan's confrontational personality. The impending departure of Dr. Donayre was viewed as very detrimental to the development or even existence of a strong vascular surgery program at Harbor. Dr. Donayre confirmed that he is leaving Harbor due to the behavior of Dr. Ryan. Members of Vascular Surgery who were interviewed liked Dr. White and felt that Dr White always did the best for them personally and professionally. Some stated that Dr. Ryan is trying to destroy Dr. White and his research program. Some members didn't understand why Dr. Ryan failed to join the research program under LA Biomed. Others stated that the difference between Dr. Ryan and Dr. White goes beyond just personal differences between them and may relate to legal action by Dr. Ryan regarding commercial / industry related conflicts. Evaluation of this latter issue was felt to be beyond the purview of the committee. There were reports of a shouting argument between cardiologists and Dr. Ryan during the course of a procedure. This report was not verified.

Education:

Interviewees stated that the impending departure of Dr. Donayre will have a significant adverse impact on the future educational development of the vascular program. Dr. Donayre had stepped down from the

Program Director position and handed over responsibility to Dr. Matt Koopmann. Dr. Donayre stated that Dr. Ryan always had been very negative about the Harbor Vascular Residency Program and was not very helpful with the educational activities. The vascular fellows uniformly confirmed that If Dr. White leaves this program, no one will consider Harbor training with any great enthusiasm. Dr. Matt Koopman agreed with such comments. Several fellows stated that Dr. Ryan had yelled at them, that they felt intimidated, and that it would be hard to recommend Harbor to future fellows due to the environment created by Dr. Ryan. Vascular fellows stated that they don't trust Dr. Ryan and didn't want to ask for any letters of recommendation from him.

[ER 8:1542]

Patient care:

A number of interviewees felt that while Dr. Ryan is a capable surgeon, his behavior has been detrimental to patient care. Several fellows indicated that Dr. Ryan has yelled at them in front of patients. A number of interviewees noted that the poor communication between Dr. Ryan and the other vascular attending physicians has the potential or already has adversely impacted patient care. Separate operating room suites must now be run so that Dr. Ryan has his own operative area. The impending loss of experienced faculty members in the division may also impair patient care.

Surgical skills of Dr. White:

Those interviewed were generally consistent in their appraisal of Dr. White's clinical and technical abilities, regarding him as highly capable surgeon.

Interaction between Ad Hoc Committee and Dr. Ryan:

The committee invited Dr. Ryan to speak and to identify people that he wished the committee to interview. He was informed that the Ad Hoc committee was constituted to investigate issues of professional behavior. Dr. Ryan demanded that all questions be provided to him in writing and that he would discuss the situation with his attorney before making a decision. Subsequently Dr. Ryan refused to meet with the committee and sent an email to Drs. Chris de Virgilio and Kumar to confirm his decision. (e mail is attached)

Summary:

The Ad Hoc Committee believes that Dr. Ryan's behavior is well below expected standards for professional conduct. Further, the committee believes that Dr. Ryan's behavior has had serious adverse impacts on the wellbeing of many health care professionals including attending physicians, physician trainees, nurses and other ancillary staff. His unauthorized access of the files of patients enrolled in studies or under the care of other physicians may constitute a violation of HIPAA. Finally, it appears that despite Dr. Ryan's acknowledged technical expertise, he is adversely impacting patient care through his behavior. The MEC is advised that the Ad Hoc committee believes

that disciplinary action is justified to safeguard Harbor employees, trainees, and patients.

We recommend that MEC should explore possible actions to remedy the underlying chaotic situation in vascular division created by Dr. Ryan's

[ER 8:1543]

unprofessional behavior. Dismissal from the medical staff or discontinuation of medical privileges are options that can considered but the committee is not knowledgeable regarding standards or precedents for such as action based solely on a lack of professionalism.

At a minimum, we believe that Dr. Ryan should receive professional counseling regarding his behavior, that behavioral limits should be set, and that ongoing monitoring of his interactions with others should take place until the problem is believed to be resolved. The Department Chair, residency/ fellowship program directors and nursing directors are suggested as the monitoring team for such action. This report reflects a unanimous consensus among committee members.

[ER 8:1641]

LOS ANGELES COUNTY/HARBOR-UCLA MEDICAL CENTER PROFESSIONAL STAFF ASSOCIATION
BYLAWS

Revised and approved: March 16, 2016

[ER 8:1642]

LOS ANGELES COUNTY/HARBOR-UCLA MEDICAL CENTER PROFESSIONAL STAFF ASSOCIATION BYLAWS

APPROVED by the Professional Staff Association on January 6, 2016

/s/
Brant Putnam, M.D.
President, Professional Staff Association
Los Angeles County / Harbor-UCLA Medical Center

APPROVED by the Interim Chief Executive Officer on 3/15/16

/s/
Kimberly McKenzie, R.N., M.S.N., C.P.H.Q.
Interim Chief Executive Officer
Los Angeles County / Harbor-UCLA Medical Center

APPROVED by the Chief Medical Officer of Health Services on 3/16/16

/s/
Hal Yee, M.D.
Chief Medical Officer of Health Services
Los Angeles County Department of Health Services

APPROVED by the Director of the Los Angeles County Health Agency on 3/16/16

/s/
Mitchell Katz, M.D.
Director
Los Angeles County Health Agency

[ER 8:1643]

PREAMBLE

These Bylaws are adopted in order to provide for the organization of the medical staff of Los Angeles County Harbor/UCLA Medical Center and to provide a framework for self-government in order to permit the medical staff to discharge its responsibilities in matters involving the quality of medical care, and to govern the orderly resolution of those purposes, subject to the ultimate authority of the Hospital Governing Body. These bylaws provide the professional and legal structure for medical staff operations, organized medical staff relations with the Governing Body, and relations with applicants to and members of the medical staff.

[ER 8:1644]

DEFINITIONS

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[ER 8:1645]

* * *

23. GOVERNING BODY means the Board of Supervisors of Los Angeles County.

* * *

[ER 8:1647]

ARTICLE I

NAME

The name of this organization shall be the Professional Staff Association of the Los Angeles County Harbor-UCLA Medical Center.

ARTICLE II

MEMBERSHIP

2.1 NATURE OF MEMBERSHIP

2.1-1 Eligibility: Membership in the Association is a privilege which shall be extended 228 only to professionally competent and licensed or 2113-certified practitioners who continuously meet the qualifications, standards and requirements set forth in these bylaws. No practitioner, including those in a medical administrative position by virtue of a contract with the Medical Center, shall admit or provide medical or health-related services to patients in the Medical Center unless the practitioner is a member of the Association or has been granted temporary privileges in accordance with the procedures set forth in these bylaws.

* * *

[ER 8:1650]

2.2 QUALIFICATIONS FOR MEMBERSHIP

2.2-1 Basic Requirements: Membership and clinical privileges shall be granted, revoked or otherwise restricted or modified based only on professional

training, current experience and current competence criteria as set forth in these bylaws.

2.2-2 Qualifications: Except for members of the Honorary Staff, in which case these criteria shall only apply as deemed individually applicable by the Association, only practitioners licensed to practice in the State of California or certified under Business and Professions Code Section 2113 who

* * *

> **2.2-2.2** are determined to adhere to the ethics of their profession, to maintain a good reputation, to be able to work cooperatively with others so as not to adversely affect patient care, and to keep as confidential, as required by law, all information or records received in the physician-patient relationship …

* * *

[ER 8:1652]

* * *

2.4 BASIC RESPONSIBILITIES OF ASSOCIATION MEMBERSHIP

Except for members of the Honorary Staff, the ongoing responsibilities of each member of the Association shall include, but are not limited to:

* * *

2.4-2 Abiding by the Association bylaws, rules and regulations, and policies, departmental rules and regulations, Medical Center policies and procedures, and Department of Health Services applicable policies and procedures approved by the Executive Committee;

* * *

2.4-7 Working cooperatively so as not to adversely affect patient care …

* * *

[ER 8:1653]

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2.5 MEMBERS' CONDUCT REQUIREMENTS

[ER 8:1654]

* * *

2.5-2 Disruptive and Inappropriate Conduct

Disruptive and inappropriate conduct by an Association member may lead to investigative actions as set forth in Articles VI and VII. Disruptive and inappropriate Association member conduct at the Medical Center affects or could affect the quality of patient care at the Medical Center and includes:

* * *

[ER 8:1655]

* * *

2.5-2.3 Deliberate, physical, visual or verbal intimidation or challenge, including disseminating threats or pushing, grabbing or striking another person involved in the Medical Center;

2.5-2.4 Inappropriate conduct reasonably interpreted to be demeaning or offensive including, but not limited to:

2.5-2.4-a belittling or berating statements;

2.5-2.4-b name calling;

2.5-2.4-c use of profanity or disrespectful language;

2.5-2.4-d writing inappropriate comments in the medical record;

2.5-2.4-e blatant failure to respond to patient care needs or staff requests;

2.5-2.4-f deliberate refusal to return phone calls, pages or other messages concerning patient care or safety;

2.5-2.4-g deliberate lack of cooperation without good cause; and

2.5-2.4-h making degrading or demeaning comments about patients and their families, nurses, physicians, Medical Center personnel and/or the Medical Center.

Such conduct when persistent can become a form of harassment;

2.5-2.5 … and

2.5-2.6 Refusal or failure to comply with these member conduct requirements.

* * *

[ER 8:1683]

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ARTICLE VI

EVALUATION AND CORRECTIVE ACTION

6.1 PEER REVIEW

Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.

* * *

[ER 8:1685]

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6.1-3 Focused Professional Practice Evaluation

6.1-3.1 Definition

Focused professional practice evaluation (FPPE) is a process initiated when the conclusions from individual case review or ongoing professional practice evaluation raise questions or concerns regarding a practitioner's ability to provide safe, high quality patient care. The proctoring program, for initial and new privileges, is a component of the FPPE process.

FPPE is not considered an investigation as defined in these Bylaws and is not subject to the requirements and procedures of the investigation process. If an FPPE results in a subsequent plan to perform an investigation, the process outlined in Section 6.2 shall be followed.

6.1-3.2 Initiation

[ER 8:1686]

FPPE is initiated when any of the following criteria are met:

6.1-3.2-a When an Association member has been granted initial privileges or an existing Association member has been granted new privileges or is returning from a leave of absence. The proctoring policies described in these Bylaws and in individual department policies will be followed;

6.1-3.2-b When case review determines evidence of failed professional skill or judgment or a lack of practitioner knowledge;

6.1-3.2-c When patterns or trends of undesirable outcomes are associated with the practitioner; and

6.1-3.2-d When evidence exists of unprofessional conduct including inappropriate or disruptive behavior.

When any of the above criteria (other than paragraph a) occurs, an Association officer; a departmental chairperson; a division chief; a departmental quality improvement committee chairperson; the Chief Medical Officer; the Chair, Professional Performance Panel; a member of the Governing Body; the Director; or the Chief Medical Officer of Health Services may request that FPPE be initiated. A FPPE request should be sent to the chair of the department of the Association member or, if the subject of the review is a department chair, to the President.

6.1-3.3 Procedure and Reporting

FPPE may be conducted by the quality improvement committee of the practitioner's

department or by a special panel where membership is determined by the departmental chairperson or, if the subject of the FPPE is a departmental chairperson, by the President. The evaluation will be specific to the individual and requested privileges, if applicable, and may include direct observation. The review body may consider information from individual case reviews, analysis of aggregate data including, but not limited to, clinical indicators, outcomes and length of stay, and material submitted by the subject practitioner. The review body will provide a report to the departmental chairperson and the Chair, Professional Performance Panel within forty-five (45) days of the requested review. FPPE pursuant to paragraph 2a above which requires proctoring will be reported to the departmental chairperson within ninety (90) days of the granting of initial or new privileges and again prior to the completion of the practitioner's 6-month provisional term Within fourteen (14) days of the receipt of the report, the department chairperson, or President, if the subject of the FPPE is a departmental chairperson, must make a determination as to whether further action is warranted, and this decision must be communicated to the Chair of the Professional Performance Panel. If corrective action is proposed, the President must also be so notified.

[ER 8:1687]

All activities related to FPPE, except for proctoring of initial 2200 or newly granted privileges, will be reported to the Executive Committee as part of the department's quarterly report.

* * *

6.1-5 Results of Peer Review

6.1-5.1 Actions Resulting from Peer Review

Adverse information resulting from ongoing peer review of members according to the relevant department criteria and analyzed by the process established in these bylaws must be acted upon. The Association officers, department and committees may counsel, educate, issue letters of warning or censure, or recommend focused professional practice evaluation in accordance with Bylaws Section 6.1-3 in the course of carrying out their duties without initiating formal corrective action. Comments, suggestions and warnings may be issued orally or in writing. The practitioner shall be given an opportunity to respond in writing and may be given an opportunity to meet with the officer, department or committee. Any actions documented in writing shall be maintained in the member's peer review file. Executive Committee approval is not required for such actions, although actions related to focused professional practice evaluation shall be reported to the Executive Committee. The actions shall not constitute a restriction of privileges or grounds for any formal hearing or appeal rights under Article VII of these Bylaws.

Resulting action can be, but is not limited to:

6.1-5.1-a documenting in the member's peer review file that the member is performing well or within desired expectations;

6.1-5.1-b identifying issues that require education, comments or suggestions given orally or in writing;

6.1-5.1-c identifying issues that require a focused evaluation without initiating formal corrective action;

6.1-5.1-d recommending to the Executive Committee needed changes in Medical Center systems to improve patient safety or the quality of patient care; or

6.1-5.1-e recommending corrective action under these bylaws.

6.1-5.2 Documentation

The fact of the peer review and any recommendations and determinations pertaining to the member shall be included in the member's peer review file and dealt with according to these bylaws.

6.2 ROUTINE CORRECTIVE ACTION

6.2-1 Collegial Intervention

6.2.1.1 These bylaws encourages the use of progressive steps by Association leaders and Medical Center management, beginning with collegial and educational efforts, to address questions relating to an Association member's clinical practice and/or professional conduct. The goal of these efforts is to arrive at voluntary, responsive actions by the individual to resolve questions that have been raised.

6.2-1.2 Collegial efforts may include, but are not limited to counseling, sharing of comparative data, monitoring, and additional training or education.

6.2-1.3 All collegial intervention efforts by Association leaders and Medical Center management are part of the Medical Center's performance improvement and professional and peer review activities.

6.2-1.4 The relevant Association leader(s) shall determine whether it is appropriate to include documentation of collegial interventional efforts in an Association member's credential file(s) and/or peer review file(s). The Association member will have an opportunity to review and respond in writing. The response shall be maintained in that member's credential file(s) and/or peer review file(s) along with the original documentation.

6.2-1.5 Collegial intervention efforts are encouraged but are not mandatory, and shall be within the discretion of the appropriate Association and Medical Center management.

6.2-1.6 The President, in conjunction with the Chief Executive Officer or the Chief Medical Officer shall determine whether to direct that a matter be handled in accordance with another policy or to direct to the Executive Committee for further determination.

6.2-2 Minor Infractions

[ER 8:1689]

6.2-2.1 The President, any Department Chair, the Executive 2303 Committee, or their respective

designees shall be empowered, after an investigation, to take appropriate disciplinary action in connection with minor infractions. Such disciplinary action may include, but shall not be limited to, the issuance of a warning, a letter of reprimand or an admonition.

6.2-2.2 For the purposes of this Section 6.2-2, a "minor infraction" may be any activity or conduct which is lower than the standards or aims of the Association, but which would not ordinarily trigger a recommendation for the denial, reduction, suspension, revocation or termination of privileges or Association membership. A sanction imposed pursuant to this Section 6.2-2 shall constitute grounds for a hearing under Article VII of these bylaws.

6.2-2.3 At the discretion of the President adverse actions imposed or implemented pursuant to this Section 6.2-2 may be reported to the Executive Committee with a copy transmitted to the Governing Body. If the Executive Committee determines that the violation is not a minor infraction, or that the intended disciplinary action is inappropriate and that other action is necessary, the Executive Committee may institute alternative disciplinary measures in accordance with this Section 6.2-2 or in accordance with other provisions of these bylaws.

6.2-3 Criteria for Initiation: Whenever reliable information indicates a practitioner with clinical privileges may have exhibited any act, statement, demeanor, or professional conduct, either within or

outside the Medical Center, which is or is reasonably likely to be

6.2-3.1 detrimental to patient safety or to the delivery of quality patient care,

6.2-3.2 disruptive or deleterious to the operations of the Medical Center or improper use of Medical Center resources,

6.2-3.3 below applicable professional standards,

6.2-3.4 contrary to the Association's bylaws, rules, regulations, or policies, or

6.2-3.5 unethical,

then an investigation or corrective action against such practitioner may be requested by any officer of the Association, by the chair of any department, by the chair of any standing committee of the Association, by the Chief Medical Officer, by the Chief Executive Officer, by the Chief Medical Officer of Health Services, by the Director, or by a member of the Governing Body, upon the complaint, request, or suggestion of any person.

6.2-4 Initiation: All requests for an investigation or corrective action shall be in writing, shall be made to the President or his/her designee, and shall be supported by reference to the specific activities or conduct which constitute the grounds for the request. If the Executive Committee initiates the request, it shall make an appropriate recording of the reason(s).

[ER 8:1690]

6.2-5 Investigation: If the Executive Committee concludes an investigation is warranted, it shall direct

an investigation to be undertaken. The Executive Committee may conduct the investigation itself, assign the task to an appropriate Association officer or standing or ad hoc committee of the Association, or may forward such request to the chair of the department(s) wherein the practitioner has such privileges who, upon receipt of such request, shall immediately appoint an ad hoc committee to investigate the matter. The Executive Committee in its discretion may appoint practitioners who are not members of the Association as Ad-hoc Staff members of the Association for the sole purpose of serving on a standing or ad hoc committee. If the investigation is delegated to an officer, department chair or committee other than the Executive Committee, such officer, department chair or committee shall proceed with the investigation in a prompt manner and shall forward a written report of the investigation to the Executive Committee within thirty (30) days. The report may include recommendations for appropriate corrective action. The member shall be notified that an investigation is being conducted and the general nature of the charges against him/her and shall be given an opportunity to provide information in a manner and upon such terms as the investigating body deems appropriate. The individual or body investigating the matter may, but is not obligated to, conduct interviews with persons involved; however, such investigation shall not constitute a "hearing" as that term is used in Article VII nor shall the procedural rules with respect to hearings or appeals apply. A record of such interview(s) shall be made by the department or investigating body and included with its report to the Executive Committee. Despite

the status of any investigation, at all times the Executive Committee shall retain authority and discretion to take whatever action may be warranted by the circumstances, including summary suspension, termination of the investigative process, or other action.

6.2-6 Corrective Action Against a Chair: Whenever the request for an investigation or corrective action is directed against the chair of a department, the Executive Committee shall appoint an ad hoc investigating committee which shall perform all the functions of the departmental ad hoc investigating committee as described in Section 6.2-5.

6.2-7 Executive Committee Action: Within sixty (60) days following the receipt of the investigating body's report, the Executive Committee shall take action upon the request for corrective action. In all cases, the affected practitioner shall be permitted to make an appearance at a reasonable time before the Executive Committee prior to its taking action on such request. This appearance shall not constitute a hearing, shall be preliminary in nature, and none of the procedures provided in these bylaws with respect to hearings shall apply thereto. A record of such appearance shall be made by the Executive Committee and included in its recommendation to the Governing Body. As soon as practicable after the conclusion of the investigation, the Executive Committee shall take action which may include, without limitation:

6.2-7.1 Rejection of the request for corrective action;

6.2-7.2 Deferring action for a reasonable time where circumstances warrant;

6.2-7.3 Referring the member to the Well-Being of Practitioners Committee for evaluation and follow-up as appropriate;

[ER 8:1691]

6.2-7.4 Issuance of a letter of admonition, censure, reprimand, or warning, although nothing herein shall preclude a department chair from issuing informal written or oral warnings outside the corrective action process. In the event such letter is issued, the affected member may make a written response which shall be placed in the member's peer review file in accordance with Section 15.8-6 of these bylaws;

6.2-7.5 Imposition of terms of probation or special limitations on continued Association membership or exercise of clinical privileges, including, but not limited to, a requirement for co-admission, mandatory consultation, or monitoring;

6.2-7.6 Recommending reduction, modification or revocation of clinical privileges;

6.2-7.7 Termination, modification, or ratification of an already imposed summary suspension of clinical privileges;

6.2-7.8 Recommending suspension of clinical privileges until satisfactory completion of specific conditions or requirements;

6.2-7.9 Recommending suspension of Association membership until satisfactory completion of specific conditions or requirement

6.2-7.10 Reductions of membership status, limitation of any prerogatives directly related to the member's delivery of patient care,

6.2-7.11 Recommending revocation of Association membership; and

6.2-7.12 Taking other actions deemed appropriate under the circumstances.

6.2-8 Determination of Medical Disciplinary Action: If the Executive Committee takes any action that would give rise to a hearing pursuant to Article VII of these Bylaws, it shall also make a determination whether the action is a "medical disciplinary" action or an "administrative disciplinary" action. A medical disciplinary action is one taken for cause or reason that involves that aspect of a practitioner's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care. All other actions are deemed administrative disciplinary actions.

If the Executive Committee makes a determination that the action is medical disciplinary, it shall also determine whether the action is taken for any of the reasons required to be reported to the Medical Board of California pursuant to California Business & Professions Code Section 805.01.

6.2-9 Notification of Corrective Action and Action by the Governing Body: If corrective action as set forth in Sections 7.2-1 through 7.2-12 is recommended by the Executive Committee, that recommendation shall be transmitted to the Chief Medical Officer, the Chief Executive Officer, the chief

Medical Officer of Health Services, the Director and the Governing Body. So long as the recommendation is supported by substantial evidence, the recommendation of the Executive Committee

[ER 8:1692]

shall be adopted by the Governing Body as final action unless the member requests a hearing, in which case the final decision shall be determined as set forth in Article VII.

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[ER 8:1696]

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ARTICLE VII

[ER 8:1697]

HEARING AND APPELLATE REVIEW PROCEDURE

* * *

7.2 GROUNDS FOR HEARING

Except as otherwise provided in these bylaws, any one or more of the following actions or recommended actions shall be deemed actual or potential adverse action and constitute grounds for a hearing:

* * *

7.2-6 Revocation of Association membership;

* * *

7.2-10 Termination of clinical privileges;

7.2-11 Involuntary imposition of significant consultation or monitoring requirements (excluding monitoring incidental to provisional status and for new privileges); or

7.2-12 Any other action which requires a report to be made to the Medical Board of California or other appropriate State licensing agency.

7.3 NOTICE OF ACTION OR PROPOSED ACTION

In all cases in which action has been taken or a recommendation has been made as set forth in Section 7.2, the President or designee on behalf of the Executive Committee shall promptly give the applicant or member written notice of (1) the recommendation or final proposed action and that, except with respect to actions reported to Business & Professions Code §805.01, such action, if adopted, shall be taken and reported to the Medical Board of California and/or to the National Practitioner Data Bank if required; (2) the reasons for the proposed action including the acts or omissions with which the member is charged; (3) the right to request a hearing pursuant to Section 7.4, below and

[ER 8:1698]

that such hearing must be requested within thirty (30) days; and (4) a summary of the rights granted in the hearing pursuant to Article VII of these Bylaws. If the recommendation or final proposed action is reportable to the Medical Board of California and/or to the National Practitioner Data Bank, the written notice shall state the proposed text of the report(s).

7.4 REQUEST FOR HEARING

7.4-1 Response to Notice of Action: The applicant or member shall have thirty (30) days following receipt of such notice of such action or recommendation to request a Judicial Review Committee hearing. The request shall be in writing addressed to the Executive Committee. In the event the applicant or member does not request a hearing within the time and in the manner described, the applicant or member shall be deemed to have waived any right to a hearing and accepted the action or recommendation in question, which shall thereupon become final and binding.

7.4-2 Action on Request for Hearing: Upon receipt of a request for a hearing, the Executive Committee shall schedule and arrange for a hearing. The date of the commencement of the hearing shall not be less than thirty (30) days nor more than sixty (60) days from the date of receipt of the request by the Executive Committee for a hearing; provided that when the request is received from a member who is under suspension which is then in effect, the hearing shall be held as soon as the arrangements may reasonably be made, so long as the member or applicant has at least thirty (30) days from the date of notice to prepare for the hearing or waives this right.

7.4-3 Notice of Hearing: Together with the notice stating the place, time and date of the hearing, the President or designee on behalf of the Executive Committee shall provide the reasons for the recommended action, including the acts or omissions with which the member is charged, a list of the charts in question, where applicable, and a list of the witnesses (if any) expected to testify at the hearing on

behalf of the Executive Committee. The content of this list is subject to update pursuant to Section 7.5, below.

7.4-4 Judicial Review Committee: When a hearing is requested, the Executive Committee shall appoint a Judicial Review Committee including the designation of the chair. The Judicial Review Committee shall be composed of not less than five (5) members of the Active Staff who shall be impartial, shall gain no direct financial benefit from the outcome, are not in direct economic competition with the involved practitioner, and shall not have acted as accusers, investigators, fact finders, initial decision makers or otherwise have not actively participated in the consideration of the matter involved at any previous level. Knowledge of the particular matter in question shall not preclude a member from serving as a member of the Judicial Review Committee. In the event it is not feasible to appoint a Judicial Review Committee entirely from the active staff, the Executive Committee may appoint members from other staff categories or practitioners who are not members of the Association. Of the Association members who serve on the Judicial Review Committee, at least one shall be a member who shall have the same healing arts licensure as the accused, and where feasible, the Committee shall also include an individual practicing the same specialty as the member.

[ER 8:1699]

7.4-5 Failure to Appear: Failure, without a showing of good cause by the person requesting the hearing, to appear and proceed at such a hearing shall be deemed to constitute voluntary acceptance of the

recommendations or actions involved which shall become final and effective immediately.

7.4-6 Postponements: Postponements and extensions of time beyond the time expressly permitted in these bylaws may be requested by anyone but shall be permitted by the Judicial Review Committee or the Hearing Officer acting upon its behalf only on a showing of good cause or upon agreement of the parties.

7.5 HEARING PROCEDURE

7.5-1 Prehearing Requests for Information: The applicant or Member shall have the right to inspect and copy at the applicant's or Member's expense documents or other evidence upon which the charges are based, as well as all other evidence relevant to the charges which the peer review body has in its possession or under its control or which will be made available to the Judicial Review Committee, as soon as practicable after the receipt of the applicant's or Member's request for a hearing. 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 applicant or Member has in his or her possession or control or which will be made available to the Judicial Review Committee as soon as practicable after receipt of the peer review body's request. The failure by either party to provide access to this information at least thirty (30) days before the hearing shall constitute good cause for a continuance. The right to inspect and copy by either party does not extend to confidential information referring solely to individually identifiable licentiates, other than the applicant or Member under review. The

Hearing 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. In so doing, the Hearing Officer shall consider:

7.5-1.1 whether the information sought may be introduced to support or defend the charges;

7.5-1.2 the exculpatory or inculpatory nature of the information sought, if any;

7.5-1.3 the burden imposed on the party in possession of the information sought, if access is granted; and

7.5-1.4 any previous requests for access to information submitted or resisted by the parties to the same proceeding.

7.5-2 Request for List of Witnesses: At the request of either side, the parties shall exchange lists of witnesses expected to testify. Failure to disclose the identity of a witness at least ten (10) days before the commencement of the hearing shall constitute good cause for a continuance.

7.5-3 Notification of Procedural Disputes: It shall be the duty of the person requesting the hearing and the Executive Committee or its designee to exercise reasonable diligence in notifying the chair of the Judicial Review Committee of any

[ER 8:1700]

pending or anticipated procedural disputes as far in advance of the scheduled hearing as possible, in order that decisions concerning such matters may be made in advance of the hearing. Objections to any

prehearing decisions may be succinctly made at the hearing.

7.5-4 Representation by Legal Counsel: The hearings provided for in these bylaws are for the purpose of intraprofessional resolution of matters bearing on professional conduct, professional competency or character. The person requesting the hearing shall be entitled to representation by legal counsel, at his or her expense, in any phase of the hearing, if the individual so chooses. The applicant or Member must inform the Executive Committee of his/her choice to be represented by counsel in his/her request for the hearing. In the absence of legal counsel, the applicant or member shall be entitled to be accompanied by and represented at the hearing by a physician, dentist, podiatrist or clinical psychologist licensed in the State of California of the applicant's or Member's choosing. The Executive Committee shall not be represented by an attorney at law if the person requesting the hearing is not so represented.

7.5-5 Qualifications of Hearing Officer: The use of a Hearing Officer to preside at a hearing is mandatory. The Hearing Officer shall be an attorney at law, qualified to preside over a quasi-judicial hearing. Such Hearing Officer may not be from a firm regularly utilized by Los Angeles County, the Medical Center, the Association or the person requesting the hearing, for legal advice regarding their affairs. The Hearing Officer shall gain no direct financial benefit from the outcome and must not act as a prosecuting officer or as an advocate for any party.

7.5-6 Selection of Hearing Officer: The appointment of a Hearing Officer shall be by the Executive Committee, as follows:

7.5-6.1 Together with the notice of a hearing, the practitioner requesting the hearing shall be provided a list of at least three (3) but not more than five (5) potential Hearing Officers,

7.5-6.2 The practitioner shall have five (5) working days to accept any of the listed potential Hearing Officers or to propose at least three (3) but not more than five (5) other names of potential Hearing Officers.

7.5-6.3 If the practitioner is represented by legal counsel, the parties' legal counsels may meet and confer in an attempt to reach accord in the selection of a Hearing Officer from the two parties' lists.

7.5-6.4 If the parties are not able to reach agreement on the selection of a Hearing Officer within five (5) working days of receipt of the practitioner's proposed list, the President shall select an individual from the composite list.

7.5-7 Hearing Officer's Authority: The Hearing Officer shall be the presiding officer at the hearing. He/she shall preside over the voir dire process and may question panel members directly. The Hearing Officer shall endeavor to ensure that all participants in the hearing have a reasonable opportunity to be heard, to present relevant oral and documentary evidence in an efficient and expeditious manner, and that proper decorum is maintained. He/she shall be entitled to determine the order of or

[ER 8:1701]

procedure for presenting evidence and argument during the hearing. In addition to ruling on prehearing requests for information as described in Section 7.5-1, he/she shall have the authority and discretion, in accordance with these bylaws, to make all rulings on questions which pertain to matters of law and to the admissibility of evidence.

At the commencement of the hearing, the Hearing Officer may also apprise the Judicial Review Committee of its right to terminate the hearing due to the applicant's or member's failure to cooperate with the hearing process, but shall not independently make that determination or otherwise recommend such a termination.

If the Hearing Officer determines that either side in a hearing is not proceeding in an efficient and expeditious manner, the Hearing Officer may recommend that the Judicial Review Committee take such discretionary action as seems warranted by the circumstances including, but not limited to, setting fair and reasonable time limits on either side's presentation of its case.

If requested by the Judicial Review Committee, the Hearing Officer may participate in the deliberations of such body and be a legal advisor to it, but he or she shall not be entitled to vote.

7.5-8 Challenging Impartiality of Judicial Review Committee and Hearing Officer: The parties shall be entitled to a reasonable opportunity to question and challenge the impartiality of Judicial Review Committee members and the Hearing Officer.

Challenges to the impartiality of any Judicial Review Committee member or the Hearing Officer shall be ruled on by the Hearing Officer.

7.5-9 Judicial Review Committee Records: A shorthand reporter shall be present to make a record of the hearing proceedings as well as the pre-hearing proceedings if deemed appropriate by the Hearing Officer. The cost of attendance of the shorthand reporter shall be borne by the Medical Center, but the cost of the transcript, if any, shall be borne by the requesting party. Oral evidence shall be taken only on oath administered by any person lawfully authorized to administer such oath.

7.5-10 Rights of Both Sides at Hearing: Within reasonable limitations, both sides at the hearing shall be provided with all of the information made available to the trier of fact, may call, examine, and cross examine witnesses, may present and rebut evidence determined relevant by the hearing officer, and may submit a written statement at the close of the hearing so long as these rights are exercised in an efficient and expeditious manner. The applicant or member may be called by the Medical Executive Committee and examined as if under cross-examination.

7.5-11 Admission of Evidence: The hearing shall not be conducted according to the rules of law relating to procedure, the examination of witnesses or presentation of evidence. Any relevant evidence, including hearsay, shall be admitted by the Hearing Officer if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. The Judicial Review Committee may

interrogate the witnesses or call additional witnesses if it deems such action appropriate.

7.5-12 Burden of Proof

[ER 8:1702]

7.5-12.1 At the hearing, the Executive Committee shall have the initial duty to present evidence which supports it's the charges or recommended action.

7.5-12.2 An initial applicant shall bear the burden of persuading the Judicial Review Committee, by a preponderance of the evidence, of the applicant's qualifications by producing information which allows for adequate evaluation and resolution of reasonable doubts concerning the applicant's current qualifications for membership and privileges. An initial applicant shall not be permitted to introduce information requested by the Association but not produced during the application process unless the applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence.

7.5-12.3 Except as provided above for initial applicants, the Executive Committee shall bear the burden of persuading the Judicial Review Committee, by a preponderance of the evidence, that its action or recommendation is reasonable and warranted.

7.6 ADJOURNMENT AND CONCLUSION

7.6-1 Conclusion of Hearing: After consultation with the chair of the Judicial Review Committee, the Hearing Officer may adjourn the hearing and

reconvene the same at the convenience of the participants without special notice at such times and intervals as may be reasonable and warranted, with due consideration for reaching an expeditious conclusion to the hearing. Both the Executive Committee and the applicant or member may submit a written statement at the close of the hearing. Upon conclusion of the presentation of oral and written evidence, or the receipt of closing written arguments, if submitted, the hearing shall be closed. The Judicial Review Committee shall thereupon conduct its deliberations and render a decision and accompanying report, in the manner and within the time as provided in Section 7.6-4.

7.6-2 Presence of Judicial Review Committee Members and Vote: Each member of the Judicial Review Committee must be present throughout the hearing and deliberations in order to vote absent an agreement by the parties to the contrary. The final decision of the Judicial Review Committee must be sustained by a majority vote.

7.6.3 Basis for Recommendation: The recommendation of the Judicial Review Committee shall be based on the evidence introduced at the hearing, including all logical and reasonable inferences from the evidence and the testimony.

7.6-4 Decision of Judicial Review Committee: The Judicial Review Committee's duty shall be to determine whether the decision of the body whose decision prompted the hearing was reasonable and warranted. Within thirty (30) days after final adjournment of the hearing, the Judicial Review Committee shall render a decision, which shall include

the Judicial Review Committee's findings of fact with respect to the charges, and a conclusion articulating the connection between evidence produced at the hearing and its recommendation, and its conclusions regarding whether each of the individual charges independently support the action taken or whether they support the charges when taken together. If the affected applicant or Member is currently under suspension, the time for the decision shall be fifteen (15)

[ER 8:1703]

days. The recommendation of the Judicial Review Committee shall be delivered to the Executive Committee, to the President, to the Chief Medical Officer, to the Chief Executive Officer, to the Director, and to the Governing Body and by special notice to the affected applicant or Member.

7.6-5 Finality of Decision: The decision of the Judicial Review Committee shall be considered final, subject only to the right of appeal as provided in Section 7.7.

7.6-6 Right to Only One Hearing: No person who requested the hearing shall be entitled to more than one hearing on any single matter which may be the subject of a hearing.

7.7 APPEAL TO GOVERNING BODY

7.7.1 Time to Appeal: Within thirty (30) days after receipt of the decision of the Judicial Review Committee, either the person who requested the hearing or the body whose decision prompted the hearing may request an appellate review by the

Governing Body. Such request shall be in writing to the President or to the Chief Executive Officer and shall be delivered either in person or by certified mail, return receipt requested. If such appellate review is not requested within such period, both sides shall be deemed to have waived any right to appellate review and accepted the action involved.

7.7-2 Grounds for Appeal: A written request for an appeal shall include an identification of the grounds for appeal, and a clear and concise statement of the facts in support of the appeal. Grounds for appeal from the decision of the Judicial Review Committee shall be:

7.7-2.1 that there was substantial noncompliance with the procedures required by these bylaws, which noncompliance has created demonstrable prejudice; or

7.7-2.2 that the decision was not supported by substantial evidence based upon the hearing record or such additional information as may be permitted pursuant to Section 7.4-5 hereof.

7.7-3 Time, Place and Notice: In the event of any appeal to the Governing Body, as set forth in the preceding Section 7.7-1, the Appeal Board shall within fifteen (15) days after receipt of such notice of appeal, schedule and arrange for an appellate review. The Appeal Board shall cause the applicant or member to be given notice of the time, place, and date of the appellate review. The date of the appellate review shall not be less than thirty (30) days, nor more than sixty (60) days, from the date of receipt of the request for appellate review, provided that when a request for

appellate review is from a member who is under suspension which is then in effect, the appellate review shall be held as soon as arrangements may reasonably be made, not to exceed fifteen (15) days from the date of receipt of the request for appellate review. The time for appellate review may be extended by the Appeal Board upon a showing of good cause.

7.7-4 Appeal Board: When an appellate review is requested, the Governing Body shall appoint an Appeal Board which shall be composed of five (5) Appeal Board

[ER 8:1704]

members, two (2) of whom shall be taken from the administrative staff of the Medical Center and three (3) of whom shall be taken from the Association. One member shall be designated by the Governing Body as Chair. Knowledge of the particular matter on appeal shall not preclude anyone from serving as a member of the Appeal Board so long as that person did not act as an accuser, investigator, factfinder, or initial decision maker in the same matter and did not take part in a prior hearing on the same matter. The Appeal Board may select an attorney to assist it in the proceeding, but that attorney shall not be entitled to vote with respect to the appeal.

7.7-5 Appeal Procedure: The proceeding of the Appeal Board is an appellate hearing based upon the record of the hearing before the Judicial Review Committee, provided, however, that the Appeal Board may accept additional oral or written evidence, subject to a foundational showing that such evidence could not have been made available to the Judicial Review

Committee in the exercise of reasonable diligence and subject to the same rights of cross-examination or confrontation provided at the Judicial Review Committee hearing; or the Appeal Board may remand the matter to the Judicial Review Committee for the taking of further evidence and for decision. The Appeal Board shall remand the matter to the Judicial Review Committee where it accepted additional written or oral evidence that could materially impact its decision.

Each party shall have the right to be represented by legal counsel, or any other representative designated by that party in connection with the appeal, to present a written statement in support of his/her position on appeal, and to personally appear and make oral argument. At the conclusion of oral argument, the Appeal Board may thereupon at a time convenient to itself conduct deliberations outside the presence of the appellant and respondent and their representatives. The Appeal Board, after its deliberations, shall recommend, in writing, that the Governing Body affirm or reverse the decision of the Judicial Review Committee or refer the matter back to the Judicial Review Committee for further review and recommendation.

7.7-6 Governing Body's Decision: Within thirty (30) days after receipt of the recommendations of the Appeal Board, the Governing Body shall render a final decision in writing and shall deliver copies thereof to the applicant or Association member and to the Executive Committee in person or by certified mail, return receipt requested. The Governing Body shall affirm the Judicial Review Committee's decision if the

Judicial Review Committee's decision is supported by substantial evidence, following a fair procedure. Should the Appeal Board determine that the Judicial Review Committee's decision is not supported by substantial evidence, the Governing Body may reverse the decision of the Judicial Review Committee, or may instead, or shall, where a fair procedure has not been afforded, remand the matter back to the Judicial Review Committee for further review and recommendation, stating the purpose for the referral.

7.7-7 Decision in Writing: The final decision shall be in writing, shall specify the reasons for the action taken, shall include the text of the report which shall be made to the National Practitioner Data Bank and the Medical Board of California, if any, and shall be forwarded to the President, Chief Medical Officer, the Executive Committee, the Chief Executive Officer, and the subject of the hearing at least ten (10) days prior to submission to the Medical Board of California.

[ER 8:1705]

7.7-8 Right to One Appeal: Except as otherwise provided in these bylaws, or in circumstances where a new hearing is ordered by the Governing Body or a court because of procedural irregularities or otherwise for reasons not the fault of the applicant or member, no applicant or Association member shall be entitled as a matter of right to more than one appeal to the Governing Body on any single matter which may be the subject of an appeal.

7.8 CONFIDENTIALITY

To maintain confidentiality in the performance of peer review, disciplinary and credentialing functions,

participants in any stage of the hearing or appellate review process shall not disclose or discuss the matters involved outside of the formal avenues provided in these Association Bylaws.

7.9 RELEASE

By requesting a hearing or appellate review under these Bylaws, a practitioner agrees to be bound by the provisions in the Association Bylaws relating to immunity from liability for the participants in the hearing process.

* * *

[ER 8:1546]

BEHAVIORAL AGREEMENT OF SEPTEMBER 6, 2016

This Professional Staff Behavioral Agreement ("Agreement") is made and entered into by and between, on the one side, the Executive Committee ("EC") of the Professional Staff Association ("PSA") of Harbor-UCLA Medical Center and Harbor-UCLA Medical Center (the "Hospital") (collectively, "Harbor-UCLA"); and on the other side, Timothy Ryan, M.D. ("Dr. Ryan"), and is effective as of September 6, 2016.

RECITALS

A. During Dr. Ryan's service as a professional staff member at the Hospital, he has been involved in multiple incidents of unacceptable and unprofessional behavior, beginning on or about February 2015. These deficiencies, which have been reported by several Hospital areas/departments, and from many levels of staff have affected the environment of patient care, and include, but are not limited to:

(a) Abusive, Harassing and Intimidating Behavior

Instances in which Dr. Ryan's interactions and behavior have been perceived by others as being abusive, retaliatory, demeaning and harassing. Such instances include but are not limited to:

- Unprofessional, demeaning and intimidating behavior toward peers, residents/fellows and staff in the presence of others, including patients;

- Unprofessional and inappropriate criticisms of other physicians' care and treatment in the presence of others, including patients.

The above behavior was almost uniformly perceived by physicians and staff (clinical and administrative) who were interviewed.

(b) Failure to Cooperate With Others and Follow Hospital Rules, Regulations, Procedures, and Bylaws

Instances in which Dr. Ryan's behavior has failed to follow hospital rules and regulations, procedures, PSA Bylaws and potentially state and Federal medical information privacy laws. Such instances include but are not limited to:

- Inappropriately accessing personal files, mails, and/or patient information of other physicians without permission or authority to do so;

- Inappropriately misleading staff to provide patient information without permission or authority to do so;

The above behavior was witnessed by multiple persons.

[ER 8:1547]

(c) Failure To Adhere to Responsibilities as a Member of the Faculty and the Professional Staff Association

Instances in which Dr. Ryan's behavior has been unprofessional and inappropriate as a member of the faculty and the Professional Staff Association. Such instances include but are not limited to:

- Unprofessional, demeaning and intimidating conduct and criticism in front of others toward Dr. White, other faculty and other staff, with regard to performance.

- Unprofessional, demeaning and intimidating conduct and criticism of residents/fellows.

B. Dr. Ryan does not deny that these incidents occurred, and acknowledges that his behavior in these incidents does not meet the required standards of behavior for a Hospital Professional Staff member ("Professional Staff Standards").

C. Dr. Ryan acknowledges that he must meet Professional Staff Standards as a condition of his continued membership on the PSA.

D. Dr. Ryan acknowledges that his unacceptable and unprofessional conduct toward others has been discussed with him previously, and that he is being given "one last chance" and has willingly and knowingly accepted the conditions herein.

E. The EC, the Hospital, and Dr. Ryan understand and acknowledge that any failure by Dr. Ryan to comply with Professional Staff Standards, or any other breach of this Agreement, will subject him to corrective action, including but not limited to termination of his PSA membership and privileges at the Hospital.

AGREEMENT

In consideration of the foregoing Recitals, which are incorporated herein, and the mutual covenants and

agreements contained herein, the parties agree as follows:

1. **Compliance with Bylaws, Rules and Regulations and Policies and Procedures**. Dr. Ryan specifically affirms his agreement to comply in all respects with the Hospital PSA Bylaws ("Bylaws"), Rules and Regulations, and Policies and Procedures, including any and all Professional Staff Standards, especially as they govern behavior and professional conduct.

2. **Behavioral Requirements.**

2.1 General Compliance with Professional Staff Standards. Dr. Ryan acknowledges and agrees that the behavioral requirements set forth in

[ER 8:1548]

this Agreement do not exceed the requirements or Professional Staff Standards for any other Professional Staff member under the provisions of the Bylaws. To the extent this Agreement imposes on Dr. Ryan different procedures than those in the Hospital's existing Policies and Procedures for any disruptive practitioner, the provisions of this Agreement shall control.

2.2 Specific Behavioral Requirements. Dr. Ryan specifically agrees to each and all of the following:

i. As used in this Agreement, terms intended to guide Dr. Ryan's behavior, including but not limited to "demeaning," "discourteous," "name calling," "demands," "criticize," "non-constructive", "intimidate", "grievance or concern," or "undermine

confidence", "provocative remarks" shall have the meanings a reasonable person would give them in the same or similar circumstances.

ii. Dr. Ryan shall not, under any circumstances, make demeaning or discourteous comments, including but not limited to name calling, or give demeaning or discourteous orders or demands to any individual in the Hospital, including but not limited to, nurses, other staff, interns, residents, fellows, administrative staff, faculty or other employees, PSA members, patients or visitors. These prohibitions shall include Dr. Ryan's responses to any individual who contacts him.

iii. Dr. Ryan shall address any criticisms of, or concerns about, nurse, residents, interns, faculty, employees, PSA members, administrative staff, patients, visitors, or other individuals in the Hospital in private to the appropriate supervisor, administrator, faculty or PSA leader in a courteous manner, or in written reports using the established Hospital reporting forms and procedures. Dr. Ryan shall not engage in unconstructive criticism addressed to any person in such a way as to intimidate, undermine confidence, belittle or imply stupidity or incompetence.

iv. Dr. Ryan shall not access the computers, correspondence, records or other documents belonging to other PSA members, faculty or others to which he is not expressly authorized to access and shall not access the medical records of any patient where he is not directly involved in the treatment of that patient or otherwise

received express permission by the Chair of his Department.

v. Dr. Ryan shall comply with the Bylaws, Rules and Regulations and all policies of the PSA and the Hospital.

3. **Anger Management and Psychological Counseling**.

3.1 Anger Management Program. Dr. Ryan shall immediately make arrangements to participate in one of the below listed two programs for

[ER 8:1549]

anger management (the "AMP" or "AMPs"). Dr. Ryan may present for approval an alternative program provided that it contains substantially the same curriculum and involves substantially the same amount of hours.

i. the University of California, San Diego Physician Assessment and Clinical Education Anger Management for Healthcare Professionals Program ("PACE"); or

ii. the Inner Solutions for Success Stress, Coping, and Communication Program ("SCC").

3.2 AMP Program Details.

i. Dr. Ryan shall bear all costs, fees and expenses associated with the AMP.

ii. Regardless of which AMP he chooses, Dr.Ryan must report his arrangements under this Section to the President of the Professional Staff Association or EC no later than seven (7) days after execution of this Agreement, and must provide

evidence of enrollment in an approved AMP no later than thirty (30) days after execution of this Agreement. If for any reason Dr. Ryan is unable to attend the scheduled course, he will be found to have defaulted on this agreement unless he has first obtained the approval of the EC or the President of the Professional Staff to delay attendance at the program. Under no circumstances shall any delay in attendance at the AMP exceed one month without being declared a default of this agreement.

iii. Dr. Ryan agrees to abide by all recommendations made by the AMP.

iv. Dr. Ryan agrees to the exchange of information between the EC and the AMP as follows:

(1) Dr. Ryan authorizes representatives of the AMP to discuss his participation in the AMP, his compliance with the AMP's requirements, and the EC's specific concerns regarding Dr. Ryan's professional behavior, with representatives of the EC and the PSA's Well-Being Committee ("WBC"). Dr. Ryan's purpose in granting these authorizations is to enable the Hospital, the EC, and the WBC full access to information necessary to evaluate his fitness and qualifications as a physician. The EC and the Hospital shall treat all information in their possession or control generated by these communications in the same manner as they treat other confidential peer review information.

[ER 8:1550]

(2) Dr. Ryan agrees to hold free and harmless the Hospital, members of the EC or authorized committees of the Hospital's Professional Staff, the

Programs, and any and all representatives of any of them, from and against any and all claims resulting from any and all actions taken, or communications made, consistent with the terms of this Agreement. Dr. Ryan further acknowledges that there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, the EC, members of the EC or authorized committees of the PSA, the Hospital, or any and all representatives of any of them, for any acts performed or communications made regarding the subject matter of this Paragraph 3.2 (ii).

(3) Dr. Ryan further agrees to execute such other releases as the Programs, the EC, or the Hospital may require as a condition to their communications with one another regarding him.

3.3 Compliance with AMP Agreements. Dr. Ryan shall comply fully with all written agreements the AMP requires as part of his participation ("AMP agreements"). All such AMP agreements are incorporated fully into this Agreement. To the extent any AMP agreement conflicts with this Agreement's terms, this Agreement shall control.

3.4 Cooperation With Well-Being Committee ("WBC").

i. No later than seven (7) days after executing this Agreement, Dr. Ryan shall contact the Chair of the WBC and shall report on the status of his enrollment and participation in the Programs.

ii. For the first twelve (12) months after his completion of the Programs, Dr.Ryan shall meet monthly with the WBC or its designee, to discuss his

progress in complying with this Agreement and the Programs' agreements. Thereafter, he shall meet with the WBC quarterly.

iii. Also for the first twelve (12) months after Dr. Ryan's completion of the Programs, the WBC or its designee, shall report quarterly to the EC regarding Dr. Ryan's participation. For the ensuing three (3) years the WBC or its designee, shall make such report to the EC semi-annually. In the event the WBC is informed that Dr. Ryan has:

(1) missed, without excuse, a scheduled meeting with the WBC or its designee;

(2) failed to comply with any provision in any agreement between him and the Program, or

(3) breached this Agreement in any manner,

[ER 8:1551]

the WBC or its designees shall report that information to the EC and the President of the PSA immediately, for action in accordance with Section 4 of this Agreement.

3.5 Psychological/Psychiatric Evaluation and Counseling.

i. Dr. Ryan agrees to consult with a psychologist or psychiatrist, who will contact the Chair of the WBC for approval prior to starting consult, for the purposes of discussing the scope of the evaluation and the therapeutic goals. Dr. Ryan agrees to authorize the psychologist or psychiatrist to contact the Chair of the WBC. Dr. Ryan agrees to undertake therapy if recommended by the consultant. If Dr. Ryan is currently engaged with a therapist, then this

individual may serve this purpose. Dr. Ryan agrees and understands that any psychiatrist, psychologist or other mental health clinician he consults will be required to provide progress reports, in the frequency requested by the Chair of the WBC, to the WBC or its designee.

ii. Dr. Ryan further acknowledges and agrees that if he chooses to terminate the services of his current therapist, the Hospital and/or the EC may require him to continue therapy with another therapist agreeable to the Hospital or the EC's choosing and at Dr. Ryan's expense.

iii. The release and authorization set forth in Paragraph 3.3 (iv) above shall apply fully to communications between and among the approved psychiatrist, psychologist or other mental health clinician, the Hospital, members of the EC or WBC or their designees, or authorized committees of the Hospital's PSA.

iv. AMP Program recommendations for ongoing psychiatric/psychological evaluation and/or counseling may be submitted to the EC or its designee for consideration on the question of whether compliance with this Section and its subparts fulfills such a recommendation, such that the requirements of Section 3.2 of this Agreement are satisfied.

4. **Default.**

On a finding of the EC that Dr. Ryan has failed to comply with the terms of this Agreement, Dr. Ryan shall be subject to corrective action, which may include any action authorized by the Professional Staff Bylaws, subject to any hearing rights provided in

Article VII of the Bylaws, or its successor, for such corrective action. In any such hearing granted to Dr. Ryan, it is the intent of the parties to resolve the issue fairly and as promptly as possible. Toward those ends, the following shall apply:

4.1 Scope of Hearing. The sole issue for consideration in any such hearing shall be whether Dr. Ryan failed to comply with the terms of this Agreement.

[ER 8:1552]

4.2 Trier of Fact. Notwithstanding any provision to the contrary in Article VII of the Bylaws, the hearing may be held, in the EC's sole discretion, before a trier of fact as follows:

i. A single arbitrator who shall be an attorney at law qualified to preside over a quasi-judicial hearing and who has experience in medical staff disciplinary matters, who meets the requirements to serve as a hearing officer under Article VII of the Bylaws, and who is selected by the process set forth in Section 4.3 below; or

ii. before a hearing panel as provided in Article VII of the Bylaws.

4.3 Selection of Arbitrator. If the EC chooses to proceed with an arbitrator pursuant to Section 4.2 (i) above, the arbitrator shall be selected by the following process, which both the EC and Dr. Ryan agree is mutually acceptable:

i. Promptly after Dr. Ryan submits his request for a hearing pursuant to Article VII, the EC shall provide Dr. Ryan a list of two (2) attorneys who meet

the qualifications set forth in Section 4.2 and whom the EC nominates to serve as arbitrator ("arbitrator nominees").

ii. Dr. Ryan may then select the arbitrator from the EC's list.

iii. The EC and Dr. Ryan shall have an opportunity to jointly voir dire any proposed arbitrator prior to the arbitrator's final selection.

iv. Dr. Ryan's failure to respond to either of the EC's lists of arbitrator nominees within five days of his receipt thereof shall constitute his acceptance of any of the nominees listed.

5. **Term and Termination**.

Unless terminated earlier by breach of the terms of this Agreement, this Agreement shall be in effect for so long as Dr. Ryan retains PSA membership or privileges at the Hospital. Either party may terminate this Agreement at any time during its term. Termination of this Agreement by Dr. Ryan shall be deemed to constitute his immediate voluntary resignation from the Professional Staff of the Hospital. In that circumstance, the Hospital shall be free to file any reports required or authorized by law.

6. **Reapplication after Termination or Resignation**.

Dr. Ryan agrees not to reapply to the Hospital Professional Staff for at least seven years if his membership and privileges are terminated, or if he resigns them, under the terms of this Agreement.

[ER 8:1553]

7. **Nature of Agreement**.

The parties agree that entering into this Agreement does not constitute an action or recommendation taken for a medical disciplinary cause or reason and that this Agreement, in and of itself, does not require a report to the Medical Board of California or any other federal or state agency. The parties acknowledge that they have each had

a full and adequate opportunity to consult with legal counsel regarding this Agreement prior to its execution.

8. **Amendments**.

Amendments to this Agreement that are mutually acceptable may be made at any time. Any amendments must be in writing and fully executed by the parties hereto.

9. **Governing Law**.

This Agreement shall be governed by and construed according to the laws of the State of California.

10. **Severability**.

In the event that any provision of this Agreement is held to be unenforceable or void, the remaining provisions of this Agreement shall nevertheless remain in full force and effect.

11. **Complete Agreement**.

This Agreement is the complete understanding of the parties regarding the subject matter herein and supersedes any prior oral or written agreements, representations, understandings or discussions between the parties.

12. **Counterparts**.

This Agreement, and any amendments hereto, may be executed in counterparts, each of which shall constitute an original document, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first written above.

HARBOR-UCLA MEDICAL CENTER

[ER 8:1554]

EXECUTIVE COMMITTEE

By: /s/
BRANT PUTNAM, M.D.
PSA President

_____
TIMOTHY RYAN, M.D.

[ER 8:1797]

REQUEST FOR CORRECTIVE ACTION

I request that corrective action be taken against Dr. Timothy Ryan pursuant to Section1A of the Medical Staff bylaws because he has engaged in conduct detrimental to the delivery of quality patient care, disruptive and deleterious to the operations of the Medical Center, the improper use of Medical Center resources, and below applicable professional standards. Specifically, he has invaded my personal privacy and the privacy of my patients thereby violating both the Health Insurance Portability and Accountability Act {" HIPAA"} ") and California's Confidentiality of Medical Information Act ("CMIA"). I previously reported Dr. Ryan's conduct to my supervisors, Drs. Stabile, deVirgilio, and VanNatta, who I understand may have made separate reports to HR. Nevertheless, Dr. Ryan's conduct has continued, leaving me with no choice but to report him to HR. On January 28, 2015, I submitted an Affidavit to HR, and they, in turn, requested that I provide additional information to support my claim.

Several months ago, I became suspicious of Dr. Ryan's activity after noticing that patient records in my office had been moved and rearranged. My colleagues and members of my staff reported that Dr. Ryan was repeatedly attempting to read my files, which include my mail, county operative reports, and patient reports. Attached a statement from the Vascular NP verifying this activity (Attachment 1)

Additionally, several hospital personnel have informed me that Dr. Ryan has persistently requested

that they provide confidential information about my patients. An example is a list of a search for surgeons in the vascular division who had performed cases from " July 2012 to Present" using CPT codes and procedure name to identify privileged patient information. Attachment 2 is the list Dr Ryan asked Amanda in Surgery Scheduling to search, and Attachment 3 is the 1st page of a 4 page report that was produced. Amanda also says Dr Ryan had changed the list of operating surgeons on several of my cases that I had Dr Ryan participate in so I could proctor him to establish his privileges at Harbor-UCLA. This also has implications on billing for the cases. Dr. Ryan's conduct is a clear violation of both HIPAA and the CMIA, which restrict access to patient information to those who are involved in the care of the patient.

Dr. Ryan has approached numerous members of the Vascular Division including surgery secretaries, ancillary staff, and OR personnel to collect information regarding me and my patients. I am deeply troubled by Dr. Ryan's

[ER 8:1798]

unscrupulous conduct, which has adversely affected my personal and professional life. Moreover, his persistent incursions into private information are highly disruptive to me, my colleagues, and other members of the Vascular Division at Harbor-UCLA

In addition Dr Ryan recently falsely accused the Director of out Research Laboratory at LA BioMed Foundation and myself of plagiarism and reported this to Dr. deVirgilio. Dr. Ryan claims that the work that George Kopchok and myself performed at an outside

certified commercial laboratory, was done by him. In short Dr Ryan made a clearly false charge as he was not present and had no ownership to the data that was reported by Dr. Koopmann at the SVS meeting in Chicago, June 2015 as a poster. The data that was generated and reported was at the suggestion of the FDA as part of our Pre_IDE discussions. This data has been reported separately to the FDA as part of a Physician Sponsored IDE for treatment certain branched thoracoabdominal aneurysms with physician modified endografts.

Rodney A White, MD 8/25/15

……,

[ER 8:1812]

REQUEST FOR CORRECTIVE ACTION
(Addendum)

I am writing to supplement my Request For Corrective Action (dated 8/25/15) pertaining to Dr. Timothy Ryan because he is continuing to engage in conduct which is detrimental to the delivery of quality patient care, disruptive and deleterious to the operations of the Medical Center, and below applicable professional standards.

On November 19, 2015 I was advised by the County`s Intake Specialist Unit that Dr. Ryan filed a complaint against me. On November 24, 2015, I received another letter from that same unit, that the complaint had been initially investigated, that the allegations would not be investigated further and that the matter was considered closed. Enclosed are copies of both letters. This continuing pattern of harassment, and unscrupulous conduct by Dr. Ryan, is having a severe adverse impact on me, as a member of the medical staff, and on my personal and professional life.

Rodney White, MD

[ER 8:1813]

PSA

PROFESSIONAL STAFF ASSOCIATION
LOS ANGELES COUNTY / HARBOR-UCLA MEDICAL CENTER
MEDICAL STAFF SERVICES
1000 West Carson Street, Box 2;
Torrance, CA 90509-2910
(310) 222-2171; Fax (310) 222-5601

October 5, 2016

Personal & Confidential
Privileged Peer Review Document (Evidence Code Section 1157)

Via Certified Mail (Return Receipt Requested) & E-mail (tjryanmd@gmail.com)

Timothy Ryan, M.D.
417 W. 39th Street
San Pedro, CA 90731

Re: Notice of Proposed Adverse Action and Hearing Rights

Dear Dr. Ryan:

This letter is to inform you of the Professional Staff Association ("PSA") Medical Executive Committee's ("MEC") final proposed action with respect to your Professional Staff membership and privileges and your hearing rights with respect to such action.

Ad Hoc Committee's Findings and Recommendations

On March 21, 2016, the MEC met and discussed the Ad Hoc Committee's Focused Professional Practice Evaluation ("FPPE") report dated February 26, 2016, including its findings and recommendations with respect to your unprofessional conduct. As explained in-person to you and your previous attorney during the MEC's meeting on July 25, 2016, the Ad Hoc Committee's report included findings that:

1. Collegiality and Work Environment: You acted aggressively and were verbally abusive to other practitioners, nurses, fellows, and in some instances, patients. Such behavior created a hostile work environment where some of your colleagues felt threatened and did not desire to be part of the vascular work team. Several people stated that they feel very intimated and often think about leaving their jobs because of your behavior. You also have a history of publicly criticizing the patient management of other members of the team. This behavior has had serious adverse impacts on the wellbeing of many health care professionals including attending physicians, physician trainees, nurses and other ancillary staff and patient care.

[ER 8:1814]

2. Education Program: At least one key physician confirmed that he is leaving Harbor-UCLA Medical Center ("Harbor") due to your behavior, which could have a significant adverse impact on the future educational development of Harbor's vascular program. Several fellows stated that you had yelled at them, that they felt intimidated by you, and that

it would be hard to recommend Harbor to future fellows due to the environment you have created. They also stated that they do not trust you and did not want to ask you for any letters of recommendation.

3. Patient Care: Despite your acknowledged technical expertise, your behavior is adversely impacting patient care. Several fellows indicated that you yelled at them in front of patients. Your behavior has contributed to poor communication with the other vascular attending physicians, which has the potential to or has already adversely impacted patient care. Because of your behavior, separate operating room suites must now be run so that you have your own operative area. The impending loss of experienced faculty members in the division may also impair patient care.

4. Unprofessional Conduct: Such behavior is well below expected standards for professional conduct and a violation of the PSA Bylaws, Sections 2.2-2.2; 2.4-2; 2.4-3; 2.4-7; 2.5-2 and 2.5-2.4.

The Ad Hoc Committee found that disciplinary action is justified to safeguard Harbor's employees, trainees, and patients. The committee recommended that the MEC explore possible actions to remedy the underlying chaotic situation in the vascular division created by your unprofessional behavior. At a minimum, the committee recommended you receive professional counseling for your behavior, that behavioral limits be set, and that ongoing monitoring of your interactions with others take place until your behavioral problems are resolved. They also recommended that the MEC consider as options your

dismissal from the medical staff or discontinuation of your medical privileges.

Corrective Action

After careful consideration of the Ad Hoc Committee's FPPE findings and recommendations, on July 25, 2016, the MEC voted to take the following corrective action:

1. Provide you with an opportunity to enter into a behavior contract with the MEC and Harbor to address and remedy your unprofessional behavior; and
2. If agreement on a behavior contract was not timely reached, revoke your Professional Staff membership and privileges at Harbor.

Opportunity for Behavior Contract

Following the MEC's decision, I e-mailed you several times to set-up an in-person meeting to discuss the MEC's decision and the proposed behavior contract. However, you declined to meet with me and requested that all communications regarding this matter be in writing.

[ER 8:1815]

Consequently, on September 6, 2016, I e-mailed you the behavior contract and provided you with 10 business days (i.e., until September 20, 2016) to sign the contract. Per your request, on September 20, 2016, you were granted a courtesy 10 calendar day extension until September 30, 2016, to give your new attorney, David Rosenberg, an opportunity to become familiar with the case. The PSA's attorney, Erin Muellenberg,

has spoken with Mr. Rosenberg and provided him with copies of the FPPE report and behavior contract.

Action to Revoke Membership and Privileges

Because you did not sign and return the behavior contract by the September 30 deadline, the MEC is proceeding with the final proposed action to revoke your Professional Staff membership and privileges at Harbor in accordance with Article VI of the Bylaws. However, the action will not become final until you have exhausted or waived your hearing and appeal rights under Article VII of the Bylaws. Therefore, your membership and privileges will remain in place until this action becomes final.

Reporting of Final Adverse Action

If this action does become the final action of Harbor's governing body, Section 805 of the California Business and Professions Code requires the filing of a report with the Medical Board of California. At that time a report regarding the final action will also be filed with the National Practitioner Data Bank pursuant to 42 U.S.C. §11101 et seq. You will receive a copy of both reports when they are filed.

Right to Request a Formal Hearing

In accordance with Section 7.4 of the Bylaws, you have the right to a formal hearing to challenge the MEC's final proposed action. If you choose to request a hearing you must do so in writing within 30 days following your receipt of this letter. Your request must include whether you intend to be represented by an attorney, and must be sent by first class mail to the MEC at the following address:

Executive Committee
Professional Staff Association
[c/o Brant Putnam, M.D., President]
Harbor - UCLA Medical Center
1000 West Carson Street, Box 2
Torrance, California 90502

If you do not request a hearing within the time and in the manner required, you will be deemed to have waived any right to a hearing and to have accepted revocation of your Professional Staff membership and privileges, which shall then become final following approval from Harbor's governing body.

[ER 8:1816]

Summary of Your Hearing Rights

If you request a hearing within the time and in the manner required, you will have the hearing rights set forth in Article VII of the Bylaws. Those rights include, among other things, the right to:

- Be provided with all of the information made available to the Judicial Review Committee;
- Call, examine, and cross-examine witnesses;
- Present and rebut evidence determined by the Hearing Officer to be relevant; and
- Submit a written statement at the close of the hearing.

A copy of the Bylaws is enclosed for your reference.

Ongoing Focused Professional Practice Evaluation

Until such time as you have waived or exhausted your hearing rights, your exercise of your clinical privileges will be subjected to a FPPE. Your behavior as a Professional Staff member will also be closely monitored. Any deviation from the standard of care or any professional misconduct will subject you to immediate disciplinary action in accordance with the Bylaws, up to and including summary suspension of your membership and privileges. In particular, the MEC will not tolerate retaliation of any kind by you against any individual who has complained about you or has participated in any way in the Ad Hoc Committee's FPPE or the MEC's decision. This prohibition includes any communication, verbal or non-verbal, direct or indirect, implicit or express, between you and employees or Professional Staff members that a reasonable person would interpret as retaliatory. Your failure to abide by this instruction will subject you to immediate corrective action.

Please contact me if you have any questions.

Sincerely,

Brant Putnam, M.D.
President
Professional Staff Association

Enclosure: Harbor - UCLA Medical Center
Professional Staff Association Bylaws

[ER 8:1817]

PSA

PROFESSIONAL STAFF ASSOCIATION
LOS ANGELES COUNTY / HARBOR-UCLA MEDICAL CENTER
MEDICAL STAFF SERVICES
1000 West Carson Street, Box 2;
Torrance, CA 90509-2910
(310) 222-2171; Fax (310) 222-5601

November 10, 2016

Confidential Medical Staff Peer Review Document
Protected from Discovery by Evidence Code Section 1157

Timothy Ryan, M.D.
417 W. 39th Street
San Pedro, CA 90731
tjryanmd@gmail.com

RE: **Notice of Charges**

Dear Dr. Ryan:

Pursuant to the Professional Staff Association (the "PSA") Medical Staff Bylaws ("Bylaws") Section 7.4-3, the following Notice of Charges responds to your request for a hearing on the proposed action of the PSA Medical Executive Committee ("MEC"), to revoke your Professional Staff membership and privileges at Harbor-UCLA Medical Center (the "Proposed Action").

A Notice of Hearing will be sent to you once the parties engage the Hearing Officer and have set dates for the

start of the hearing. The hearing will be conducted according to the hearing procedure set forth in Bylaws Article VII, copy of which you have previously received.

PROCEDURAL MATTERS

Representation

Pursuant to Bylaws Section 7.5-4, you are entitled to be represented by an attorney or other person of your choice. We understand that you will be represented at the hearing by David Rosenberg, Esq. of Rosenberg, Shpall & Zeigen. The MEC will be represented by:

Erin L. Muellenberg
Annie Chang Lee
Arent Fox LLP
555 West Fifth Street, 48 Floor
Los Angeles, California 90013
Phone: (213) 443-7516
Fax: (213) 629-7401
erin.muellenberg@arentfox.com

[ER 8:1818]

Personal Presence Mandatory

As required by Bylaws Section 7.4-5, your personal presence at the hearing is mandatory. Failure, without a showing of good cause, to appear and proceed at the hearing shall be deemed to constitute voluntary acceptance of the recommendations or actions involved which shall become final and effectively immediately.

Potential Witnesses

The MEC expects to call on the following individuals to testify in this matter:

- Rodney White, M.D.
- Ravin Kumar, M.D.
- Robert Hockberger, M.D.
- Clint Coil, M.D.
- Christian DeVirgilio, M.D.
- Ira Lesser, M.D.
- Rowena Buwalda, RN
- Carla Mitchell RN
- Kim Bradley NP

The MEC reserves the right to amend the witness list at any time, with proper advance notice and to add and call other witnesses to testify at the hearing. In accordance with the Bylaws, the MEC requests that you provide a list of witnesses you intend to call during the hearing.

Exhibits

Pursuant to Bylaws Section 7.5-1, the MEC will provide to your counsel all documents and other evidence it intends to introduce at the hearing. In the event additional documents are identified, the MEC will produce them at least thirty (30) days prior to the commencement of the evidentiary hearing sessions. You are requested to provide, at least thirty (30) days prior to the commencement of the hearing, any and all documents or other evidence you intend to introduce at the hearing. The MEC will provide copies of all exhibits it intends to use to the Hearing Officer and the Judicial Review Committee and requests that you do the same.

NOTICE OF CHARGES

Timothy Ryan, M.D. ("Dr. Ryan") is a member of the Harbor-UCLA Medical Center Medical Staff, in the

Division of Vascular Surgery. His unprofessional and uncooperative conduct and interactions with other Medical Staff members and support staff, have compelled the MEC to recommend revoking his Medical Staff membership and privileges. Dr. Ryan's conduct and interactions weaken the health care team's performance and thus either have

[ER 8:1819]

a negative impact on patient care or create an unacceptable potential for such impact. Dr. Ryan has shown himself to be unfit to be a Medical Staff member.

The MEC voted to revoke Dr. Ryan's PSA membership and privileges at Harbor-UCLA Medical Center based on his unprofessional and uncooperative conduct. The MEC contends that the MEC's Proposed Action is reasonable, warranted and necessary to avoid patient harm and to promote high-quality patient care at Harbor-UCLA Medical Center.

Background

Harbor-UCLA Medical Center is one of only five level one trauma centers in Los Angeles County, and it is a major academic teaching hospital with nearly 450 residents and fellows. Harbor-UCLA Medical Center offers a well-respected two (2) year Vascular Fellowship for residents who have competed a General Surgery Residency training program. Dr. Ryan was recruited and joined the Division of Vascular Surgery in 2013. An essential component of any teaching program and a fundamental requirement for Medical Staff membership is the ability to work professionally and "cooperatively so as not to adversely affect patient

care." (Bylaws, Section2.4-7). Unfortunately, Dr. Ryan has proven that he is unable to meet this basic requirement.

Among the Medical Staff members and support staff, Dr. Ryan has a reputation of displaying unprofessional conduct. After receiving multiple credible complaints, the MEC initiated an ad hoc investigative committee. The ad hoc committee was charged to investigate the allegations that Dr. Ryan's unprofessional and disruptive conduct was:

(1) detrimental to the staff's ability to deliver quality patient care;

(2) disruptive and deleterious to operations of Harbor-UCLA Medical Center.

The ad hoc committee reviewed documents, interviewed various members of the Vascular Surgery team, and offered to meet with Dr. Ryan. In a report dated February 26, 2016, the ad hoc committee summarized its unanimous findings that Dr. Ryan's behavior has a negative impact on patient care. The ad hoc committee found that such behavior is well below expected standards for professional conduct and a violation of the PSA Bylaws. Specific identified inappropriate behaviors included but are not limited to the following:

- Openly and loudly criticizing other PSA members in front of multiple Medical Center and PSA staff in a disruptive manner;
- Openly threatening to call external agencies to conduct investigations;

- Openly making unfounded accusations in an angry manner;
- Openly making belittling and berating statements;
- Openly making degrading and demeaning statements;
- Refusing to answer questions regarding patient care;
- Openly and angrily telling Medical Center staff to do what he says without offering any explanation;
- Refusing to acknowledge other patient care team members;

[ER 8:1820]

- Approaching and addressing staff in an angry and intimidating manner; and;
- Failure to work cooperatively and professionally together as a member of the patient care team.

The ad hoc committee found the witnesses to be consistent and credible, and after considering all available information, determined that a recommendation for disciplinary action was reasonable, necessary and warranted to safeguard Harbor-UCLA Medical Center's employees, trainees, and patients. At a minimum, the ad hoc committee recommended that Dr. Ryan undergo professional behavioral counseling, that behavioral limits be set, and that ongoing monitoring of his interactions with others take place until his behavioral problems are resolved. The ad hoc committee also recommended

that the MEC consider dismissing Dr. Ryan from the Medical Staff.

Prior to acting on the ad hoc committee's report, the MEC held a meeting where Dr. Ryan was invited to attend and present his response to the behavior concerns. Dr. Ryan was accompanied to the meeting by his attorney. After the MEC carefully considered the ad hoc committee's findings, the MEC rejected the revocation of Dr. Ryan's Medical Staff membership and privileges as the first step. Instead, the MEC voted to provide Dr. Ryan the opportunity of remediation by entering into a behavioral contract, and only if Dr. Ryan refused to enter into a behavioral contract, then recommend revocation of his Medical Staff membership and privileges. The terms of the behavioral contract were reasonable and included provisions requiring him to abide by the PSA Bylaws, to refrain from inappropriate behavior at Harbor-UCLA Medical Center, to participate in UCSD's Physician Assessment and Clinical Education Anger Management program, and to consult the Well-Being Committee.

Dr. Ryan, however, repeatedly refused to meet with Brant Putnam, M.D., President of the PSA, to discuss the proposed behavioral contract. On September 6, 2016, Dr. Putnam had no choice but to e-mail Dr. Ryan the proposed behavioral contract and gave him until September 30, 2016, to sign the contract. Dr. Ryan did not sign and return the behavioral contract by the September 30, 2016, deadline or any time since that date nor has he indicated a willingness to negotiate the contract.

Charges

The MEC's Proposed Action as set forth above is based on the following charges:

Charge Number 1

Bylaws, Section 2.1-1 states in pertinent part:

> Membership in the Association is a privilege which shall be extended only to professionally competent and licensed...practitioners who continuously meet the qualifications, standards and requirements set forth in these bylaws.

[ER 8:1821]

By virtue of his unprofessional and disruptive conduct, Dr. Ryan has failed to continuously meet the qualifications, standards and requirements set forth in the Bylaws.

Charge Number 2

Bylaws, Section 2.2-2.2 further provides that only individuals who

> are determined to adhere to the ethics of their profession, to maintain good reputation, to be able to work cooperatively with others so as not to adversely affect patient care, and to keep as confidential as required by law, all information or records received in the physician-patient relationship are qualified for PSA membership.

Based on his unprofessional and disruptive conduct Dr. Ryan fails to meet the qualifications for PSA membership.

Charge Number 3

Bylaws, Section 2.4 sets forth the basic responsibilities of PSA membership. Specifically, set forth is Section 2.4-7, which states:

> Working cooperatively with others so as not to adversely affect patient care.

Dr. Ryan has violated the PSA Bylaws by failing to work cooperatively with others which has directly and adversely affected patient care.

Charge Number 4

Bylaws, Section 2.4, sets forth the basic responsibilities of PSA membership and specifically includes under Section 2.4-2 the following:

> Abiding by the Association bylaws, rules and regulations, and policies and departmental rules and regulations, Medical Center policies and procedures, and Department of Health Services applicable policies and procedures approved by the Executive Committee.

Dr. Ryan has violated the Bylaws by his unprofessional and disruptive behavior.

[ER 8:1822]

Charge Number 5

Bylaws, Section 5, sets forth the requirements for professional conduct. These requirements are a condition of membership and privileges. Disruptive and inappropriate conduct is specifically defined in Section 5. Included in Section 2.5-2.3 is:

Deliberate, physical, visual or verbal intimidation or challenge, including disseminating threats or pushing, grabbing or striking another person involved in the Medical Center.

Dr. Ryan has violated the professional conduct requirements of the Bylaws by unprofessional and disruptive conduct.

Charge Number 6

Bylaws, Section 5, sets forth the requirements for professional conduct. Section 2.5-2.4 sets forth the following specific acts as inappropriate conduct which can reasonably be interpreted as demeaning or offensive and when persistent becomes a form of harassment.

a. belittling or berating statements;

b. name calling;

c. use of profanity or disrespectful language;

d. writing inappropriate comments in the medical record;

e. blatant failure to respond to patient care needs or staff requests;

f. deliberate refusal to return phone calls, pages or other messages concerning patient care or safety;

g. deliberate lack of cooperation without good cause; and

h. making degrading or demeaning comments about patients and their families, nurses, physicians, Medical Center personnel and/or the Medical Center.

Dr. Ryan has violated the bylaws and conduct requirements by his unprofessional and disruptive conduct.

Charge Number 7

Bylaws, Section 2.5 sets forth the professional conduct requirements and specifically includes under Section 2.5-2.6 the following:

> Refusal or failure to comply with these member conduct requirements.

Dr. Ryan has specifically violated the Bylaws by his "refusal or failure to comply with [the PSA's] member conduct requirements."

*****

[ER 8:1823]

The MEC reserves the right to amend this Notice of Charges at any time before the matter is submitted for decision by the JRC. In that event the MEC will stipulate to allowing Dr. Ryan the time required by Bylaws Article VII to defend against any new or revised charges.

Respectfully submitted,

/s/

Brant Putnam, M.D.
President
Professional Staff Association

[ER 8:1596]

June 20, 2018

J. Robert Liset, Hearing Officer
MUSICK PEELER
One Wilshire Boulevard, Suite 2000
Los Angeles, CA 90017

Re: Timothy Ryan, M.D./Harbor-UCLA Professional Staff Association

Dr. Mr. Liset:

This matter has become moot because Dr. Ryan's Professional Staff Association membership and privileges have lapsed. The parties mutually request that the Hearing Officer dismiss the hearing without determination on the merits and thank and excuse the JRC panel.

Respectfully Submitted,

NOSSAMAN LLP	ROSENBERG, SHPALL & ZEIGEN APLC
/s/	/s/
Tom Curtis, On Behalf of the Executive Committee of the PSA of Harbor-UCLA Medical Center	David Rosenberg, On Behalf of Timothy Ryan, M.D.

[ER 9:2071]

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Timothy Ryan

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

TIMOTHY D. RYAN, M.D., an individual,

Plaintiff,

v.

BRANT PUTNAM, M.D., an individual, JANINE VINTCH, M.D., an individual, ANISH MAHAJAN, M.D., an individual, CHRISTIAN DE VIRGILIO, M.D., an individual, HAL F. YEE, M.D., an individual, ROGER LEWIS, M.D., an individual, MITCHELL KATZ, M.D., an

Case No. 2:17-cv-05752-R-RAO

FIRST AMENDED COMPLAINT FOR RETALIATION BASED ON EXERCISE OF FIRST AMENDMENT RIGHTS [42 U.S.C. § 1983]

[DEMAND FOR JURY TRIAL]

individual, and DOES 1 through 50, inclusive,

Defendants.

Plaintiff Timothy Ryan alleges as follows:

STATEMENT OF THE CASE

1. Plaintiff Timothy Ryan ("Plaintiff") is an accomplished general vascular surgeon. He graduated from Harvard Medical School, performed his residencies in vascular surgery at Stanford University and the Cleveland Clinic Foundation. He is board certified from the American Board of Surgery in Vascular Surgery. From 2013 to the present, Plaintiff served as a Staff Vascular Surgeon, Physician Specialist, at Harbor-UCLA, a public hospital ("Hospital").

[ER 9:2072]

2. Beginning in late 2013 and continuing through 2014, Plaintiff uncovered a fraudulent kickback scheme whereby one or more surgeons would perform risky and medically unnecessary surgical procedures in exchange for financial kickbacks from a national medical device manufacturer in violation of federal criminal laws and regulations. Plaintiff reported the criminal kickback scheme to federal, state, and local government agencies. In response, the Hospital's Medical Executive Committee ("MEC"), acting under color of state law, retaliated against Plaintiff and initiated a pretextual and retaliatory disciplinary proceeding intended and designed to punish and to silence him for blowing the whistle and reporting these criminal and fraudulent activities. That

retaliation violated Plaintiff's First Amendment rights.

JURISDICTION AND VENUE

3. The claims alleged herein are asserted pursuant to the United States Constitution and 42 U.S.C. § 1983. This matter is within the Court's jurisdiction under 28 U.S.C. § 1331 and 1343.

4. The acts complained of occurred in this district and, therefore, venue lies in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1391.

PARTIES

5. Plaintiff is, and at all times mentioned herein was, a vascular surgeon at Los Angeles County Harbor-UCLA Medical Center ("Harbor-UCLA"). The Los Angeles County Department of Health Services ("DHS") employed Plaintiff as a surgeon. Harbor-UCLA is, and all times mentioned herein was, a California Department of Health Care Services "designated public hospital" and a Medicare and Medicaid certified hospital located in the County of Los Angeles. The County of Los Angeles owns and operates Harbor-UCLA and employs its staff of medical professionals, including Defendants. A vast majority of Harbor-UCLA's patients receive healthcare services through Medicare and/or Medi-Cal.

[ER 9:2073]

6. Defendant Brant Putnam, M.D. ("Dr. Putnam") is, and at all times mentioned herein was, employed by DHS and the Chair of the MEC and President of

the Professional Staff Association at Harbor-UCLA. Dr. Putnam is, and at all times mentioned herein was, a resident of the State of California.

7. Defendant Janine Vintch, M.D. ("Dr. Vintch") is, and at all times mentioned herein was, employed by DHS and the Vice Chair of the MEC at Harbor-UCLA. Dr. Vintch is, and at all times mentioned herein was, a resident of the State of California.

8. Defendant Anish Mahajan, M.D. ("Dr. Mahajan") is, and at all times mentioned herein was, employed by DHS and presently the Chief Medical Officer at Harbor UCLA. He is a Member of the MEC at Harbor-UCLA. Dr. Mahajan is, and at all times mentioned herein was, a resident of the State of California.

9. Defendant Christian DeVirgilio, M.D. ("Dr. DeVirgilio") is, and at all times mentioned herein was, employed by DHS and as of 2015 a Member of the MEC at Harbor-UCLA. Dr. DeVirgilio is, and at all times mentioned herein was, a resident of the State of California.

10. Defendant Hal F. Yee, M.D. ("Dr. Yee") is, and at all times mentioned herein was, employed by DHS as Los Angeles County's Chief Medical Officer. Dr. Yee is, and at all times mentioned herein was, a resident of the State of California.

11. Defendant Roger Lewis, M.D. is, and at all relevant times was, employed by DHS as the Chief of Emergency Medicine at Harbor-UCLA. He is a Member of the MEC and a resident of the State of California.

12. Defendant Michael Katz, M.D. is and at all times was the Director of DHS and a resident of the State of California.

13. Plaintiff does not know the true names of Does 1 through 20, inclusive, and thus sues said Defendants by fictitious names. Plaintiff will identify the true names and capacities of Does 1 through 50, inclusive, when they are ascertained. Plaintiff is informed, believes, and thereon alleges that each of the fictitiously named Defendants is

[ER 9:2074]

a member of the MEC and responsible for initiating and pursuing retaliatory disciplinary proceedings against Plaintiff to punish and silence him for reporting a fraudulent kickback scheme to state and federal prosecutorial authorities. Because the MEC has only provided redacted minutes and orders concealing the identities of the particular MEC members who approved the retaliatory actions against him, and because some MEC members may have been absent or abstained when the MEC took those actions, Plaintiff cannot yet identify those additional MEC members. Plaintiff will amend as soon as he identifies those MEC members through discovery.

14. Plaintiff does not know the true names and capacities of Does 21 through 50, inclusive, and thus sues said Defendants by fictitious names. Plaintiff will identify the true names and capacities of Does 21 through 50, inclusive, if and when they are ascertained. Plaintiff is informed, believes, and thereon alleges that each of the fictitiously named

Defendants is in some manner legally responsible for the occurrences alleged herein.

15. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them, at all times herein mentioned, were the agents, employees, servants, and/or co-conspirators of the remaining Defendants. Plaintiff is further informed, believes, and thereon alleges that Defendants, and each of them, were the actual and/or ostensible agents of the remaining Defendants and were acting within the course and scope of said agency.

GENERAL ALLEGATIONS

16. Rodney White, M.D. ("Dr. White") served as the Chief of Vascular Surgery at Harbor-UCLA and as Vice Chair of Harbor-UCLA's LA BioMed Research Committee. Dr. White had an agreement with a certain manufacturer of aortic stent grafts. Under the agreement, the manufacturer agreed to pay Dr. White to put on "courses" during which the manufacturer's employees could observe stent graft procedures on patients. In fact, the payments for "courses" were a sham, an effort to disguise unlawful kickbacks to Dr. White for his use of the manufacturer's stent grafts.

[ER 9:2075]

17. These kickbacks gave Dr. White and certain fellow surgeons at Harbor-UCLA a financial incentive to seek out opportunities to perform stent graft procedures with minimal regard as to whether the patients actually needed them, i.e., whether they were medically necessary. Dr. White's scheme to obtain this financial payment was first to review Harbor-UCLA medical files to find candidates for stent graft

procedures and then order procedures for them. For instance, in December 2013, none of Dr. White's patients needed a stent graft. Nonetheless, because the manufacturer would pay Dr. White a fee for each "course" and a per-patient fee, in addition to the professional fee he billed to the health insurance provider, Dr. White contacted one of Plaintiff's patients ("Patient BH") and coerced her to agree to such a stent graft procedure the following week, even though the procedure was not medically necessary.

18. Specifically, Patient BH, who presented to Harbor-UCLA in December 2013, suffered from an acute type B aortic dissection. Plaintiff had managed her appropriately with beta-blockers and antihypertensives. When she was symptom free and without malperfusion, Plaintiff discharged her home.

19. Nonetheless, Dr. White and his nurse Rowena Buwalda contacted Patient BH and instructed her to report to the emergency room at Harbor-UCLA under false pretenses. Specifically, Dr. White and his subordinates instructed Patient BH to report to the emergency room and claim to have "chest pains" even though the patient was not experiencing chest pains. Dr. White instructed Patient BH to claim that she was experiencing chest pains so that she could be admitted to Harbor-UCLA so Dr. White could perform the unnecessary and medically unwarranted stent graft that would financially benefit Dr. White.

20. Patient BH came to Harbor-UCLA's emergency room as instructed, falsely complaining of chest pain. Dr. White managed her care. Under his care, Patient BH sat in the emergency room for eight hours, and then was sent to a transitional hospital floor rather

than a cardiac floor without any antihypertensive IV medication, and was given a regular diet. This is not how a patient with dissection pain would typically be managed.

[ER 9:2076]

Dr. White managed her that way because he knew that her pain was fabricated at his instruction. After being talked into signing a consent form, Patient BH waited in the hospital for four days and then had a medically unnecessary stent graft on the following Monday at Dr. White's direction. Even though Plaintiff was Patient BH's medical specialist for these issues, Dr. White did not inform Plaintiff he was proceeding to undergo this medically unnecessary procedure on her.

21. During the medically unnecessary procedure that Dr. White performed, Patient BH suffered a serious complication (a retrograde dissection and stroke) resulting in complete expressive aphasia.

22. Plaintiff is informed and believes based on review of medical and payment records, and on that basis alleges, that the above conduct was part of a larger fraudulent scheme to promote medically unnecessary implantation of stents from a manufacturer paying financial kickbacks to Dr. White, often at the expense of patient safety. This scheme included the manufacturer's payment of kickbacks to other Harbor-UCLA physicians each time they used a particular medical device from the manufacturer in treating a patient.

23. From April through November 2014, Plaintiff discovered additional instances of misconduct by Dr.

White involving unethical and illegal acts which adversely affected patient safety. This misconduct included falsifying patient case records to appear eligible to participate in clinical trials the National Institute of Health ("NIH") sponsored and false certification of medical need regarding patients Dr. White had not examined, including patients Plaintiff examined and for whom Plaintiff formulated a medical plan.

24. Plaintiff reported the above-described improper and illegal conduct, as well as more general concerns, that Dr. White and others at Harbor-UCLA were compromising patient care in order to perform "courses" for third party medical device manufacturers, and utilizing specific medical devices in which Dr. White and others had a pecuniary interest. Specifically, Plaintiff reported these issues to Timothy Van Natta,

[ER 9:2077]

M.D., Chief Medical Officer at Harbor-UCLA ("Dr. Van Natta"), Bruce Stabile, M.D., then Chief of Surgery ("Dr. Stabile"), Defendant Dr. DeVirgilio, then a senior Vascular Surgeon, Defendant Dr. Yee, and Delvecchio Finley, then CEO of Harbor-UCLA ("Finley").

25. Around the same time, Plaintiff also reported his concerns to an NIH compliance officer and informed Dr. Van Natta and Dr. DeVirgilio that he had reported the issues to NIH.

26. By January 2015, Plaintiff had lost confidence that Hospital management would investigate and stop the fraud scheme and patient endangerment. As a

result, on January 12, 2015, Plaintiff contacted Deputy District Attorney Jennifer Lenz Snyder ("DDA Snyder"), head of the Los Angeles County District Attorney's Healthcare Fraud Division, and informed her of the ongoing fraud scheme. DDA Snyder informed Plaintiff on April 9, 2015 that the Los Angeles County District Attorney's Office had transferred the investigation to the California Department of Justice ("DOJ"). Plaintiff thereafter informed Dr. Putnam, Dr. Van Natta, and Dr. DeVirgilio that he had reported Dr. White's conduct to law enforcement and that a criminal investigation was underway. Plaintiff is informed and believes, and on that basis alleges, that Dr. White and Defendants learned of Plaintiff's disclosures to NIH and law enforcement through discussions among Hospital personnel.

27. In or about March 2015, after conducting a site audit, an NIH Research Integrity Officer informed Plaintiff via email that several members of the Harbor-UCLA team misrepresented their procedural volume histories to appear eligible to participate in clinical trials the NIH sponsored. NIH's investigation confirmed Plaintiff's allegations of improper conduct among Harbor-UCLA's medical staff.

28. On May 21, 2015, Deputy Attorney General Sue Melton Bartholomew informed Plaintiff that the California Department of Justice had opened a criminal investigation. Plaintiff provided further information to the Department of Justice.

[ER 9:2078]

29. On August 25, 2015, Dr. White sent a letter to Defendant Dr's. DeVirgilio and Van Natta requesting that the Hospital take corrective action against Plaintiff. In his letter, Dr. White claimed that Plaintiff's collection of information evidencing Dr. White's fraudulent and unlawful conduct (which Plaintiff had disclosed to NIH) violated the Health Insurance Portability and Accountability Act ("HIPAA") and California's Confidentiality of Medical Information Act ("CMIA"). Dr. White claimed in his letter that Plaintiff's collection and disclosure of this information "adversely affected [his] personal and professional life."

30. Thereafter, and as a direct result of Plaintiff's reporting of Dr. White's unlawful conduct to law enforcement, Harbor-UCLA's MEC initiated an internal disciplinary procedure which sought to revoke Plaintiff's Professional Staff membership and privileges at Harbor-UCLA. Per Harbor-UCLA's Bylaws, the MEC is responsible for, among things, initiating disciplinary actions against medical staff at Harbor-UCLA and, where appropriate, dismissing medical staff and discontinuing medical privileges.

31. As part of this process, members of the MEC met with Dr. Yee, Los Angeles County's Chief Medical Officer, discussed with Dr. Yee Plaintiff's disclosure of unlawful conduct to NIH and law enforcement, and asked Dr. Yee and DHS to ratify the MEC's proposed retaliatory employment action. In or about April 2016, with full knowledge of Plaintiff's actions and MEC's proposed retaliatory employment actions, Dr. Yee endorsed, ratified, encouraged, and approved the MEC's adverse employment action against Plaintiff

knowing that the action taken was to retaliate against Plaintiff for reporting Dr. White's unlawful and fraudulent conduct to NIH and law enforcement.

32. In 2014, Dr. Van Natta informed DHS Director Dr. Katz of Plaintiff's reports regarding Dr. White's misconduct and the illegal kickback scheme. Knowing that the MEC proceeding was brought in retaliation for Plaintiff's protected speech and petition activities, Dr. Katz endorsed, permitted, and encouraged the retaliatory MEC proceeding. When Dr. Stuart Bussey, President of the Union of American Physicians

[ER 9:2079]

and Dentists, confronted Dr. Katz with the fact that the proceeding was retaliatory and should be stopped, Dr. Katz replied that he would "let nature take its course."

33. On October 5, 2016, Defendant Dr. Putnam informed Plaintiff via letter that the MEC had voted to revoke Plaintiff's Professional Staff membership and privileges at Harbor-UCLA in accordance with Article VI of Harbor-UCLA's Bylaws. The stated reason for the MEC's proposed action was Plaintiff's alleged "unprofessional behavior" which purportedly created a "chaotic situation in the vascular division." Defendants Putnam, Vintch, Mahajan, and Lewis voted to take this step in order to retaliate against Plaintiff for his protected speech, and Lewis argued that he should be punished for his protected speech.

34. The MEC's allegations against Plaintiff are false. The alleged "unprofessional behavior" the MEC cited was a pretext for taking retaliatory action against Plaintiff for reporting unlawful and

fraudulent conduct by Harbor-UCLA's Chief of Vascular Surgery Dr. White, to NIH and law enforcement. Plaintiff thereafter requested a hearing in accordance with Section 7.4-2 of Harbor-UCLA's Bylaws.

35. Plaintiff received on or about November 10, 2016 a "Notice of Charges" from Defendant Dr. Putnam. The Notice of Charges informed Plaintiff that a hearing would be conducted on the proposed action of the MEC to revoke Plaintiff's Professional Staff membership and privileges at Harbor-UCLA. Like the October 5, 2016 letter, the "Notice of Charges" falsely stated that the MEC sought to take this action because of "unprofessional and uncooperative conduct and interactions with other Medical Staff members and support staff."

36. The November 10, 2016 Notice of Charges also cited as a reason for the MEC's proposed action Plaintiff's "[o]penly threatening to call external agencies to conduct investigations." In reality, the MEC members knew that Plaintiff had already reported Dr. White's conduct to NIH and law enforcement, as permitted by his First Amendment rights. Plaintiff had conveyed that information to Dr. Putnam, Dr. Van Natta, and Dr. DeVirgilio.

[ER 9:2080]

37. On or about April 4, 2017, Defendant Dr. Mahajan hand-delivered a letter to Plaintiff indicating the County of Los Angeles' intention to suspend Plaintiff's employment at Harbor-UCLA for 25 days. The letter, signed by Defendant Dr. Mahajan, cited multiple unfounded HIPAA and CMIA violations for

Plaintiff's reporting of Dr. White's conduct to the NIH and law enforcement as the reason for the proposed suspension. Specifically, the letter stated that Plaintiff's actions violated DHS' Discipline Manual and Guidelines because the actions were outside the scope of Plaintiff's employment duties.

CLAIM FOR RELIEF

Retaliation Based on Exercise of Right to Free Speech in Violation of 42 U.S.C. § 1983

(Against All Defendants)

38. Plaintiff re-alleges and incorporates by reference all preceding paragraphs of this complaint as if fully set forth herein.

39. Plaintiff is a citizen of the United States and each Defendant is a "person" within the meaning of 42 U.S.C. § 1983.

40. Defendants, at all times mentioned herein, were acting under the color of state law in their capacity as DHS employees and/or members of Harbor-UCLA's MEC. Defendants' acts or omissions were conducted within the scope of their official duties or employment.

41. Plaintiff exercised his constitutional right to free speech and to petition the government by reporting Dr. White's and other physicians' fraudulent and unlawful conduct to NIH, the Los Angeles County District Attorney's Office and the California Attorney General's Office. As a direct result of his exercise of this constitutionally-protected right, Defendants retaliated against Plaintiff through adverse employment actions. Absent Plaintiff engaging in the protected speech set forth above, Defendants would

not have taken these adverse employment actions against him.

[ER 9:2081]

42. At all times mentioned herein, Plaintiff's speech activities related to matters of public concern and were not taken pursuant to any official job duties, as confirmed in DHS's April 4, 2017 letter stating it intended to suspend Plaintiff's employment for 25 days. Plaintiff's speech activities are relevant to the public's evaluation of the performance of public officials and public hospitals, and relevant to citizen decisions about the operation of government. Specifically, Plaintiff's reporting of the conduct of Dr. White and others demonstrated a fraudulent kickback scheme and fraudulent misuse of taxpayer dollars to pay for medically unnecessary treatments which jeopardized the safety of patients at a County owned and operated hospital.

43. Defendants retaliated against Plaintiff for exercising his rights to free speech and petition in voting to revoke Plaintiff's Professional Staff membership and privileges at Harbor-UCLA. By taking adverse employment actions against Plaintiff substantially motivated by protected speech, Defendants violated Plaintiff's rights under the First Amendment to the United States Constitution to freedom of speech and petition. Defendants' adverse employment actions would chill and deter reasonable employees from speaking or associating.

44. As a direct result of Defendants' acts and omissions, Plaintiff suffered economic damages and noneconomic damages that Plaintiff would not have

incurred but for Defendants' adverse employment actions. As a direct result of Defendants' acts and omissions, Plaintiff also incurred attorneys' fees and expenses, and had to spend time and resources responding to, defending himself against, and otherwise handling Defendants' retaliatory adverse employment actions. Plaintiff will continue to suffer damages because of Defendants' acts, as their retaliatory MEC proceeding will permanently impair Plaintiff's ability to seek and secure employment appropriate to his ability and his ability to secure privileges at other facilities.

45. Further, Defendants Dr. Putnam, Dr Katz, Dr Yee, Dr Lewis and Dr. Virgilio acted with malice and conscious disregard for Plaintiff's rights.

[ER 9:2082]

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Timothy Ryan, M.D. prays for judgment against Defendants for:

1. Compensatory damages, economic and non-economic damages in excess of the minimal jurisdiction of this Court, in an amount according to proof;

2. General damages to compensate Plaintiffs for the mental and emotional injuries, physical injuries, distress, anxiety, and humiliation;

3. Attorneys' fees in an amount according to proof pursuant to 42 U.S.C. § 1988;

4. For costs of suit herein;

5. For prejudgment interest pursuant to California Civil Code section 3287, subdivision (a);

6. As to Defendants Dr. Putnam, Dr. Yee, Dr. Lewis, Dr. Katz, and Dr. DeVirgilio, punitive damages in an amount appropriate to punish them and make an example of them to the community; and

7. For such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiff respectfully demands a trial by jury.

DATED: October 6, 2017 BROWN WHITE & OSBORN LLP

By *s/Kenneth P. White*
THOMAS M. BROWN
KENNETH P. WHITE
Attorneys for Plaintiff
TIMOTHY RYAN, M.D.