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## OPINIONS AND ORDERS



## REHEARING ORDERS



## CONSTITUTIONAL AND STATUTORY PROVISIONS

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**MEMORANDUM* OPINION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 2, 2025)**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH PETERSON, M.D.,

*Plaintiff-Appellant,*

v.

SUTTER MEDICAL FOUNDATION; SUTTER BAY HOSPITALS, DBA ALTA BATES SUMMIT MEDICAL CENTER; EDEN MEDICAL CENTER; SUTTER EAST BAY MEDICAL FOUNDATION; NEIL STOLLMAN; ROD PERRY; PHILLIP RICH; CATHY LOZANO; KRISTINA LAWSON; HOWARD KRAUSS; RANDY HAWKINS; RICHARD FANTOZZI; HEDY CHANG; DEV GNANEDEV; RONALD LEWIS; LAURIE ROSE LUBIANO; ASIF MAHMOOD; RICHARD THORP; ESERICK WATKINS; FELIX YIP; DENISE PINES; SHARON LEVINE; EVELYN SCHIPSKE; JAMIE WRIGHT; LINDA WHITNEY; SUTTER BAY MEDICAL FOUNDATION; PHILIP RICH,

*Defendants-Appellees.*

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

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No. 23-2911

D.C. No.3:21-cv-04908-WHO

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Submitted June 6, 2025**
San Francisco, California

Before: CALLAHAN and LEE, Circuit Judges,
and RASH, District Judge.***

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Ralph Peterson is an African American physician who treated mostly indigent and under-served patients in Oakland, California. In 2009, when his practice consisted primarily of endoscopic procedures performed at an outpatient clinic, he resigned his hospital consultation privileges with Summit Hospital over a disagreement about providing physician coverage for his patients who were admitted to the hospital. In June 2021, after the unsealing of a whistleblower suit (the "Qui Tam action") against Sutter Medical Foundation ("Sutter") alleging that Sutter had paid kickbacks to doctors that referred patients to Sutter, Peterson filed this lawsuit against the Medical Board of California ("MBC"), some of its personnel, Sutter, and several doctors that worked for Sutter. Peterson alleged federal civil rights violations, federal antitrust

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Scott H. Rash, United States District Judge for the District of Arizona, sitting by designation.

violations, and violations of California law. The District Court dismissed Peterson's claims against the MBC and its members as barred under the Eleventh Amendment and qualified immunity, struck Peterson's state-law claims against Sutter and its doctors under California's anti-SLAPP statute (and awarded attorneys' fees), and granted summary judgment for the defendants on Peterson's First Amendment and Due Process claims finding that there was no evidence in the record to support his claims.

We review de novo issues concerning immunity, statute of limitations, dismissal, motions to strike, and summary judgment. *See Buckles v. King County*, 191 F.3d 1127, 1132 (9th Cir. 1999) (immunity); *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003) (statute of limitations); *Naffe v. Frey*, 789 F.3d 1030, 1035 (9th Cir. 2015) (dismissal); *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003) (motion to strike); *Metal Jeans, Inc, v. Metal Sport, Inc.*, 987 F.3d 1242, 1245 (9th Cir. 2021) (summary judgment). The attorney fee award is reviewed for abuse of discretion. *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 (9th Cir. 2007). The District Court's rulings are affirmed.

1. Peterson has not shown that the District Court erred in holding that the MBC was entitled to sovereign immunity. Peterson does not contest that the MBC is a California government agency. Rather, he argues that his claims against it are contract claims, which are not subject to immunity. This argument is unpersuasive. Under the Eleventh Amendment, a federal court cannot "entertain a suit brought by a citizen against his own state." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984).

2. Peterson has not shown that the District Court erred in granting the MBC members immunity. Peterson alleges that members made false statements to insurance companies and credentialing committees causing him to be denied physician provider status. He contends that these are not quasi-judicial activities and are not entitled to absolute immunity, citing *Mishler v. Clift*, 191 F.3d 998 (9th Cir. 1999). *Mishler*, which concerned the Nevada Board of Medical Examiners, is inapposite because under California law, the MBC and its members are required "to publish information about enforcement actions initiated while an individual is licensed to practice medicine in California, and to correct those disclosures when new information becomes available." *Fulton v. Med. Bd. of Cal.,* 183 Cal. App. 4th 1510, 1517 (2010). While California Business & Professional Code § 805(i) requires that an 805 Report be maintained electronically for three years, this does not, as Peterson contends, mean that information may not be disseminated after three years. Moreover, even if the members are not entitled to absolute immunity, they are entitled to qualified immunity because, in light of the MBC's obligation to disseminate information about California-licensed physicians, the members had no reason to believe their conduct was unlawful. *See Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996).

3. Peterson has not shown that the District Court erred in finding that Peterson's claims are time-barred. The statute of limitations on the antitrust claims is four years, *see* 15 U.S.C. § 15b, and the statute of limitations on Peterson's First Amendment and Due Process claims is two years from the accrual date. *See Bonelli v. Grand Canyon Univ.,* 28 F.4th

948, 951 (9th Cir. 2022) (holding the statute of limitations for federal civil rights claims is governed by the forum state's statute of limitations for personal injury actions); *see* Cal. Code Civ. Proc. § 355.1. The claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Bonelli*, 28 F.4th at 952.

Peterson filed this action more than four years after his 2009 resignation. Peterson argues, however, that the time for filing was extended under the delayed discovery doctrine, the continuing violations doctrine, the continuing accrual doctrine, and equitable tolling. None of these exceptions apply to Peterson's claims arising from his 2009 resignation as he clearly knew of his injury then, even if he did not know all the reasons for the injury. *See id.*

4. Peterson has not shown that the District Court erred in dismissing his state claims against the Sutter defendants under California's anti-SLAPP statute. The California anti-SLAPP statute is "designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern." *Bonni v. St. Joseph Health Sys.*, 11 Cal. 5th 995, 1008-09 (2021) ("*Bonni I*"). *Bonni I* holds that resolution "of an anti-SLAPP motion involves a two-step process." *Id.* at 1009. It explained that "[fJirst, 'the moving defendant bears the burden of establishing that the challenged allegations or claims "aris[e] from" protected activity in which the defendant has engaged'" and "[s]econd, for each claim that does arise from protected activity, the plaintiff must show the claim has at least 'minimal merit.'" *Id.* (quoting *Park v. Bd. of Tr. of Cal. State Univ.*, 2 Cal. 5th 1057, 1061 (2017) (first and third

alterations added, second alteration in original)). *Bonni I* concludes that if "the plaintiff cannot make this showing, the court will strike the claim." *Id.*

Peterson argues that the allegedly false statements to insurance companies and credentialing committees are not privileged communications by state actors because the official disciplinary proceedings had long since concluded and are too attenuated from broad public health issues to be covered by California Code of Civil Procedure § 425.16(e)(4). He further asserts that a claim-by-claim analysis shows that not all claims are covered by the anti-SLAPP statute, and that allegations of illegal conduct are excluded from anti-SLAPP protection.

Peterson's assertions are not persuasive. *Yang v. Tenet Healthcare Inc.*, 48 Cal. App. 5th 939, 947-548 (2020), held that private and public communications concerning a licensed physician's professional skills are a public issue. *Bonni v. St. Joseph Health Sys.*, 83 Cal. App. 5th 288, 300-01 (2022) ("*Bonni II*"), held that the litigation privilege is not limited to statements made during the proceedings, extends to steps taken afterwards, and such communications are "absolutely privileged under Civil Code 47, even if they were 'improperly motivated.'" Thus, the communications are the type covered by the anti-SLAPP statute. In addition, Peterson's assertion of illegality fails as this exception only applies "if a 'defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.'" *Birkner v. Lam*, 156 Cal. App. 4th 275, 285 (2007) (quoting *Flatley v. Mauro*, 39 Cal. 4th 299,

320 (2006)). Peterson offered no evidence that any communication by the defendants was criminal.[1]

5. Peterson has not shown that the District Court erred in granting summary judgment against him on his First Amendment and Due Process claims. Peterson seeks to convert his objections to his resignation in 2009 into some type of claim on behalf of his "indigent and under-served patients." He alleges that "each time Sutter received a kickback, upcoded, or steered patients to maximize the receipt of funds from the MediCal pool he was injured because the pool was nearly dry and his patients did not get enough care."

This approach is not persuasive. First, the District Court found there was no factual basis for the claim. It explained: (a) the Qui Tam action contains allegations, not evidence, and the case was settled with no admission of liability, (b) the Qui Tam action alleged Sutter paid external doctors for referring patients to Sutter, but Peterson alleged Sutter paid its doctors to refer indigent patients out, and (c) there was no evidence of the alleged kickbacks to Sutter doctors. Peterson proffers no contrary evidence, nor does he address how the alleged harm to his patients harmed him or how he has standing to represent his patients.

Second, Peterson's assertion that the Sutter defendants acted under color of state law fails as the District Court found that the peer review proceedings were initiated to address patient safety issues and

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[1] The determination that Peterson has not shown that the District Court erred in granting the anti-SLAPP motion disposes of his challenges to the attorney fee award as he did not otherwise challenge the award.

there was no evidence that the Sutter defendants had any role in the MBC's investigation or evidence of retaliation. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977). Third, Peterson's First Amendment retaliation claim fails because there is no evidence that Peterson informed the Sutter defendants that his objections were made on behalf of the poor and indigent, and thus, he has not shown a causal connection to constitutionally "protected speech." *See Nieves 23 v. Bartlett*, 587 U.S. 391, 398 (2019). Finally, Peterson's Due Process claim fails because he does not address the District Court's finding of no evidence of a lack of required process and he does not indicate what arguments he was precluded from making.

The District Court's orders dismissing certain defendants and granting summary judgment against Peterson on the remaining defendants are

**AFFIRMED**.

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (OCTOBER 6, 2023)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH PETERSON, M.D.,

*Plaintiff,*

v.

SUTTER MEDICAL FOUNDATION, ET AL.,

*Defendants.*

Case No. 3:21-cv-04908-WHO

Re: Dkt. No. 149

Before: William H. ORRICK,
United States District Judge.

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

Plaintiff Ralph Peterson filed this case against the defendants—Sutter Bay Medical Foundation and Sutter Bay Hospitals, as well as the three individual physicians Neil Stollman, Rod Perry, and Philip Rich—asserting various claims arising out of his resignation from employment with Sutter in April

2009. After several rounds of motions to dismiss, his remaining claims are for First Amendment and Due Process violations related to the disciplinary proceedings carried out by the defendants before Peterson's resignation, as well as allegations concerning kickbacks that the defendants accepted but Peterson refused to accept. The defendants filed the pending motion for summary judgment on both of Peterson's remaining claims. Because there is no genuine dispute of fact contesting that the statute of limitations bars the claims, the defendants did not act under state law, and there was no kickback "scheme" related to Peterson's employment or resignation, the claims fail, and the motion is GRANTED.

## BACKGROUND

### I. Factual Background

The following facts are undisputed.

Peterson was a medical doctor who practiced gastroenterology and worked for Summit Hospital, an affiliate of Sutter Bay Medical Foundation and Sutter Bay Hospitals, from about 1999 to 2009. Declaration of Ralph Peterson ("Peterson Decl.") [Dkt. No. 154] ¶¶ 4-5, 8. As of 2009, Peterson had "Hospital Consultation" privileges at Sutter, which are similar to outpatient privileges, and well as privileges to perform specific procedures like colonoscopies. *Id.* ¶ 5; Deposition of Ralph Peterson ("Peterson Depo.") [Dkt. No. 149-28 Exs. F, G; Dkt. No. 154-6] 50:15-51:9; ("Application") [Dkt. No. 149-2, Dkt. No. 154-1]. The agreement provided that the "exercise of all privileges may occur only in the context of prevailing bylaws, rules and regulations and hospital policies." Application. Peterson received a copy of those rules and regulations, Peterson

Depo. 65:20-23, which provided in part that he was required to find another physician to provide "coverage" for any of his patients that were admitted in-patient, *see* [Dkt. No. 149-20] at-306.

In early February 2009, Peterson met with Perry, then Chair of the Department of Medicine, and Stollman, then Chief of Gastroenterology, to discuss concerns about certain patients and practices, including withdrawal times for sedation procedures, whether Peterson should have anesthesiologists during certain procedures, and whether he had sufficient "coverage" for his patients. *See* Peterson Depo. 83:15-25 (confirming they spoke about patients, withdrawal times, and coverage); [Dkt. Nos. 149-13, 149-18] (letter confirming topics discussed).

On March 2, 2009, Perry sent Peterson a letter about their February meeting with Stollman, noting that failure to meet the coverage requirements "constitutes grounds for corrective action" include that Peterson's staff "membership and clinical privileges may be in jeopardy" if he failed to meet his coverage obligations by the end of March. [Dkt. Nos. 149-13, 149-18]; *see also* Peterson Depo. 82:9-25.

On March 25, 2009, Peterson sent Stollman a letter asking if Stollman's medical group could help provide coverage for Peterson's patients. [Dkt. No. 149-19].

On March 15, 24, and 25, 2009, three of Peterson's patients were admitted to Summit. Peterson Decl. ¶¶ 15-16; *see also* [Dkt. No. 149-3]. Peterson did not provide care for these patients and did not have coverage in place for another doctor to provide care. Peterson Decl. ¶¶ 16-18; [Dkt. No. 149-3].

On March 26, 2009, Rich, then Medical Staff President, sent Peterson a letter outlining those three instances, noting it was "intolerable" that Peterson failed to provide care or coverage for the patients, and requesting that Peterson stipulate to suspending his clinical privileges until he found coverage. [Dkt. No. 149-3].

On March 30, 2009, Peterson sent a letter to Rich acknowledging his prior conversations with and letter from Perry, discussing the three patient incidents, contesting the portrayal of Peterson as (in Peterson's words) "a physician who does not care for his patient, neglects them and readily abandons them," and declaring he intended to continue scheduling patients at Summit. [Dkt. No. 149-4].

On April 1, 2009, Rich sent a letter to Peterson, suspending his privileges due to lack of coverage and Peterson's "unwillingness or inability to understand the problems at issue and your responsibilities toward your patients." [Dkt. No. 149-5]. The letter stated that the suspension would be considered by the hospital's Medical Executive Committee on April 6, 2009, that Peterson's presence was "required" at the meeting, and that Peterson would have an opportunity to make a statement and provide written materials to the committee if he wanted. *Id.*

On April 6, 2009, Peterson sent Rich a letter stating that he resigned at 5:30 p.m. "due to inability to secure coverage." [Dkt. No. 149-6].

On April 8, 2009, Rich sent Peterson a letter informing him that a report was filed with the Medical Board of California ("MBC") "as required by law" due to "the circumstances surrounding [his] resignation."

[Dkt. No. 149-7]. Rich attached the report to the letter, which showed a check mark next to the box, "Following notice of an impending investigation based on information indicating medical disciplinary cause or reason . . . Licentiate resigned from staff." *Id.*

On May 28, 2009, Peterson sent a letter through counsel to Perry, explaining the events from March and stating that the hospital's conduct undermined Peterson's reputation, caused him financial damages due to inability to practice, and noting that he would have claims of tortious interference with economic gain as well as federal constitutional claims against the defendants. [Dkt. No. 149-22]. Perry responded through counsel, noting that the report to the MBC was required by state law, stating that the defendants would respond to a lawsuit from Perry by filing an anti-Strategic Lawsuit Against Public Participation ("SLAPP") motion, and denying any basis for damages. [Dkt. No. 149-23]. Peterson's counsel responded, noting Peterson "believes he was set up in an elaborate conspiracy to terminate his hospital privileges" and that he has "a myriad of . . . federal and state claims that he may bring." [Dkt. No. 149-24].

Subsequently, in November 2012, Peterson sued the individual doctor defendants for claims related to the end of his employment at Sutter and the disciplinary proceedings, including extensive allegations that the doctor defendants steered low-income patients of color away from Sutter in favor of wealthier white patients, which benefitted the Sutter entities. ("2012 Compl.") [Dkt. No. 149-28] Ex. 35; Peterson Depo. 180:12-182:21. The defendants filed an anti-SLAPP motion to strike, and in response Peterson submitted an opposition and declaration that stated he cared for

underserved, low income, and African American patients using Medi-Cal insurance; the defendants did not want these patients because they provided less compensation for the hospital; and the defendants unfairly subjected him to "peer review" and then "remov[ed]" him from the hospital so that the hospital would not have to serve those patients.[1] [Dkt. No. 149-28] Ex. 34.

In November 2019, a previously sealed federal court lawsuit against Sutter was made publicly available. [Dkt. No. 154-32]; *see also* [Dkt. Nos. 154-22,-23]. That whistleblower complaint was initially filed on September 10, 2014, and brought causes of action under the federal and California state False Claims Acts, alleging that Sutter unlawfully paid kickbacks to doctors and entities that referred patients to Sutter. ("Qui Tam Compl."[2]) [Dkt. No. 154-20]. It alleged in part that Sutter implemented a "scheme" in which it paid or provided to physicians "unlawful kickbacks, excessive compensation, free employees and other illegal incentives" for referring patients to Sutter. *See, e.g.*, *id.* ¶ 85. Subsequent media coverage indicated that the case settled. *See* [Dkt. Nos. 154-22,-23].

On December 13, 2020, the news program "60 Minutes" aired an episode discussing a lawsuit filed

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[1] The defendants state in their motion that the anti-SLAPP motion to strike was granted and the case was dismissed, Mot. 10:8, but they point to no supporting evidence nor do they request judicial notice of relevant court documents. Peterson does not mention the dismissal of that case.

[2] Because the parties refer to this as the "Qui Tam Case" in their papers, I use that language in this Order.

by the California Attorney General against Sutter, in which the state declared that Sutter merged with and acquired many hospitals, physicians, and clinics to reduce competition, raise prices, and "use its market power to dominate, to dictate" and then to "jack[] up prices." [Dkt. No. 154-24]. Peterson watched this program. Peterson Decl. ¶ 23.

## II. Procedural Background

Peterson filed this case on June 26, 2021. [Dkt. No. 1]. I granted in part and denied in part the first round of motions to dismiss, dismissing some defendants with prejudice. [Dkt. No. 74]. I subsequently granted in part and denied in part another round of motions to dismiss, dismissing with prejudice all but the remaining defendants here, and dismissing all claims against these defendants except for Peterson's First Amendment and Due Process claims. [Dkt. No. 102]. That order also granted the defendants' anti-SLAPP motion to strike. *Id.*

The defendants filed their answers. ("Sutter Answer") [Dkt. No. 105]; ("Perry Stollman Answer") [Dkt. No. 106]; ("Rich Answer") [Dkt. No. 107]. Discovery ensued.

Now the defendants move for summary judgment on Peterson's two remaining claims. ("Mot.") [Dkt. No. 149]. Peterson opposed. ("Oppo.") [Dkt. No. 153]. The defendants replied. ("Repl.") [Dkt. No. 161]. I held a hearing at which counsel for both parties appeared.

## LEGAL STANDARD

Summary judgment on a claim or defense is appropriate "if the movant shows that 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. Proc. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby,* 477 U.S. 242, 257 (1986).

On summary judgment, the Court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

## DISCUSSION

### I. Statute of Limitations

The defendants argue that both remaining claims are barred by the statute of limitations and seek summary judgment in their favor for that reason alone. *See* Mot. 14:7-16:24. Peterson opposes, arguing that the delayed discovery doctrine, continuing vio-

lations doctrine, and equitable tolling all apply to delay accrual of his claims or toll the statute of limitations. *See* Oppo. 9:25-13:7.

The statute of limitations is an affirmative defense and so the defendants bear the burden of proof to warrant summary judgment in their favor. *United States v. Real Prop., Titled in the Names of Godfrey Soon Bong Kang & Darrell Lee*, 120 F.3d 947, 949 (9th Cir. 1997); *Menzel v. Scholastic, Inc.*, No. 17-CV-05499-EMC, 2019 WL 6896145, at *2 (N.D. Cal. Dec. 18, 2019); *Pollock v. Tri-Modal Distrib. Servs., Inc.*, 11 Cal. 5th 918, 945, 491 P.3d 290, 305 (2021) (California law). The defendants properly asserted the statute of limitations defense in their answers. *See* Fed. R. Civ. Proc. 8(c)(1); Sutter Answer 41:21-42:13; Stollman Perry Answer 25:7-27; Rich Answer 24:10-25:2.

The basis for Peterson's First Amendment and Due Process claims is 42 U.S.C. § 1983, and the statute of limitations for federal civil rights claims brought under § 1983 is "governed by the forum state's statute of limitations for personal injury actions." *Bonelli v. Grand Canyon Univ.*, 28 F.4th 948, 951 (9th Cir. 2022) (citation omitted). As the parties agree, California's personal injury statute of limitations is two years from the accrual date. Cal. Code Civ. Proc. § 335.1; *see also Butler v. Nat'l Cmty. Renaissance of Cal.*, 766 F.3d 1191, 1198 (9th Cir. 2014). Federal law governs when the claim accrues, which is "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Bonelli*, 28 F.4th at 952 (quoting *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008)).

This federal accrual standard mirrors California's discovery rule, which some courts apply in § 1983

cases,[3] that "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807, 110 P.3d 914, 920 (2005) (citing *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397, 981 P.2d 79, 88 (1999)). Under California law, "[a] plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements,'" and the "suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period." *Id.* (citing *Norgart*, 981 P.2d at 88-89 & n.3). To employ the discovery rule, the plaintiff "must conduct a reasonable investigation of all potential causes of that injury," and if that investigation "would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." *Id.* at 921 (citations omitted). Ignorance of the legal theories underlying the cause of action is "irrelevant" to the delayed discovery analysis. *Norgart*, 981 P.2d at 88 n.2.

The federal standard for equitable tolling also borrows the rules from the forum state, and in California equitable tolling applies "when, possessing several legal remedies [the plaintiff], reasonably and in good faith, pursues one designed to lessen the extent of [the plaintiff's] injuries or damage." *Butler*, 766 F.3d at 1204 (quoting *Addison v. State,* 21 Cal. 3d

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[3] *See, e.g.*, *James v. Contra Costa Cnty.*, No. 22-CV-05939-SI, 2023 WL 4410504, at *2 (N.D. Cal. July 7, 2023); *Dutro v. Cnty. of Contra Costa*, No. 12-CV-02972 NC, 2013 WL 5444431, at *3-5 (N.D. Cal. Sept. 30, 2013).

313, P.2d 941, 943 (1978)). To equitably toll the statute of limitations, "a plaintiff must establish 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'" *Id.* (quoting *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 194 P.3d 1026, 1033 (2008)).

To analyze whether the defendants met their burden to establish that summary judgment is warranted in their favor based on the statute of limitations defense, *see Real Prop.*, 120 F.3d at 949; *Pollock*, 491 P.3d at 305, I must first assess when the claim accrued, which requires determining what injuries Peterson is asserting—something that is not entirely clear from the papers, the record, the hearing, the SAC, or prior litigation in this case. As best I can understand it, and as informed by counsel's representations at the hearing, Peterson contends that the defendants had a policy in which Sutter paid "kickbacks" to doctors, including the three individual physician-defendants in this suit, who intentionally steered away less profitable patients such as those using Medi-Cal insurance, and that Sutter and the complying physicians punished doctors that refused to steer patients and accept kickbacks. *See* Oppo. 1:11-9:10, 14:20-25; *see also* SAC ¶¶ 168-70, 179. Peterson believes that this policy led to the violation of his First Amendment rights because he refused to accept the kickbacks and instead advocated for indigent and low-income patients with Medi-Cal insurance, including by educating them about their medical rights,[4] for

[4] In his deposition, Peterson frames this as his refusal to "upcode" his patients by unnecessarily using and charging for an anesthesiologist, and he asserts that his refusal was motivated

which he was punished and subjected to disciplinary proceedings: by carrying out disciplinary proceedings, Peterson asserts that the defendants interfered with and violated Peterson's First Amendment rights to advocate for patients. *See* Oppo. 2:19-3:5, 14:20-25; SAC ¶¶ 166-70, 179-80. And Peterson believes his Due Process rights were violated because, while he voluntarily resigned and gave up his medical privileges, he did so without knowing that the disciplinary processes were instigated by the kickback scheme, and that the proceedings did not provide adequate process because they were marred by fraud and fabrication. *See* Oppo. 20:12-21:26; SAC ¶¶ 199, 224, 232.[5]

With respect to timing, based on Peterson's theories of liability, the injuries from these remaining defendants were caused when he was subjected to disciplinary proceedings for advocating for patients instead of participating in the kickback scheme, and when those proceedings were tainted by fabrication and fraud—both of which occurred in April 2009, or would have if he had not first resigned. *See* [Dkt. Nos. 149-5,-6]. Accordingly, the record shows that Peterson's civil rights injuries occurred in April 2009 and accrued then. Peterson does not appear to contest

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in part by his desire to protect the "Medi-Cal budget." *See* Peterson Depo. 193:1-24, 195:10-96:14.

[5] To clarify, I cite the allegations in the SAC to understand and explain the framework of Peterson's theories of liability and injury because these were not well explained by the opposition or the oral arguments. I do not rely on the allegations as evidence or argument in deciding this motion.

this.[6] And because there appears to be no evidence in the record suggesting these injuries occurred at a different time, I find that the claims accrued in 2009 and were subject to a two-year statute of limitations, *see Butler*, 766 F.3d 1191, 1198, and so the defendants met their burden to prove the statute of limitations bars the claims, *see Real Prop.*, 120 F.3d at 949; *Pollock*, 491 P.3d at 305.

Rather than point to evidence in the record that would create a dispute of fact regarding the accrual date, Peterson mostly relies on the discovery doctrine to argue that there is a genuine dispute of fact whether he could have known of these claims and injuries before the unsealing of Qui Tam Case in 2019 and the news show in 2020. He argues that because the qui tam investigations were under seal, he could not have previously discovered the kickback scheme or known that it was the basis of his First Amendment and Due Process injuries. *See* Oppo. 7:25 9:10; 10:11-12:10. Previously I found that these allegations were sufficiently plausible to deny the defendants' motion

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[6] To the extent that Peterson argues that his First Amendment rights were violated when he was precluded from "testifying" on behalf of another physician, Dr. Bonner, *see* Peterson Decl. ¶ 27; Oppo. 19:7-10, he fails to point to any evidence at all that explains either what this injury was or how it affected him, and he likewise fails to explain how that injury is connected to the defendants, *see* SAC ¶¶ 99, 181, 234 (alleging that the *MBC* prevented Peterson from testifying on Bonner's behalf). As the defendants point out, the SAC asserts that this testimony incident occurred in January 2013, *see id.*, so even if this somehow constituted a First Amendment injury, the statute of limitations ran in January 2015. There is no evidence in the record suggesting otherwise, nor does Peterson appear to argue otherwise.

to dismiss based on the statute of limitations because Peterson alleged that the kickback policy was secret and so he could not have known about it and the related injuries earlier. *See* [Dkt. No. 75] 20:28-21:11. But now, after an opportunity for discovery and with plenty of evidence in the record, I find that this kickback theory—including when Peterson learned of the theory as well as its general existence and relationship with his injuries—cannot delay the accrual date or toll the statute of limitations to allow him to bring his claims now.

First, the discovery doctrine does not provide for accrual once the plaintiff knows of *all* facts and causes of his injury—it accrues when the plaintiff has reason to know of the injury that is the basis for his action. *See Bonelli*, 28 F.4th at 952. Peterson's claims accrued when he knew or had reason to know of his injuries—being subjected to sham disciplinary proceedings because of his patient advocacy and related refusal to participate in the patient steering and kickback scheme—not when he learned the specific contours of the kickback policy. He sued the individual defendants in 2012 based on similar allegations and explained the role of the entity defendants in that suit:[7] in April 2013 he explained in his papers and declaration that he was punished and subject to a "charade" disciplinary

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[7] While the allegations in Peterson's 2012 complaint focused more on the race-based motivations of the defendants rather than on their financial motivations, it is clear from the complaint that Peterson believed he was injured because the allegedly racist actions in the steering scheme and sham disciplinary processes were motivated by the defendants' financial incentives to steer away poor patients of color and steer toward Sutter wealthy, usually white, patients. *See* 2012 Compl.

process for refusing to participate in the financially-motivated "scheme" perpetrated by the defendants (except Rich) to steer high compensation patients to Sutter and steer low compensation patients—like those treated by Peterson on Medi-Cal insurance—away from Sutter. [Dkt. No. 149-28] Ex. 34 2:10-3:19, 4:21-25, ¶¶ 7-12. At least by April 2013, then, he believed that he was injured by sham disciplinary proceedings and his refusal to participate in the steering scheme, even if he did not know the specific contours of his kickback policy allegations. Therefore, even if Peterson did not or could not have known about the "secret" kickback policy until the unsealing of the AG investigation and related media reports, he knew of the basis for his First Amendment and Due Process injuries, and so the claims accrued two years after the date of his April 2013 declaration. *See Bonelli*, 28 F.4th at 952.

Second, even if I accept that Peterson could not have known the bases for and causes of his injuries until he learned of the kickback policy, the tolling doctrines do not apply because there is nothing in the record that shows there *was* a kickback scheme, let alone evidence connecting the scheme to Peterson's injuries. *See id.*; *see also Fox*, 110 P.3d at 921 (explaining that under California law, the discovery rule applies only where a reasonable investigation into the causes of the injury "would have disclosed *a factual basis for a cause of action*" (emphasis added)). To the extent that Peterson relies on the unsealing of the Qui Tam Case or its underlying allegations, or the related media reports as evidence of the kickback policy, *see* Oppo. 11:10-12:10; [Dkt. Nos. 154-11,-20-23[8]], these

[8] Peterson's request for judicial notice says that Dkt. No. 154-21 is "an Order filed" in the qui tam case, but he attached a copy of

documents show allegations, not evidence, and so are insufficient to create a genuine dispute of fact concerning the existence of any such policy or any connection to Peterson's career and resignation. Peterson conceded in his deposition that he did not know if the investigation involved the defendants. *See* Peterson Depo. 195:7-96:14. And while there was a settlement in the Qui Tam Case, it appears there was no admission of liability or concession of the existence of any policy, *see* [Dkt. No. 154-23], and Peterson points to no contradictory evidence. Additionally, the news program from 2020 concerned investigations into Sutter's anticompetitive business practices, including mergers and acquisitions, and is unrelated to Peterson's kickback allegations. [Dkt. No. 154-24]; [Dkt. No. 149-35] ¶ 3; *see also* Peterson Dep. 194:12-21 (conceding that the individual defendants were not mentioned in the news program). The most that the Qui Tam Case and news show demonstrate is that there were *investigations* into Sutter's general practices, which is not enough to create a dispute of material fact whether these practices actually existed, let alone that they caused Peterson's injuries. Indeed, the documents that Peterson cites suggest that the investigations concerned whether Sutter was paying external doctors to refer patients to Sutter and then paying kickbacks to those external doctors—not whether Sutter was paying kickbacks to its own doctors to refer indigent patients out, as Peterson

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my prior order in this case. At any rate, he does not cite that exhibit as including evidence establishing the existence of kickbacks and their connection to his injuries and the defendants. *See generally* Oppo.

suggests. *See* Qui Tam Compl. ¶¶ 85-199; [Dkt. No. 154-23].

Further, no record evidence creates a genuine dispute whether the defendants participated in a kickback policy or whether such a policy caused Peterson's injuries. Each piece of evidence that Peterson cites shows standard salaries and stipends paid to medical staff.[9] Though Peterson's declaration asserts these were unlawful kickbacks, there is no other evidence in the record[10]—that he points to or that I could find—that even alludes to these being anything but valid business payments. *See also Bohmker v.*

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[9] *See* Peterson Depo. 193:1-24 (Peterson stating he refused to "upcode" and use anesthesiologists when unnecessary); Deposition of Rod Perry ("Perry Depo.") [Dkt. No. 154-4] 35:5-9 (Perry received stipend for role as department chair), 72:8-73:21 (Perry received stipend for role as chief of general medical); Deposition of Neil Stollman ("Stollman Depo.") [Dkt. No. 154-5] 14:16-20 (Stollman received payment for role as department chair), 17:3-7 (Stollman and gastroenterologists received $1,700 for each 24 hour period on call); Deposition of Philip Rich ("Rich Depo.") [Dkt. No. 154-8] 19:19-21:21 (Rich or his medical group was compensated when he was medical staff president but not for his duties on the executive committee), 71:17-72:9 (Rich knew the hospital had contracts for service in the emergency department). 72:22-73:7 (Rich was aware of media reports concerning kickbacks), 87:13-16 (Rich received a salary).

[10] *See, e.g.*, Declaration of Philip Rich ("Rich Decl.") [Dkt. No. 149-1] ¶ 13 (Rich received stipend from Summit Medical Staff for role as President); Declaration of Rod Perry ("Perry Decl.") [Dkt. No. 149-11] ¶ 9 (Perry received stipend from Summit Medical Staff for compensation for role as Chair); Declaration of Neil Stollman ("Stollman Decl.) ¶ 11 (Stollman received stipend from Summit Medical Staff for compensation for role as Chair), ¶ 21 (all on-call gastroenterologists receive $1,700 per 24-hour shift, though rate was lower in 2009).

*Oregon*, 903 F.3d 1029, 1044 (9th Cir. 2018) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." (quoting *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (as amended)). Peterson cannot create a dispute of fact from mere conjecture and speculation that the payments were unlawful or unfair without pointing to a single line in the record that supports that theory. Accordingly, there is no evidence suggesting that the kickback policy or related injuries form the "basis of the action," *see Bonelli*, 28 F.4th at 952, and so there is no evidence showing that the discovery of the scheme provides the accrual date for Peterson's claims.

Peterson also argues that his claims should be tolled under the doctrine of equitable tolling because he has been pursuing his rights diligently and because there were extraordinary circumstances that prevented timely filing. *See* Oppo. 12:19-13:3. This argument is foreclosed for the same reasons that his claims are not saved by discovery doctrine—he knew at least by the filing of his declaration in 2013 of all the facts underlying his injuries and claims, and to the extent that Peterson learned new information in 2019 and 2020, he fails to point to evidence connecting that information to his injuries. Accordingly, there *was* no new information to discover, and so to the extent that he was pursuing his rights diligently, he already pursued them—in the case he filed in 2012.

Finally, Peterson cites the continuing violations doctrine as a reason to toll the statute of limitations but failed to explain in his papers or at the hearing why it applies, given that his injuries arose in 2009

and he knew of them by the latest in 2012, let alone cite record evidence showing that there is a genuine dispute of material fact to foreclose summary judgment. *See* Oppo. 12:11-18; *see also Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) ("[The] mere 'continuing *impact* from past violations is not actionable.'" (citations omitted)).

Accordingly, Peterson's claims ran in April 2015 at the latest. They are barred by the two-year statute of limitations and the defendants' motion is GRANTED.

## II. Color of State Law

The defendants argue that Peterson's 42 U.S.C. § 1983 claims also fail because each defendant is a private actor and there is no evidence showing that any defendant acted under color of state law, as required to establish liability under § 1983. *See* Mot. 17:1-21:4. In opposition, Peterson asserts that the defendants' private conduct constituted state action under the joint action, governmental compulsion or coercion, and government nexus standards. *See* Oppo. 13:8-18:10.

"A § 1983 plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (citing *West v. Atkins,* 487 U.S. 42, 48 (1988)). "While generally not applicable to private parties, a § 1983 action can lie against a private party when" the private party "is a willful participant in joint action with the State or its agents." *Id.* (quoting *Dennis v. Sparks,* 449 U.S. 24, 27 (1980)).

There are four tests that identify whether a private party acted under color of state law: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020) (quoting *Kirtley*, 326 F.3d at 1092). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." *Id.* (quoting *Kirtley*, 326 F.3d at 1092). "At bottom, the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 748 (quoting *West*, 487 U.S. at 49) (internal quotation marks omitted).

Before answering the question of whether the defendants acted under color of law, courts first "must identify the 'specific conduct of which the plaintiff complains.'" *Id.* at 747 (quoting *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010)). Here, as discussed above, Peterson complains that his First Amendment rights were violated when he was subjected to disciplinary proceedings for advocating for patients rather than participating in the kickback scheme, and that his Due Process rights were violated when he resigned his privileges without knowing about the scheme and was subjected to disciplinary processes marred by fabrication and fraud. The "relevant inquiry" is therefore whether the defendants' roles in initiating and carrying out the disciplinary proceedings and related actions constituted state action. *See id.*

**a. Joint Action**

"[T]he joint action test . . . consider[s] whether 'the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity.'" *Kirtley*, 326 F.3d at 1093 (quoting *Parks Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1486 (9th Cir. 1995)); *see also Rawson*, 975 F.3d at 748 (same). "This occurs when the state knowingly accepts the benefits derived from unconstitutional behavior." *Kirtley*, 326 F.3d at 1093 (quoting *Parks Sch.*, 51 F.3d at 1486).

I previously denied the defendants' motion to dismiss because I found that Peterson plausibly alleged joint action between the defendants and the MBC by pleading that they engaged in an illicit, improper strategy to subject Peterson to the disciplinary powers of the state agency because he refused to accept kickbacks. *See* [Dkt. No. 75] at 12-13. But after discovery, the defendants point to evidence showing that their peer review proceedings were initiated by the defendants to address coverage issues and focus on patient safety,[11] which suggests no role played by and

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[11] *See* [Dkt. Nos. 149-21-24] (letters between Peterson's counsel and defendants' counsel showing that coverage issues led to the inquiries, suspension, and disciplinary hearings); Peterson Depo. 289:14-290:8 (explaining that Peterson and Rich discussed coverage issues on date of resignation, without mentioning MBC); Rich Decl. ¶¶ 25-35 (Rich explaining the initial inquiries and suspension were due to coverage and quality of care issues); [Dkt. Nos. 149-3-5] (letters confirming same, including Peterson confirming the conversations concerned "COVERAGE" issues); Perry Decl. ¶¶ 20-21 (explaining that initial inquiries concerned coverage issues); [Dkt. No. 149-18] (letter confirming same); Stollman Decl. ¶¶ 26-29 (explaining that initial inquiries

no connection with the MBC. There is also no evidence showing that the defendants had any role in the MBC's subsequent investigation besides the initial filing of the statutorily mandated 805 report.[12]

After discovery and the opportunity to depose the defendants and investigate their documents, Peterson has come up with no contradictory evidence sufficient to show a genuine dispute of fact concerning joint action. Rather, his opposition relies almost entirely on the allegations in the Qui Tam Case, *see* Oppo. 15:15-17:4, which are not evidence and cannot create a dispute of fact. He also cites records that he says show that none of the defendants have a disciplinary record, *see id.* 16:20-25, and even if he had not withdrawn some of these records, [Dkt. No. 156], it is unclear how showing the defendants have not been professionally disciplined could create a dispute of fact whether they jointly participated with the MBC to deprive Peterson of his rights. Similarly, noting that a partner at the law firm that represented the defendants is also a member of the MBC, *see* Oppo. 17:5-9; [Dkt. Nos. 154-29, 30], does not create a dispute of fact concerning

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concerned coverage issues); *see also* [Dkt. No. 149-20] at-306 (by-laws requiring physicians to maintain coverage).

[12] *See* Peterson Depo. 303:17-304:17 (Peterson had no information that defendants discussed anything with MBC other than 805 report); Rich Decl. ¶¶ 38-42 (Rich confirming he submitted 805 report as required by law but had no other communication with MBC); [Dkt. Nos. 149-7-8] (letters to Peterson with and about MBC report); Perry Decl. ¶ 25 (no communication with MBC); Stollman Decl. ¶ 33 (no communication with MBC); *see also* Cal. Bus. & Prof. Code § 805(c)(1) (requiring medical peer review bodies to file 805 report within 15 days after licentiate resigns privileges after receiving notice of pending investigation for a medical disciplinary cause or reason).

joint participation, particularly where that attorney apparently did not join the MBC or the law firm until years after the underlying actions in this case, *see* Repl. 10 n.21. Even if I credit Peterson's declaration that Rich submitted a falsified 805 report to the MBC, this is insufficient to show joint action because it does not show that the MBC knowingly accepted benefits derived from any unconstitutional behavior, *see Kirtley*, 326 F.3d at 1093, in part because Peterson concedes that the MBC cleared him of wrongdoing, and in part because it is not clear what benefits the MBC was deriving, *see* Peterson Decl. ¶ 35.

Accordingly, the evidence shows that any injuries were caused by the actions of the defendants alone and the state was not a joint actor; there is no genuine dispute of fact.

**b. Governmental Compulsion or Coercion**

"Governmental compulsion or coercion may exist where the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Rawson*, 975 F.3d at 748 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). "The compulsion test considers whether the coercive influence or 'significant encouragement' of the state effectively converts a private action into a government action." *Kirtley*, 326 F.3d at 1094 (citation omitted).

Peterson argues that the compulsion and coercion tests apply because when he "refused to participate in upcoding, kickbacks[,] or steering," he was subjected to disciplinary proceedings through the MBC. But the MBC did not initiate investigations against compliant doctors. *See* Oppo. 17:20-25. This argument seems to

imply that the MBC coerced *Peterson's* actions, not those of the defendants; indeed it is not clear how these allegations could show that the state compelled, coerced, or encouraged the private actions carried out by the defendants. *See Rawsom*, 975 F.3d at 748; *Kirtley*, 326 F.3d at 1094. Generously, it seems possible that Peterson is arguing that the MBC's general participation in the Medi-Cal/kickback scheme is enough to show it encouraged or compelled the defendants' participation in the scheme, though Peterson does not explain (or point to evidence showing) why the MBC would do that. But even if this established governmental compulsion or coercion—it does not—there is no evidence that the MBC participated in any such scheme, in part because there is no evidence of such a scheme. *Supra* Part I. As addressed, *supra* Part II.A, the evidence shows that the defendants initiated the disciplinary proceedings, but nothing shows that the MBC played a role in the hospital's processes. And while Rich filed the 805 report, there is no evidence that suggests the filing of that report was caused by the coercive power of the MBC as opposed to the procedure required by law. *See* Cal. Bus. & Prof. Code § 805. Indeed, because it is legally required, the Ninth Circuit has suggested that the filing of the 805 report alone is "irrelevant" to addressing whether medical defendants acted under color of state law. *See Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1034 (9th Cir. 1989), *aff'd*, 500 U.S. 322 (1991).

Accordingly, it is not clear how this theory could support Peterson's argument, but it is clear that there is no evidence that genuinely disputes that the defendants acted independently and, with respect to

the 805 report, were merely following the law. This standard is not met.

**c. Governmental Nexus**

Finally, the nexus test is "satisfied where the court finds a sufficiently close nexus between the state and the private actor so that the action of the latter may be fairly treated as that of the State itself." *Rawson*, 975 F.3d at 748 (citation and quotation marks omitted); *see also Kirtley*, 326 F.3d at 1094-95 (same).

Again, Peterson fails to explain why or how this test applies and he cites no evidence in support. *See* Oppo. 17:26-18:7. Merely arguing that there is "a factual issue" concerning whether "the Sutter defendants acted in concert or conspiracy with the MBC members" is insufficient to show a nexus between the MBC conduct and that of the defendants. *Id.* To the extent that Peterson intends to argue that there is a nexus between the MBC's actions and the defendants' actions because both participated in the Medi-Cal and kickback scheme, he again fails to cite any evidence showing that the scheme existed, the defendants participated, or that the scheme caused his injuries.

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For those reasons, there is no genuine dispute of fact suggesting that the defendants acted under color of state law.[13] The motion is GRANTED on this basis.

**III. First Amendment**

Peterson argues that his First Amendment claim is one for retaliation. *See* Oppo. 18:13-17. The defen-

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[13] Peterson does not argue that the public action test applies.

dants assert that even if this claim survives the arguments addressed above, it fails because there is no evidence supporting any elements of the claim.

To prevail on a First Amendment retaliation claim, a plaintiff must show (1) she was engaged in constitutionally protected speech; and (2) there was "a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019)); *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019).[14] "Specifically, a plaintiff must show that the defendant's retaliatory animus was 'a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.'" *Capp*, 940 F.3d at 1053 (quoting *Nieves*, 139 S. Ct. at 1722).

Even if Peterson's First Amendment claim survived the statute of limitations, and even if he showed that the injuries were caused by the defendants acting under color of state law, Peterson's First Amendment claim still fails for many of the same reasons addressed above: he does not point to any evidence supporting his theories of liability. As addressed, he explains his injury as being subjected to disciplinary proceedings for advocating for patients instead of participating in the kickback scheme, and possibly as being precluded from testifying on behalf

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[14] *Capp* requires that, to state a claim, a plaintiff also allege that "the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity." 940 F.3d at 1053. It is not clear this is a required element to *prove* a First Amendment retaliation claim, *see Nieves*, 139 S. Ct. at 1722, but Peterson's claims fail regardless for the reasons addressed in this section.

of Dr. Bonner. *Supra* n.6. If Peterson's patient advocacy constituted protected speech—which I do not find, in large part because it is not entirely clear what "advocacy" he did, due to his failure to point to evidence—the claim fails because he points to no evidence that he participated in "advocacy" activities, *see* Oppo. 18:13-19:17, nor could I find any in the record.[15] And there is no evidence of causation, *see Capp*, 940 F.3d at 1053, because Peterson's own uncontradicted testimony affirms that he did not tell any of the defendants about his advocacy activities before his resignation, *see* Peterson Depo. 288:15-290:25;[16] *see also* Rich Decl. ¶ 43 (confirming he did not know of advocacy activities); Stollman Decl. ¶ 35 (same); Perry Decl. ¶ 26 (same).

If Peterson's First Amendment injury was instead caused by being prohibited from testifying on Bonner's behalf, and even if this constituted protected speech, the claim still fails for lack of evidence of causation. *See Nieves*, 139 S. Ct. at 1722. Peterson provides only general and vague statements about the Bonner testimony. *See* Peterson Decl. ¶¶ 26-27. The allegations in the SAC seem to suggest that Peterson believes the MBC prevented him from testifying at Bonner's

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[15] At the hearing, Peterson's counsel seemed to argue this advocacy was on behalf of patient B.E., but he failed to point to evidence of such advocacy or that this advocacy caused Peterson's injuries.

[16] Peterson's deposition testimony confirms *lack* of causation because it shows that he believed the disciplinary proceedings and his resignation were caused by the coverage issues, not any advocacy activities, and does not suggest he was concerned about informing patients on Medi-Cal of their rights. Peterson Depo. 288:15-290:25.

hearing, though it is not entirely clear why. *See* SAC ¶ 99; *see also id.* ¶¶ 123-24 (MBC retaliated against *Bonner* for certain activities and revoked license), ¶ 124 (Medi-Cal terminated *Bonner*'s provider status), ¶¶ 11, 181, 234 (MBC investigator threatened Peterson with discipline if he testified at Bonner hearing). Of course, the complaint allegations are not evidence and cannot create a dispute of fact, and at any rate there is no evidence connecting the testimony with the defendants as opposed to the MBC, let alone showing the defendants caused the issue. *See Nieves*, 139 S. Ct. at 1722 (requiring a causal connection between the defendant's "animus" and the plaintiff's injury).

Therefore, the First Amendment claim fails because there is no evidence in the record supporting Peterson's theories of his injuries. The motion is GRANTED on this basis.

**IV. Due Process**

Peterson's theory of liability for his Due Process claim is that he did not know of the underlying kickback scheme when he resigned his privileges, so he gave up those rights unknowingly, and that the disciplinary process was unfair because it was marred by fabrication and fraud. *See* Oppo. 19:18-21:26.

To prevail on a due process claim based on deprivation of property, a plaintiff must prove "(1) a property interest protected by the Constitution; (2) a deprivation of the interest by the government; and a (3) lack of required process." *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 974 (9th Cir. 2002) (citing *Portman v. Cnty. of Santa Clara*, 995 F.3d 898, 904 (9th Cir. 1993)).

I previously found that Peterson sufficiently alleged deprivation of a property interest because he plausibly alleged that any waiver of his rights (meaning relinquishment of his property rights) was not done knowingly. [Dkt. No. 75] 13:24-14:3. I will assume without finding that his medical privileges at Sutter were a constitutionally protected property interest. Even if the deprivation of that interest was caused by the government—which I do not find, *supra* Part II—the claim still fails because Peterson points to no evidence that there was a lack of required process. His theory appears to be that there was no process because he did not know about the kickback scheme and so he did not know he was giving up his privileges for unfair reasons. But as addressed, Peterson points to no evidence showing that kickbacks existed, let alone that his refusal to accept them, played any role in the disciplinary proceedings. His theory that he relinquished his rights unknowingly because he did not know of the kickbacks at the time fails because he does not show there were any kickbacks that he could have known about or that affected the proceedings or his decision. His new theory that his consent was vitiated by fraud, *see* Oppo. 21:3-13, fails for similar reasons—he points to no such evidence. Nor is there any evidence that the defendants or even the MBC fabricated anything in the proceedings leading up to or after his resignation, or otherwise failed to give him the required process.

Accordingly, like his other claims, this one too fails for lack of evidence. The motion is GRANTED on this basis.[17]

## CONCLUSION

For the above reasons, the motion is GRANTED. Judgment will be entered accordingly.

**IT IS SO ORDERED.**

Dated: October 6, 2023

/s/ William H. Orrick
United States District Judge

[17] Because I grant the defendants' motion for summary judgment on the above grounds, I need not address their argument concerning specific intent under § 1983 or whether they are a separate entity from the medical staff. *See* Mot. 23:11-24:19.

**JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (OCTOBER 6, 2023)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH PETERSON, M.D.,

*Plaintiff,*

v.

SUTTER MEDICAL FOUNDATION, ET AL.,

*Defendants.*

Case No. 3:21-cv-04908-WHO

Re: Dkt. No. 149

Before: William H. ORRICK,
United States District Judge.

**JUDGMENT IN A CIVIL CASE**

Pursuant to the Order Granting Motion for Summary Judgment, Judgment is accordingly entered.

Mark B. Busby
Clerk

By: Jean M. Davis
Deputy Clerk

Dated: October 6, 2023

**ORDER GRANTING MOTION TO DISMISS AND GRANTING ANTI-SLAPP MOTION, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JULY 20, 2022)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH PETERSON, M.D.,

*Plaintiff,*

v.

SUTTER MEDICAL FOUNDATION, ET AL.,

*Defendants.*

Case No. 3:21-cv-04908-WHO

Re: Dkt. Nos. 79, 80, 81, 82

Before: William H. ORRICK,
United States District Judge.

**ORDER ON MOTIONS TO DISMISS AND STRIKE, AND SETTING CASE MANAGEMENT CONFERENCE**

Plaintiff Ralph Peterson alleges that various defendants associated with the Medical Board of California ("MBC") and Sutter network of healthcare providers took several unlawful acts against him,

including subjecting him to a peer-review and disciplinary proceeding. The remaining defendants move to dismiss or strike the claims. The MBC board members are dismissed from the suit due to personal immunity doctrines, the suit may proceed against the Sutter-associated defendants and doctors who carried out the peer-review only on claims for First Amendment and due process violations, and the anti-SLAPP motion is granted.

## BACKGROUND

### I. Factual Background

#### A. The Parties

Peterson is a medical doctor who lives and works in Oakland, California. Second Amended Complaint ("SAC") [Dkt. No. 78] 112. He has practiced medicine since 1983. *Id.* ¶ *57.*

Three groups of defendants are relevant to the current motions. The "MBC Defendants" are Kristina Lawson, Howard Krauss, Randy Hawkins, Richard Fantozzi, Dev Gnanadev, Ronald Lewis, Laurie Rose Lubiano, Asif Mahmood, Richard Thorp, and Felix Yip. All were or are members of the MBC, the state's medical licensure agency. *Id.* ¶¶ 11-22. The "Sutter

Defendants" are Sutter Bay Medical Foundation ("Sutter Bay") and Sutter Bay Hospitals d/b/a Alta Bates Summit Medical Center ("Alta Bates"). *Id.* ¶¶ 3-5. The "Doctor Defendants" are Neil Stollman, Rod Perry, and Philip Rich, physicians associated with the Sutter Defendants. *See id.* ¶¶ 7-10.

From 1999 to 2009, Peterson had endoscopy privileges at Alta Bates. *Id.* ¶ 58.

### B. The Medical Strategy

Peterson alleges that Sutter employs something called the MediCal Strategy. According to him, Sutter Bay "monopolizes and controls healthcare and medical discipline in Northern California." *Id.* ¶ 30. It does this in part, he alleges, through having 24 hospitals with tens of thousands of employees. *Id.* But, he claims, it also uses "unlawful strategies" to maintain its position. *Id.* ¶ 31. The MediCal Strategy, he alleges, has several parts. First, the Sutter Defendants perform only "profitable procedures" while "steering" less profitable ones to county medical facilities. *Id.* ¶ 34. Then, it uses the revenue to pay kickbacks and acquire new medical practices. *Id.* ¶ 35. He alleges that it uses "medical discipline" to control referrals and acquisitions of medical practices by other practices to punish non-cooperating physicians. *Id.* ¶ 32. And, he says, it is able to do so by placing cooperating physicians and attorneys on the MBC and on the panels that review other physicians. *Id.* ¶ 33.

One way by which the Sutter Defendants carry out this alleged strategy is through connections between the MBC and the law firm Hanson Bridgett LLP. Hanson Bridgett allegedly represents Sutter in some matters and Lawson is an attorney there. *See id.* ¶ 43. Later, Hanson Bridgett would represent Sutter and other defendants in a state-court suit that Peterson filed. *Id.* ¶ 101.

### C. The Peer Review and MBC Proceeding

In February 2009, Doctor Defendants Perry and Stollman "ordered" Peterson to "appear at Alta Bates without explanation." *Id.* ¶ 63. Despite Peterson's demands, they refused to grant him a "formal" meeting

under the Health Care Quality Improvements Act about any allegations against him and refused to provide him a notice of the allegations. *Id.* ¶ 64. Ten days after that first "order," Perry "ordered" Peterson to increase his "call coverage" or pay a fee to Stollman. *Id.* ¶ 65. The next month, Peterson requested more call coverage from Stollman, but Stollman refused unless he was paid an "unreasonable fee." *Id.* ¶ 67. The next day, Doctor Defendant Rich ordered Peterson to resign his privileges at Alta Bates due to "failure to obtain additional call coverage." *Id.* ¶ 68 (internal quotation marks omitted).

Peterson refused. *Id.* ¶ 69. He also refused to "steer" unprofitable indigent clients and MediCal patients to the county medical facility. *Id.* He alleges that his privileges were summarily suspended without a complaint, investigation, or hearing. *Id.* ¶ 70. He says that, five days later, the privileges were "constructively terminated" because he was forced to resign under threat of a peer review proceeding and MBC discipline. *Id.*

Two days later, Sutter Bay transmitted a "form 805," also called an "adverse action report," to a national database of medical practitioners and the MBC. *Id.* ¶ 72. In November 2009, the MBC opened an investigation into the allegations of the form 805. *Id.* ¶ 76.

In 2010, a longtime patient of Peterson's (referred to in the complaint as "B.E.") filed a complaint against Peterson with the MBC that he calls "unfounded." *Id.* ¶ 87. According to Peterson, Sutter "encouraged and participated in the filing." *Id.* On his telling, the complaint resulted from B.E. not attending a series of cardiologist appointments that Peterson arranged for

her. *See id.* ¶¶ 81-82. She then had an "ischemic attack" resulting from blockage in an artery for which she went to Sutter Bay for care. *Id.* ¶ 83. Peterson alleges that Sutter "steered" B.E. to a county facility in line with the MediCal Strategy and failed to treat her. *Id.* She later suffered a stroke, treated by Sutter, and complaint about Peterson. *Id.* ¶¶ 85-97. MBC ultimately determined that there were "no quality of care issues" in Peterson's treatment of B.E. in July 2013. *Id.* ¶ 111. But it did not disclose that to Peterson at the time. *Id.* A state-court suit brought by B.E.'s conservator was also determined in Peterson's favor. *Id.* ¶ 113. In December 2013, however, Peterson was told by the MBC that he did not maintain adequate records regarding B.E. *Id.* ¶ 117.

In November 2012, Peterson filed an action in California state court against Perry and Stollman for alleged misuse of the disciplinary process. *Id.* ¶ 98. The trial court and Court of Appeal found against Peterson. *Id.* ¶ 133. In July 2013, Peterson (represented by counsel) agreed to a settlement with the MBC under which he surrendered his medical privileges and license. *See id.* ¶ 210.

Peterson alleges that, as a result of all this, he was repeatedly denied provider status at various healthcare facilities and that others declined to partner with him to provide care, in part because various defendants communicated that he had been disciplined. *See, e.g., id.* ¶¶ 103, 110, 114, 136.

**D. Attorney General Investigations**

Starting in 2013, Sutter was investigated by the California Attorney General for, as the complaint characterizes it, paying kickbacks to compliant phy-

sicians in line with the MediCal Strategy. *Id.* ¶ 102. Peterson learned of this from a television program in December 2020. *Id.* ¶ 109. Public reporting indicates that Sutter paid $30 million to settle a resulting lawsuit. *Id.* ¶ 148. The Attorney General's office stated that Sutter had been giving physicians kickbacks. *Id.* ¶ 149.

The California Attorney General also at some point investigated the MBC for—again, as the complaint puts it—discrimination against Black and Hispanic physicians. *Id.* ¶ 102.

## II. Procedural Background

Peterson filed this suit in June 2021. *See* Dkt. No. 1. In February 2022, I granted in part and denied in part motions to dismiss the complaint. *See* Dkt. No. 75. I dismissed the State of California and the MBC itself from suit. I also dismissed all of the state-law claims against the MBC Defendants with prejudice. Some other claims survived and some claims were dismissed with leave to amend, as discussed in more detail in the body of this Order.

Now, the SAC includes the following claims against all defendants: (1) violation of the First Amendment, (2) violation of the Due Process Clause, (3) what Peterson labels "protected class" discrimination under federal law, and (4) failure to prevent discrimination and retaliation under federal law. Peterson alleges the following claims only against the Sutter Defendants: (5) federal antitrust interference, (6) violation of federal antitrust laws, (7) breach of contract, (8) breach of the covenant of good faith and fair dealing, (9) negligence, (10) intentional interference with current and prospective contractual relationships,

(11) business disparagement, (12) intentional infliction of emotional distress, (13) negligent infliction of emotional distress, (14) violation of the Unfair Competition Law, and (15) violation of the Unruh Civil Rights Act.

## LEGAL STANDARD

### I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) is a challenge to the court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. of Am.,* 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *Id.*

A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman,* 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are insufficient "on their face" to invoke federal jurisdiction. *See Safe Air Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inference in favor of the party opposing dismissal. *See Wolfe,* 392 F.3d at 362.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air,* 373 F.3d at 1039. To resolve this challenge, the court "need not presume the truthfulness of the plaintiffs allegations." *Id.* (citation omitted). Instead, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* (citations omitted). Once the moving party has made a factual challenge by offering affidavits or other evidence to dispute the allegations in the complaint, the party opposing the motion must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989); *see also Savage v. Glendale Union High Sch. Dist. No. 205,* 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

## II. Motion to Dismiss for Failure to State a Claim

Under FRCP 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. lqbal,* 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require

"heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly,* 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1055 (9th Cir. 2008).

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *See Moore v. Kayport Package Express,* 885 F.2d 531, 538 (9th Cir. 1989).

**III. Anti-Slapp Motion**

California Code of Civil Procedure § 425.16 "was enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." *Metabolife Intl, Inc. v. Wornick,* 264 F.3d 832, 839 (9th Cir. 2001).

These lawsuits are also known as "Strategic Lawsuits Against Public Participation," or "SLAPPs." *Makaeff v.*

*Trump Univ.,* LLC, 715 F.3d 254, 261 (9th Cir. 2013). Under Section 425.16, a party may file an "anti-SLAPP motion" to strike "a cause of action based on an act in furtherance of [the] right to petition or free speech." *Metabolife,* 264 F.3d at 840 (internal quotations omitted).

In ruling on an anti-SLAPP motion, a court engages in a two-step process. *Equilon Enterprises v. Consumer Cause, Inc.,* 29 Cal. 4th 53, 67 (2002). At step one, the court assesses whether the moving party has made "a prima facie showing that the lawsuit arises from an act in furtherance of its First Amendment right to free speech." *Nat'l Abortion Federation v. Center for Medical Progress,* Case No. 15-cv-03522-WHO, 2015 WL 5071977, at *3 (N.D. Cal. Aug. 27, 2015). At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. I f the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. *Baral v. Schnitt,* 1 Cal. 5th 376, 398 (2016).

If the moving party can establish step one, the burden shifts to the non-moving party which must then show a reasonable probability that it will prevail on its claim. *Makaeff,* 715 F.3d at 261. "For a plaintiff to establish a probability of prevailing on a claim, he must satisfy a standard comparable to that used on a

motion for judgment as a matter of law." *Price v. Stossel,* 620 F.3d 992, 1000 (9th Cir. 2010). This standard requires that a claim be dismissed if the plaintiff presents an insufficient legal basis, or if no reasonable jury would find in its favor. *Metabolife,* 264 F.3d at 840; *see also Price,* 620 F.3d at 1000 (an anti-SLAPP motion will be granted if the plaintiff "presents an insufficient legal basis for the claims or when no evidence of sufficient substantiality exists to support a judgment for the plaintiff") (internal quotations omitted). But when the step-two analysis depends on the defendant's assertion that a privilege applies, the defendant bears the burden of establishing it. *See Mandel v. Hafermann,* 503 F. Supp. 3d 946, 963-64 (N.D. Cal. 2020) (collecting authorities).

## DISCUSSION

### I. MBC Defendants' Motion

The MBC Defendants move to dismiss the claims against them because (1) they are entitled to absolute personal immunity and (2) the claims are inadequately pleaded. *See* Dkt. No. 79 ("MBC Mot.").[1] I agree with them that they are entitled to prosecutorial or quasi-judicial immunity (so there is no need to address the adequacy of the claims).

All of the claims against the MBC Defendants in the SAC are brought under 42 U.S.C. § 1983 for

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[1] The MBC Defendants also argued that any claims for damages against them in their official capacities are barred by sovereign immunity. MBC Mot. 8-9. Peterson clarified in his Opposition that the damages claims are against them in their individual capacities, *see* Dkt. No. 94 at 10, and the MBC Defendants accept that characterization in their Reply, *see* Dkt. No. 98 at 1 n.1.

alleged violations of Peterson's federal constitutional or statutory rights. *See* SAC ¶¶ 165-269. As a general matter, Section 1983 imposes tort-like liability on individuals acting under color of state law who deprive others of federal constitutional or statutory rights. The Supreme Court has held that state officials are absolutely immune from suit "if they perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability." *Buckwalter v. Nevada Bd. of Med. Examiners,* 678 F.3d 737, 740 (9th Cir. 2012), *as amended* (June 8, 2012) (internal quotation marks and citations omitted). Relevant here, "[t]he paradigmatic functions giving rise to absolute immunity are those of judges and prosecutors." *Id.* The Supreme Court and Ninth Circuit have extended these immunities to certain administrative proceedings and regulatory agencies. *See Butz v. Economou,* 438 U.S. 478, 515 (1978) (extending prosecutorial immunity to agency enforcement action); *Mishler v. Clift,* 191 F.3d 998, 1007 (9th Cir. 1999) (extending quasi-judicial immunity to state medical board).

"[I]mmunity decisions are based on the nature of the function performed, not the identity of the actor who performed it." *Milstein v. Cooley,* 257 F.3d 1004, 1008 (9th Cir. 2001) (internal quotation marks and citations omitted). Accordingly, the Ninth Circuit has "held that members of state medical boards are functionally comparable to judges and thus entitled to absolute immunity for their quasi-judicial acts." *Buckwalter,* 678 F.3d at 740 (internal quotation marks and citation omitted). But, as with all such decisions, "immunity reaches only those actions that

are judicial or closely associated with the judicial process." *Id.* To make that determination, courts examine a set of factors:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; **(b)** the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

*Cleavinger v. Saxner,* 474 U.S. 193, 202 (1985). And prosecutorial immunity is based on the "same considerations." *Imbler v. Pachtman,* 424 U.S. 409, 422-23 (1976).

All of the alleged acts for which Peterson seeks to impose liability are quasi-judicial or prosecutorial in nature. To start, the MBC is a quasi-judicial organ; if its judicial and prosecutorial acts fall within the scope of the immunity, they are protected. The Ninth Circuit has reached this conclusion about similar medical boards in other states. *See Buckwalter,* 678 F.3d at 740; *Olsen v. Idaho State Bd. of Med.,* 363 F.3d 916, 925 (9th Cir. 2004). Neither party has pointed to any feature of the MBC that would meaningfully distinguish it from these boards, so the relevant factors point in that direction. And federal district courts in California have repeatedly found that the MBC can qualify; I am unaware of any decision to the contrary (and Peterson does not point to any). *See Bonner v. Med. Bd. of California,* No. 2:17-CV-00445-

KJM-DB, 2019 WL 3767480, at *7 (E.D. Cal. Aug. 9, 2019) (collecting cases).

As explained, however, the question is whether a particular act qualifies for immunity. Here, the alleged acts do. Peterson's First Amendment claim is based on the MBC's investigation into him, its evaluation of the complaint against him, the resulting official cases opened against him, and the public record created of the result of those cases. *See* SAC ¶¶ 165-89. The due process claim is based on the same things. *See id.* ¶¶ 190-243. The third claim is for, as Peterson puts it, "protected class discrimination" and appears to actually be predicated on multiple causes of action: the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, and unnamed "other related state and federal statutes, rules and regulations." *Id.* ¶ 254.[2] Those claims are a little more difficult to parse. But, when it comes to liability against the MBC Defendants, the claim appears to be limited to several of them allegedly "failing to investigate and/or impose discipline on physicians that they knew participated in the MediCal fraud." *Id.* ¶ *252.* And the failure-to-prevent-discrimination and-retaliation claim is likewise somewhat unclear but could either be read to be based on manipulation of the MBC disciplinary process resulting in discrimination against Peterson or on the "protected class" of his low-income patients.

As the Ninth Circuit has explained when evaluating claims against medical board members, "[t]here is no question that acts occurring during the

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[2] Of course, Peterson is required to actually state the legal basis of his claims, so I treat this one as being based on the Fourteenth Amendment and Title VII as no others are listed with specificity.

disciplinary hearing process fall within the scope of absolute immunity." *Mishler,* 191 F.3d at 1008. Similarly, "filing charges and initiating" a disciplinary complaint are protected. *Id.* Here, all of the alleged acts that harmed Peterson and would create liability are sufficiently closely associated with the judicial and prosecutorial process to be entitled to immunity. Those acts, boiled down, are either carrying out investigations in response to complaints, carrying out adjudicatory disciplinary proceedings, creating the required public record of these proceedings, or (reading the complaint liberally) declining to carry out disciplinary proceedings. None of these are merely "ministerial" or are separate from the quasi-judicial process.

Peterson's curt response to this argument is somewhat difficult to parse. It appears that he first argues that "fraud" is not entitled to immunity, by which he appears to mean the MediCal Strategy itself. *See* Dkt. No. 94 ("MBC Oppo.") 12. There are several layers of problems. To start, this is not a criminal prosecution or a citizen-suit in which Peterson is seeking to vindicate the public's interest in preventing these alleged activities. This is a suit about specific alleged violations of rights; those violations are, no doubt, alleged to be related to the MediCal strategy, but one is not the other. This aside, paying kickbacks and steering procedures—the MediCal Strategy—are not alleged to have been done by the MBC Defendants. The MBC Defendants' role, Peterson alleges, was in using its official disciplinary process. And even if Peterson's argument is that the MBC disciplinary process was tainted, the question for purposes of immunity is not whether they are alleged to have

behaved wrongly in that disciplinary process—if it were, the immunity doctrines would mean nothing because the inquiry would always be on the merits. The point of the immunity doctrines is, instead, that there are other avenues to ensure proper process in the MBC aside from private damages actions. Finally, I note that this is not a case in which Peterson has pointed to some discrete act, such as filing a false probable cause statement, that plausibly falls outside of the grant of immunity. *See Kalina v. Fletcher,* 522 U.S. 118, 123 (1997). Though one sentence of his opposition references "false declarations, fraudulent settlements, [and] fabricated investigations," it appears that is just a rhetorical way of discussing the allegations just addressed. MBC Oppo. 13.

At the hearing, for the first time, Peterson's counsel offered a series of aspects of the MBC that, he argues, mean its members cannot receive immunity for their judicial or prosecutorial acts. Peterson first points to allegations by a former MBC member of preferential treatment, *see, e.g.,* SAC ¶ 161, but those are far from allegations, as Peterson characterized them at the hearing, of "harassment" or "intimidation" sufficient to allege that the MBC does not operate in a quasi-judicial way. He also argued that there were insufficient safeguards and insulation in place, but it is undisputed that half of the MBC are non-physician members, that the attorney general must bring enforcement actions, and that the MBC's acts are subject to judicial review, so it is unclear what sort of additional structural safeguards Peterson believes are necessary to confer judicial immunity. *See Bonner,* 2019 WL 3767480, at *7 (discussing these and other structural features of the MBC); *cf. Olsen,* 363 F.3d at

925 (discussing similar features of the Idaho medical board conferring immunity).

The motion to dismiss the claims against the MBC Defendants is GRANTED WITH PREJUDICE. Any attempt to amend these claims would be futile.

## II. Sutter Defendants' Motions

The Sutter Defendants move to dismiss all claims against them and move to strike the state-law claims under California's anti-SLAPP law. They argue that (1) the federal civil rights claims fail because they were not acting under color of state law, (2) the due process claim fails because there is no cognizable loss of a property interest as Peterson voluntarily resigned his medical license, (3) most of the claims are time-barred, (4) the antitrust claims are not actionable, and (5) the state-law claims are protected by the litigation privilege. *See* Dkt. No. 80 ("Sutter Mot"); Dkt. No. 82 ("Strike Mot.").

### A. Under Color of Law

Section 1983 applies only to those who deprive others of federal rights "under color of law." The Sutter Defendants argue that they were not acting under color of law and, so, cannot be liable. *See id.* 9-12.

As an initial matter, Peterson argues that I cannot consider this argument under Federal Rule of Civil Procedure 12(g)(2), which states that, "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." While it is true that the Sutter

Defendants failed to raise this argument in their first motion to dismiss (and were able to do so) and this rule generally would bar them from raising it now, I will still consider it. If I did not, they would be able to file an answer and then immediately move for judgment on the pleadings on this basis under Rule 12(c). In these circumstances, the Ninth Circuit has explained that district courts have discretion to address the issue to avoid this unnecessary burden and delay, which I exercise here. *In re Apple iPhone Antitrust Litig.,* 846 F.3d 313, 318-19 (9th Cir. 2017).

Generally, private (that is, non-governmental) actors are not subject to Section 1983 liability. *Kirtley v. Rainey,* 326 F.3d 1088, 1092 (9th Cir. 2003). But "[w]hat is fairly attributable as State action is a matter of normative judgment, and the criteria lack rigid simplicity." *Lee v. Katz,* 276 F.3d 550, 554 (9th Cir. 2002) (internal quotation marks and citation omitted). There are "at least four" different criteria that can establish state action by private actors. *Kirtley,* 326 F.3d at 1092. The parties here argue over all of them, but there is no need to assess all four because I conclude that Peterson has plausibly alleged—which is all he needs to do that this stage—that the "joint action" doctrine applies.

"Under the joint action test, we consider whether the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity. This occurs when the state knowingly accepts the benefits derived from unconstitutional behavior." *Id.* at 1093. Here, Peterson alleges that Sutter improperly influenced the MBC such that the two worked in concert to help carry out the MediCal

Strategy—in particular that the MBC used its disciplinary powers as one of the ways that Sutter could enforce compliance from physicians. That is sufficient to connect Sutter to state action.

To resist this, the Sutter Defendants primarily rely on *Pinhas v. Summit Health, Ltd.,* 894 F.2d 1024 (9th Cir. 1989), *aff'd,* 500 U.S. 322 (1991). There, the Ninth Circuit held that the doctors who carried out peer-review proceedings were not joint actors with the state merely because they did so under tight regulations from the state. *Pinhas,* 894 F.2d at 1034. The allegations here, however, draw a much closer nexus between the state and the Sutter Defendants because they allege that the MBC (a state agency) engaged in an illicit or improper strategy with the private entities using its governmental powers.

**B. Loss of Property Interest**

The Sutter Defendants argue that Peterson has not alleged that he was deprived of a cognizable property interest and, so, has not adequately alleged a due-process violation. Sutter Mot. 12-13.[3] I disagree.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amdt. 14 § 1. The alleged deprivation here, Peterson argues, is his "medical privileges and license to practice medicine." Sutter Oppo. 16. To successfully plead a due-process claim, he would need to adequately allege that (1) these qualified as a

[3] Peterson again argues that this argument should be ignored under Rule 12(g)(2). Sutter Oppo. 16. For the reasons stated earlier, I will consider it now. *See supra* Section II.A.

property interest protected by the Constitution, (2) there was a deprivation by the government, and (3) there was a lack of required process. *Ulrich v. City & Cnty. of San Francisco,* 308 F.3d 968, 974 (9th Cir. 2002). But there was no deprivation here, the Sutter Defendants assert, because Peterson voluntarily resigned his medical privileges and license while represented by counsel and after admitting the MBC could prove a prima facie case against him.

I find there is a plausible deprivation of a property interest here. Neither party has pointed to any caselaw on this issue—that is, on whether a voluntary agreement to give up an interest in these circumstances can count as a deprivation. But even though Peterson's actions were apparently voluntary, he alleges that they were not knowing. When the MBC was carrying out its investigation and adjudication, he claims, it did so with improper motives that were concealed from him. In other areas of law, including those involving constitutional rights and property interests, important relinquishments of rights must often be done knowingly. *See, e.g., Oum v. Lewis,* 166 F.3d 343 (9th Cir. 1998) *(Miranda* rights); *lbarra-Flores v. Gonzales,* 439 F.3d 614, 620 (9th Cir. 2006) (agreement to accept voluntary departure in removal proceedings); *Colaco v. Asic Advantage Simplified Emp. Pension Plan,* No. 5:13-CV-00972-PSG, 2015 WL 5655465, at *6 (N.D. Cal. Sept. 24, 2015) (ERISA waivers). It would be a strange outcome for the government to be able to conceal facts during an investigation, for the subject of that investigation choosing to give up a property interest due to that unknowingly tainted investigation, and for that subject to then be barred from challenging it because he did

so unknowingly but voluntarily. In the absence of any authority from the Sutter Defendants, I will not so hold today. This issue may be reexamined with more complete briefing.

### C. Statute of Limitations

I previously found that the discrimination-based federal claims, the antitrust claims, and some of the state-law claims were time-barred but that the First Amendment, due process, and several state law claims were not. *Peterson v. Sutter Med. Found.,* No. 3:21-CV-04908-WHO, 2022 WL 316677, at *13—*14 (N.D. Cal. Feb. 2, 2022) ("Prior Order"). But I granted leave to amend so that Peterson could add allegations about whether accrual was delayed or the statute of limitations tolled. *See id.*

#### i. Discrimination Claims

I previously held that the two federal discrimination claims and the Unruh Act were time-barred on the face of the complaint and not saved by the discovery rule or a tolling doctrine. As I explained, "the events that make up the core of this case occurred from 2009 to 2013" and the relevant statute of limitations was two years from "when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Id., at *11* (internal quotation marks and citations omitted); *see also id., at *14* (addressing Unruh Act claim). But I gave Peterson leave to amend.

Now, Peterson relies on, as best I understand it, the continuing violation doctrine. Though he does not use that term and he cites no cases—about that doctrine or any other—that is the gist of his argument,

so I address it under that rubric. The continuing violation doctrine holds that "a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Williams v. Owens-Illinois, Inc.,* 665 F.2d 918, 924 (9th Cir. 1982), *as modified on denial of reh'g,* No. 79-4110, 1982 WL 308873 (9th Cir. June 11, 1982). But "continuing impact from past violations is not actionable. Continuing violations are." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit has "recognized two applications of the continuing violations doctrine: first, to a series of related acts, one or more of which falls within the limitations period, and second, to the maintenance of a discriminatory system both before and during the limitations period." *Bird v. Dep't of Hum. Servs.,* 935 F.3d 738, 746 (9th Cir. 2019) (internal quotation marks, alteration, and citation omitted).

Peterson has not alleged any discriminatory violations against him that happened within the limitations period. First, he relies on the fact that the public record of his disciplinary investigation remained up on the MBC website. Sutter Oppo. 17-18. That is best conceptualized not as a "new violation" but instead as the "continuing impact" from the past violation of the disciplinary proceeding, which is insufficient. *Williams,* 665 F.2d at 924. Next, he relies on various "warnings" given to other healthcare companies and prospective physician partners about the disciplinary problems. Sutter Oppo. 17-18. The paragraphs of the complaint that mention these "warnings" discuss them only in the most conclusory terms. To plead an act within the limitations period, he needed to allege what it was. Here, though, he

merely states that unidentified warnings from unidentified individuals occurred "though 2021," which is insufficient. *See* SAC ¶ 171. And it is, in any event, difficult to see how true warnings about the existence of a disciplinary proceeding (even if the proceeding itself was improper) are actionable as discriminatory. Last, Peterson relies on the alleged continued existence of the MediCal strategy itself. Sutter Oppo. 17-18. But the harms he is suing over occurred (allegedly) as a result of the MediCal strategy culminating in him losing his license. He has not identified any invasion of a legally protected interest *of his* inside the limitations period.

**ii. Antitrust Claims**

**I** previously dismissed with leave to amend the antitrust claims as time-barred against the Sutter Defendants. *See* Prior Order, at *13 ("As discussed in section I.C.iii.2 above concerning the MBC Defendants, the federal antitrust claims are subject to a somewhat different analysis based on antitrust-specific accrual rules. And for the reasons explained there, the antitrust claims against the Sutter Defendants are also dismissed as time-barred."). The Sutter Defendants again move to dismiss. Sutter Mot. 15-17. Peterson's only response is, oddly, that those claims "survived the first motion to dismiss," Sutter Oppo. 19, which is not accurate. Peterson makes no substantive argument that he has adequately pleaded delayed discovery or tolling this time around.

**D. State-Law Claims**

The Sutter Defendants move to strike the state-law claims under the anti-SLAPP law; they also move

to dismiss those claims under Rule 12(b)(6) for overlapping reasons. *See generally* Strike Mot.; *see also* Sutter Mot. 21-25.[4]

**i. Timeliness**

As an initial matter, Peterson argues that the anti-SLAPP motion should be denied as untimely because California law provides that an anti-SLAPP motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Cal. Civ. P. Code § 425.16(0. But the Ninth Circuit has held that this requirement does not apply in federal court and, instead, the timelines for bringing motions under the Federal Rules of Civil Procedure govern. *Sarver v. Chartier,* 813 F.3d 891, 900 (9th Cir. 2016).

**ii. Prong One**

As noted, at prong one of the anti-SLAPP analysis, the defendants must make a prima facie showing that the speech is protected. Here, the speech and communications that form the basis of the state-law claims are protected.

First, most of the underlying speech is protected by California-law privileges. When statements are made in connection with official proceedings under the state-law immunity or when they are shielded by the litigation privilege, they are protected speech for anti-SLAPP purposes. *See* Cal. Civ. P. Code § 425.16(e); *Briggs v. Eden Council for Hope & Opportunity,* 19 Cal. 4th 1106, 1115 (1999). California Civil Code

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[4] The Sutter Defendants also argue that some of the state-law claims are time-barred. There is no need to address that argument.

§ 47(b) privileges any "publication or broadcast" made, as relevant here, "[i]n any . . . judicial proceeding [or] in any other official proceeding authorized by law." The privilege is to be given "broad application." *Moore v. Conlif fe,* 7 Cal. 4th 634, 641 (1994) (internal quotation marks and citation omitted). It applies to "any communication" and to "all torts except malicious prosecution." *Id.* And it applies to those communications even if they are outside of the proceedings so long as they are made "to achieve the objects of the litigation." *Id.* California Business and Professions Code § 805 requires, as a general matter, reporting physician disciplinary action to the MBC. When a person's speech is made "in connection with issues considered in such proceedings—such as criticism of a doctor's competence supplied to a body reviewing his or her hospital privileges," those statements are "protected activity under the anti-SLAPP law" and cannot be subject to liability. *Bonni v. St. Joseph Health Sys., 11* Cal. 5th 995, 1016 (2021).

Most of the statements for which Peterson would impose liability on the Sutter Defendants are shielded by one or both of these protections. To the extent liability would attach for the peer review proceeding itself, or any statement made in the course of it, that is protected from a later civil suit. *See Moore,* 7 Cal. 4th at 641. So too with the reporting, required by law, of the discipline to the MBC. *Bonni, 11* Cal. 5th at 1016. It appears that Peterson also takes issue with filings made in his suit against Stollman and Perry. But those are communications made in the course of litigation; if they were indeed false, the remedy was to be sought in that litigation or through perjury charges, not through this federal suit. Cal. Civ. Code.

§ 47(b). And Peterson also alleges that the Sutter Defendants "encouraged" the filing of the complaint against him with the MBC but the litigation privilege "applies to a communication intended to prompt an administrative agency charged with enforcing the law to investigate or remedy a wrongdoing." *Hagberg v. California Fed. Bank,* 32 Cal. 4th 350, 362 (2004).

To resist this, Peterson argues that his state-law claims do not seek to impose liability for the communications but instead that "the core of the case is Sutter's MediCal fraud scheme which includes the kickbacks, up-coding, diversion of profitable procedure to Sutter facilities which reduces the pool of Medical funds available for the indigent population served by Dr. Peterson, and the targeting of noncompliant physicians." Sutter Oppo. 24. And *those* acts, he argues, are not "communications" protected by the privilege. *Id.* As I explained in an earlier section of this Order, however, although the MediCal Strategy allegedly supplied a motive, *liability* would attach for the communications. Peterson's state-law claims all allege that the harm to him is due to the communications. While the federal antitrust claims do challenge other behavior, the state-law claims do not.

The alleged defamatory publication of falsehoods is not protected by these same principles, but the speech on which the claims are based is nonetheless still protected under prong one. Peterson, again, alleges that the Sutter Defendants falsely told other healthcare-related entities and individuals about his disciplinary records. Those communications were not made as part of litigation or to further its objects—indeed the official proceedings had long since fmished—so they cannot be protected by that privilege. Nor are

they protected by the medical-reporting immunity because, again, the reports had already been issued and the defendants were not communicating information *to the MBC. Bonni, 11* Cal. 5th at 1016. These statements are, however, still protected speech for purposes of prong one because they satisfy the catchall prong of the anti-SLAPP statute, which protects "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. P. Code § 425.16(e)(4). These statements qualify under this provision because the basis of these statements are "the qualifications, competence, and professional ethics of a licensed physician," which "implicate[]" the public interest for antiSLAPP purposes. *Yang v. Tenet Healthcare Inc.,* 48 Cal. App. 5th 939, 947 (2020).

Peterson replies that the anti-SLAPP statute does not protect the speech here because it does not apply to criminal conduct that is not protected by the First Amendment. *Flatley v. Mauro,* 39 Cal. 4th 299, 328 (2006). As I have explained, however, Peterson is not bringing some sort of citizen suit against the kickbacks. These state-law claims are about discrete communications by the Sutter Defendants. Peterson has made no colorable argument that those statements are themselves criminal.

**iii. Prong Two**

At the second prong, I ask whether Peterson has shown a sufficient probability of prevailing on the merits as a matter of law. *Mindys Cosms., Inc. v. Dakar,* 611 F.3d 590, 599 (9th Cir. 2010).

When it comes to the statements and communications shielded by state-law privileges or immunities, Peterson cannot show any probability on the merits. For the reasons above and incorporated here, those statements cannot create liability as a matter of law because the privileges discussed are an absolute bar to liability. *See Moore,* 7 Cal. 4th at 641; *Bonni, 11* Cal. 5th at 1016.[5]

Peterson has also not shown the "minimal merit," *Mindys,* 611 F.3d at 599, needed when it comes to the other statements—the alleged defamation to third parties that survived the motion to dismiss. As noted, I disagree with the Sutter Defendants that these statements fall within the privileges. The Sutter Defendants offer two reasons those claims are meritless separate from the other claims: that **(1)** the communications to others about Peterson are true and (2) there are no allegations supporting a finding of actual malice. *See* Strike Mot. 12-15. Peterson's opposition does not respond to these arguments at all, despite addressing other ones. *See* Dkt. No. 93 ("Strike Oppo."). The burden was his to show that the claims had merit. *Mindys,* 611 F.3d at 599. And, in the absence of any argument to the contrary, the Sutter Defendants' argument that the statements are substantially true and, therefore, cannot result in defamation or trade libel liability appears correct. *See, e.g., Campanelli v. Regents of Univ. of California,* 44 Cal. App. 4th 572, 582 (1996) (holding that substantial truth is an absolute defense to defamation liability). Accordingly, Peterson has

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[5] This would also require dismissal under Rule 12(b)(6) because the Sutter Defendants make the same argument in that motion.

failed to show any probability of success on these claims because they would fail as a matter of law.

### E. Sutter Defendants Conclusion

The First Amendment and due process claims again survive the motion to dismiss. The federal discrimination claims, Unruh Act claim, and antitrust claims are dismissed as time-barred. Because this is the second time I have dismissed them on this basis and is the third version of the complaint—and because Peterson has not identified any other allegations he could plead to make them timely—dismissal is without leave to amend. The state-law claims are struck under the antiSLAPP law.

## III. Doctor Defendants' Motion

Many of the grounds for dismissal that the Doctor Defendants put forward mirror those the Sutter Defendants put forward. *Compare* Dkt. No. 81 ("Doctor Mot"), *with* Sutter Mot. The plaintiffs' counterarguments do not raise any different issues. *Compare* Dkt. No. 96 ("Doctor Oppo."), *with* Sutter Oppo. Accordingly, I reach the same conclusion about those issues. *See supra* Section II. I find that the federal discrimination claims are time-barred. I reject the argument that the federal civil rights claims must fail because the defendants were not acting under color of state law.[6] And I reject the argument, at least for now, that Peterson has not pleaded a deprivation of property for due process purposes.

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[6] The Doctor Defendants are alleged to have worked in concert with the Sutter Defendants and MBC, so the joint-action analysis applies equally to them as to the Sutter Defendants.

The Doctor Defendants also raise several different issues than the Sutter Defendants. I address those here.

### A. Statute of Limitations on First Amendment and Due Process Claims

The Doctor Defendants argue that the First Amendment and due process claims are time-barred. I rejected this argument the last time around and denied these defendants' motion to dismiss those claims. *See* Prior Order, at *12. That could end the analysis.

To get around this, the Doctor Defendants now argue that "[t]he SAC fails to allege any specific facts concerning any of the Doctor Defendants that Plaintiff allegedly learned in 2019, but did not know and could not reasonably have discovered earlier." Doctor Mot. 8 (emphasis in original). The Doctor Defendants appear to believe they get this second bite at the apple because, last time around, they *and* the Sutter Defendants filed a consolidated motion to dismiss. They are wrong.

But even if they were not, I reject their argument. As I explained last time,

> Peterson has plausibly alleged that the discovery rule saves the First Amendment and due process claims. He alleges that the Sutter Defendants maintained a secret policy of providing kickbacks to compliant doctors and punishing uncompliant ones. *See* Sutter Oppo. 11. He has adequately pleaded that he could not reasonably have discovered that information until it was made public in November 2019, when the previously confid-

> ential California Attorney General investigation was publicized. *See Lukovsky,* 535 F.3d at 1048 (holding that a claim accrues when the plaintiff knows or has reason to know the "underlying facts" and the "cause" of the injury); *Bibeau v. Pac. Nw. Rsch. Found. Inc.,* 188 F.3d 1105, 1108 (9th Cir. 1999), *opinion amended on denial of reh'g,* 208 F.3d 831 (9th Cir. 2000) ("[T]he statute only begins to run once a plaintiff has knowledge of the 'critical facts' of his injury, which are that he has been hurt and who has inflicted the injury." (emphasis added)). Because of the nature of the alleged violation here, "what [Peterson] knew and when [he] knew it are questions of fact." *Bibeau,* 188 F.3d at 1108.

Prior Order, *12. And because the Doctor Defendants' alleged First Amendment and due process violations are based on these same facts, it is plausible the claims against them are similarly not time-barred. Said another way, it is not clear from the face of the complaint that the discovery rule does not save these claims because the Doctor Defendants' alleged violations are predicated on the same alleged secret conspiracy.

**B. Retaliatory Intent**

Next, the Doctor Defendants argue that the First Amendment claim fails because Peterson does not "allege facts showing that the Doctor Defendants were motivated to participate in the peer review proceeding

because of Plaintiff's purported exercising of his First Amendment rights." Doctor Mot. 15.[7]

To plead a First Amendment retaliation claim, a plaintiff must adequately allege that "(1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *Capp v. Cnty. of San Diego,* 940 F.3d 1046, 1053 (9th Cir. 2019) (internal quotation marks and citations

Here, Peterson argues that the constitutionally protected activity was "advocating for patients [sic] rights and refusing to accept kickbacks or participate in the Medical [sic] scheme." Doctor Oppo. 21. No party challenges whether this can amount to constitutionally protected activity, so I do not address that issue. Instead, the Doctor Defendants argue that there is no allegation showing that their actions were *motivated* by Peterson engaging in this activity. I disagree. Peterson pleads that the peer-review process conducted by the Doctor Defendants was motivated by Peterson refusing to participate in the MediCal Strategy, as they "punished" other non-cooperating physicians. *See, e.g.,* SAC ¶¶ 169, 171, 179. Assuming for the sake of argument that his refusal to participate was constitutionally protected speech, he has drawn a plausible link between it and the Doctor Defendants' motivation for reviewing him.

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[7] Peterson raises his 12(g)(2) objection to this; I again reject it. *See supra* Section II.A. omitted).

### C. Doctor Defendants' Conclusion

The First Amendment and due process claims again survive the motion to dismiss. The federal discrimination claims are dismissed as time-barred. Because this is the second time I have dismissed them on this basis and the third version of the complaint—and because Peterson has not identified any other allegations he could plead to make them timely—dismissal is without leave to amend.

## CONCLUSION

The MBC Defendants' motion to dismiss is GRANTED WITH PREJUDICE and they are DISMISSED from the suit. The Sutter Defendants' motion to dismiss is DENIED on the First Amendment and due process claims and GRANTED WITHOUT LEAVE TO AMEND on the federal discrimination, Unruh Act, and antitrust claims. The Sutter Defendants' anti-SLAPP motion to strike the state-law claims is GRANTED. The Doctor Defendants' motion to dismiss is DENIED on the First Amendment and due process claims and GRANTED WITHOUT LEAVE TO AMEND on the federal discrimination claims.

The Sutter Defendants and Doctor Defendants shall answer the remaining claims within **14** days.

A Case Management Conference is set for September 13, 2022, at 2:00 p.m. The Joint

Case Management Statement is due September 6, 2022.

**IT IS SO ORDERED.**

Dated: July 20, 2022

/s/ William H. Orrick
United States District Judge

**ORDER GRANTING MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (FEBRUARY 2, 2022)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH PETERSON, M.D.,

*Plaintiff,*

v.

SUTTER MEDICAL FOUNDATION, ET AL.,

*Defendants.*

Case No. 3:21-cv-04908-WHO

Re: Dkt. Nos. 60, 61

Before: William H. ORRICK,
United States District Judge.

## ORDER ON MOTIONS TO DISMISS

Plaintiff Ralph Peterson is a medical doctor who alleges that various defendants associated with the Sutter network of healthcare facilities unlawfully steer away unprofitable procedures, give kickbacks to physicians who comply, and punish physicians who do not. He contends that the Medical Board of California ("MBC") facilitates these actives by using its disciplinary

authority against physicians, like him, who will not comply. He also asserts that it discriminates against African American doctors like him. He alleges that, from 2009 to 2013, the defendants conspired to punish him through investigations and disciplinary proceedings. And in late 2019, he learned through public reporting that the California Attorney General had sued Sutter and entered into a confidential settlement with it regarding Sutter's anti-competitive behavior. Peterson brings numerous claims that fall into three groups: federal civil rights violations, federal antitrust violations, and violations of California state law.

The defendants move to dismiss. The MBC is shielded by sovereign immunity and it is dismissed with prejudice. The state-law claims against individual MBC members are likewise dismissed with prejudice. The federal civil rights claims against those individuals are dismissed as barred by sovereign immunity (in the defendants' official capacities) or absolute immunity (in their individual capacities), but Peterson has leave to amend to adequately plead that *Ex parte Young* applies or that absolute immunity does not apply. His federal antitrust claim is time-barred, but Peterson has leave to amend to allege that it should be delayed or tolled. The private parties' motion is granted with prejudice on a claim under the Health Care Quality Improvement Act ("HCQIA") because Peterson has not shown that it creates a private right of action.

Most remaining claims against the private parties are dismissed as time-barred, but Peterson has leave to amend to adequately allege that their statutes of limitations are delayed or tolled. And the motion to dismiss is denied when it comes to certain claims that he would not have had notice to bring until the

California Attorney General's investigation was made public, because the discovery rule applies to toll the statute of limitation.

## BACKGROUND

### I. FACTUAL BACKGROUND

#### A. The Parties

Peterson is a medical doctor who was licensed to practice medicine in California. First Amended Complaint ("FAC") [Dkt. No. 47] ¶ 2. He has sued two groups of defendants.

The first I refer to collectively as the "Sutter Defendants." Sutter Bay Medical Foundation ("Sutter Bay") and Sutter Bay Hospitals d/b/a Alta Bates Summit Medical Center ("Alta Bates") are tax-exempt corporations doing business in Alameda County.[1] *Id.* ¶¶ 3–5. These entities are, collectively, "Sutter." Neil Stollman, Rod Perry, and Phillip Rich are licensed physicians who sat on Sutter's "peer review panels." *Id.* ¶¶ 7–9, 52. Rich also was president of Alta Bates's medical staff. *Id.* ¶ 9.

The second I refer to as the "MBC Defendants." Cathy Lozano was, during the events of this case, an employee investigator for the Medical Board of California ("MBC"), the agency that regulates the practice of medicine in California. *Id.* ¶ 11. Kristina Lawson was a "public member"—that is, a non-

[1] Sutter East Bay Medical Foundation and Sutter East Bay Hospitals were named as defendants, but the FAC alleges that they merged into, respectively, Sutter Bay in 2017 and Alta Bates in 2018. FAC ¶¶ 3–4.

physician member—of the MBC from October 2015 onward; in 2020, she was elected its president. *Id.* ¶ 12.[2] Howard Krauss, Randy Hawkins, Dev Gnanadev, Ronald Lewis, Richard Thorp, Felix Yip, Michael Bishop, Sharon Levine, and Asif Mahmood were physician members of the MBC. *Id.* ¶¶ 13–14, 17–18, 20–21, 23, 25–26. Richard Fantozzi was a physician member of the MBC and served as its secretary, vice president, and president at various times. *Id.* ¶ 15. Denise Pines was a physician member of the MBC and served as its secretary and president. *Id.* ¶ 24. Hedy Chang was a board member and its secretary from 2007 to 2011. *Id.* ¶ 16. Laurie Lubiano, Eserick Watkins, and Jamie Wright were public members of the MBC. *Id.* ¶¶ 19, 22, 28. Evelyn "Gerrie" Schipske was a board member and its secretary. *Id.* ¶ 27. Linda Wright is executive director of the MBC. *Id.* ¶ 29.

### B. Sutter's Allegedly Unlawful Activities

Sutter owns and operates 24 hospitals with 53,000 employees. *Id.* ¶ 39. According to Peterson, it "monopolizes" healthcare and medicine in Northern California. *Id.* He alleges that Sutter uses "unlawful strategies" to maintain this monopoly, which he refers to as its "MediCal Strategy." *Id.* ¶ 40. He claims that it uses "medical discipline" by placing "cooperating or

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[2] The MBC has 15 members: 13 appointed by the governor and confirmed by the Senate, one appointed by the Senate Committee on Rules and one appointed by the speaker of the Assembly. *See* Cal. Bus. & Prof. Code § 2001. Seven of the MBC's members are public members—that is, members who are not licensed by the MBC. *Id.* § 2007. The remaining members must be licensed physicians or surgeons. *Id.*

compliant physicians" and attorneys on peer review panels and the MBC. *Id.* ¶ 42. It allegedly uses these institutions to control physician referrals and acquisition of physician practices to "punish" physicians that do not "cooperate." *Id.* ¶ 41. This "cooperation," Peterson states, is that Sutter only performs profitable procedures and steers unprofitable procedural to county medical facilities. *Id.* ¶ 43. Sutter also allegedly manipulates charges and coding to increase revenue, performs unnecessary medical procedures, charges for unused materials, and takes other actions. *Id.* ¶ 51. Sutter then uses its revenue to pay kickbacks and acquire medical practices. *Id.* ¶ 44. Among other things, Peterson pleads that Stollman (who sits on a peer review panel) received kickbacks from Sutter. *Id.* ¶ 61.

**C. Peterson's History with Sutter**

Peterson, who is African American, has practiced medicine in California since 1983. *Id.* ¶¶ 55–57. He alleges that he serves Oakland's Indigent and . . . MediCal community." *Id.* ¶ 56. From 1999 to 2009, he had privileges at Alta Bates to perform endoscopies. *Id.* ¶ 58.

In February 2009, Stollman and Perry—who were members of Alta Bates's peer review board—ordered Peterson to "appear . . . without explanation." *Id.* ¶ 63. Peterson requested a hearing under the HCQIA and notice of the allegations against him. *Id.* ¶ 64. He claims that they never provided either. *Id.* Several days later, Perry ordered Peterson to "increase his 'call coverage'" (from context, how much he would cover for Sutter) or pay a fee. *Id.* ¶ 65. Peterson requested from Stollman to cover more calls,

but Stollman allegedly refused to provide it "without payment of an unreasonable fee." *Id.* ¶ 67. In March 2009, Rich (also a member of the peer review panel) ordered Peterson to resign his privileges, but Peterson refused. *Id.* ¶¶ 68–69. In April 2009, he claims that his privileges were suspended without a complaint, investigation, or hearing. *Id.* ¶ 70. He claims that Alta Bates then "forced" him to resign his privileges under threat of MBC discipline. *Id.* ¶ 71. An adverse action report prepared by Sutter states that Peterson "resigned to avoid further investigation into various quality of care complaints." *Id.* ¶ 72. Several months later, Peterson opened an independent endoscopy facility. *Id.* ¶ 74.

### D. First MBC Investigation

In November 2009, Peterson was notified that the MBC had opened an investigation into the allegations in the Sutter adverse action report. *Id.* ¶ 76. Soon after, a formal accusation was filed and Peterson was given a summary of the investigation. *Id.* ¶¶ 77–78. Peterson claims that the summary contained false and misleading statements. *Id.* ¶ 78. In October 2010, Peterson was informed that a "medical consultant" determined the allegations were not "extreme enough to warrant pursuing administration action." *Id.* ¶ 80 (internal quotation marks omitted).

### E. Second MBC Investigation and Patient Suit

In 2010, a longtime patient of Peterson's filed a complaint against Peterson that he calls "unfounded." *Id.* ¶¶ 81–87. Peterson alleges that Sutter "encouraged and participated in" filing that complaint. *Id.* ¶ 87.

Peterson allegedly referred the patient to cardiologists but the patient did not come to the appointments. *Id.* ¶¶ 82–85. Instead, the patient eventually went to Sutter, which allegedly discharged her to "steer" her to a county healthcare facility. *Id.* ¶ 83. In 2009, the patient had a stroke and was treated by Sutter. *Id.* ¶¶ 85–86.

In 2011, the same MBC investigator that carried out the previous investigation looked into this complaint. *Id.* ¶ 88. According to Peterson, the MBC determined that Sutter had discovered an artery blockage in the patient but "failed, refused and/or neglected to treat her," steering her to a county medical facility. *Id.* ¶ 89. In October 2011, the MBC's executive director (Whitney) allegedly signed a formal accusation that, according to Peterson, "concealed Sutter's refusal and/or failure to diagnose, treat" the patient. *Id.* ¶ 90. Peterson asserts that a provider contract he had with Cigna was terminated due to "online accusations" from MBC. *Id.* ¶ 94. Later, a Health Net provider contract was terminated due to the existence of the MBC case. *Id.* ¶ 95. In 2013, Peterson was denied provider status with Hill Physicians Medical Group, Alta Bates, and Blue Shield of California; in 2014, he was denied provider status with Aetna. *Id.* ¶¶ 103, 110, 114, 118. According to him, the MBC refused to provide him a complete file on the investigation and its supporting evidence. *Id.* ¶ 97. In January 2013, Peterson attempted to testify in front of the MBC as a witness on behalf of another physician but was not allowed to do so. *Id.* ¶ 99.

In April 2013, the estate of the deceased patient sued Peterson in state court. *Id.* ¶ 104. Peterson claims that the case was "prompted, perpetuated and encour-

aged by Sutter, [the] peer review panel members and" the MBC for his alleged refusal to cooperate in Sutter's unlawful tactics. *Id.* ¶ 105. The court eventually entered judgment in Peterson's favor and dismissed the action with prejudice. *Id.* ¶ 113.

In July 2013, the MBC allegedly "determined that there were no quality of care issues" in treating Peterson's patient "but did not disclose that finding" to Peterson. *Id.* ¶ 111. Yet in December 2013, it found that Peterson had not maintained sufficient records about his treatment of the patient. *Id.* ¶ 115. He alleges that these accusations were fabricated. *Id.*

**F. State-Court Suit**

In November 2012, Peterson filed an action in California Superior Court against Perry and Stollman for allegedly "misusing the physician disciplinary process." *Id.* ¶ 98. The law firm Hanson & Bridgett is alleged to have represented Sutter, the peer review panel, and MBC. *Id.* ¶ 101. That is also the firm at which defendant Lawson, president of the MBC, is an attorney. *Id.* ¶ 12. Peterson claims that this representation was a conflict and was not disclosed to him. *Id.* ¶ 101. In May 2013, the court "issued a tentative order against" Peterson. *Id.* ¶ 107. The California Court of Appeal eventually dismissed Peterson's appeal (and the California Supreme Court denied review). *Id.* ¶¶ 122–23.[3]

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[3] The parties' unopposed requests for judicial notice of filings in the state-court action are GRANTED. *See* Dkt. Nos. 62, 67.

### G. California Attorney General Investigations and Suit

In 2013, the California Attorney General's Office was investigating Sutter about the use of kickbacks. *Id.* ¶ 102. Peterson also alleges that a separate investigation—apparently also by the California Attorney General—was conducted into MBC discrimination against African American and Hispanic doctors. *Id.*

In March 2018, the California Attorney General sued Sutter for anti-competitive behavior. *Id.* ¶ 127. Sutter and the state eventually entered a confidential settlement that has been publicly reported to be worth more than $600 million, 10 years of monitoring, and a consent decree barring kickbacks. *Id.* ¶¶ 129–31, 133. According to Peterson, the Attorney General asserted that Sutter's physician referral program violated the law and that Sutter gave kickbacks. *Id.* ¶ 130.

The Sacramento Bee allegedly first publicly reported about the kickback lawsuit on November 4, 2019. *Id.* ¶ 129. The Attorney General's Office revealed the investigation two weeks later. *Id.* ¶ 130.

## II. PROCEDURAL BACKGROUND

Peterson filed this suit in June 2021. Dkt. No. 1. He moved to enter default against many defendants, some of which the Clerk of Court entered and some of which the Clerk denied. Dkt. No. 24. Eventually, after the defendants appeared and moved to set aside their defaults, the parties agreed to moot those motions, withdraw the defaults, and permit Peterson to file the FAC. Dkt. No. 45.

As currently pleaded, the FAC contains 17 causes of action. The following are against all defendants: (1)

violation of the First Amendment; (2) violation of constitutional due process; (3) discrimination against Peterson and his indigent patients under the Constitution, the HCQIA, Title VII, and other unspecified statutes; (4) failure to prevent discrimination and retaliation (presumably under the same sources); (5) retaliation in violation of the HCQIA; (7) violation of federal antitrust law; (11) negligence; (12) intentional interference with contractual relationships; (13) business disparagement; (14) intentional infliction of emotional distress; (15) negligent infliction of emotional distress; (16) violation of California's Unfair Competition Law ("UCL"); and (17) violation of the Unruh Civil Rights Act. The following are against Sutter: (6) antitrust interference with business relationships and (8) breach of contract. Peterson also alleges a breach of contract claim (9) against the MBC. And he alleges a breach of the covenant of good faith and fair dealing (10) against Sutter and the MBC.

## LEGAL STANDARD

### I. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1) is a challenge to the court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *Id.*

A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are insufficient "on their face" to invoke federal jurisdiction. *See Safe Air Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true and draws all reasonable inference in favor of the party opposing dismissal. *See Wolfe*, 392 F.3d at 362.

"By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. To resolve this challenge, the court "need not presume the truthfulness of the plaintiff's allegations." *Id.* (citation omitted). Instead, the court "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* (citations omitted). Once the moving party has made a factual challenge by offering affidavits or other evidence to dispute the allegations in the complaint, the party opposing the motion must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *see also Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

## II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Under FRCP 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

If the court dismisses the complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the

court should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *See Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

## DISCUSSION

### I. MBC DEFENDANTS' MOTION TO DISMISS

The MBC Defendants' motion to dismiss states that it is brought by the State of California, through the MBC and the MBC Defendants. *See* MBC Defendants' Motion to Dismiss ("MBC Mot.") [Dkt. No. 60] 1. It seeks to dismiss all claims against those entities.

#### A. The State of California and MBC

The MBC Defendants move to dismiss the claims to the extent they are against the State of California or MBC based on their sovereign immunity. MBC Mot. 6–7.

##### i. State of California

The State of California has not been named as a defendant, none of the claims are brought against it, and Peterson's brief does not respond to the argument about it. Accordingly, there is no dispute between the parties on this point and the case cannot proceed against the State of California itself.

##### ii. MBC

The MBC is not named as a defendant and, as far as the record shows, has not been served with process.

Despite this, two of the substantive claims in the FAC state that they are against it. *See* FAC ¶¶ 288–300 (breach-of-contract claim against MBC), 301–313 (bad-faith claim against Sutter and MBC). And MBC has appeared in this action, filed a Rule 12 motion, and does not object on service-of-process or personal-jurisdiction grounds, so it has waived those challenges. *See* Fed. R. Civ. P. 12(h). It also proceeds on "the understanding that MBC is an intended Defendant to this action," so I do as well. MBC Mot. 2 n.1.

I agree with MBC that it is shielded from liability by sovereign immunity. In general, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984) (internal quotation marks and citation omitted). That immunity includes suits against states' agencies and departments. *Id.* The Ninth Circuit has held that the MBC's predecessor board was an agency of the state for purposes of sovereign immunity. *Forster v. Cty. of Santa Barbara*, 896 F.2d 1146, 1149 (9th Cir. 1990). The statute it relied on for that conclusion remains the same when it comes to MBC. *See id.*; Cal. Bus. & Prof. Code § 2001. Peterson's brief does not address MBC's argument that it is immune (for instance, to argue that the state consented to suit or that Congress abrogated its immunity).

Accordingly, MBC is immune from suit for the two state-law claims here. *See Pennhurst*, 465 U.S. at 100 (explaining that immunity applies "regardless of the relief sought"); *see also Stanley v. Trustees of California State Univ.*, 433 F.3d 1129, 1134 (9th Cir. 2006) (holding that the supplemental-jurisdiction statute does not abrogate sovereign immunity for

state-law claims). The claims against the MBC are DISMISSED WITH PREJUDICE.

### B. State-Law Claims Against the MBC Defendants

Peterson's brief clarifies that he sues the MBC Defendants in their official and individual capacities. *See* Opposition to the MBC Mot. ("MBC Oppo.") [Dkt. No. 68] 7. The MBC Defendants move to dismiss the claims for both types of liability. The MBC Defendants argue that all of Peterson's claims against them are barred by sovereign immunity. *See* MBC Mot. 7. In response, Peterson contends that the claims may proceed (1) to the extent they are against the MBC Defendants in their official capacities under *Ex parte Young*, 209 U.S. 123 (1908), and (2) to the extent they are in their individual capacities under 42 U.S.C. § 1983 ("Section 1983"). *See* MBC Oppo. 6–8.

I first address the claims brought under California state law. In general, a suit against a state official in her official capacity is a suit against the state for purposes of sovereign immunity. *Pennhurst*, 465 U.S. at 102–103. Under *Ex parte Young*, that immunity does not generally bar suits against state officials that challenge the constitutionality of their action and seek redress through prospective injunctive relief. *Id.* But Peterson's state-law claims do not challenge the constitutionality of the MBC Defendants' actions, they allege violations of California law. The Supreme Court has expressly held that the *Ex parte Young* exception does not apply to state-law claims. *Id.* at 106. Accordingly, the state-law claims cannot proceed against the MBC Defendants in their official capacities.

Section 1983 provides a cause of action against state officials "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. As the Supreme Court has explained, "the Eleventh Amendment does not erect a barrier against suits to impose individual and personal liability on state officials under § 1983." *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991) (internal quotation marks and citation omitted). But Peterson's state-law claims are not cognizable under Section 1983, which only provides a cause of action to redress violations of *federal* law. *Lovell By & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996). The state-law claims cannot proceed against the MBC Defendants in their individual capacities on this basis either.[4]

Peterson offers no other ground to overcome the MBC Defendants' sovereign immunity for the state-law claims; he does not argue, for instance, that the state has waived sovereign immunity as a matter of state law.

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[4] Peterson passingly asserts that the state-law claims are not barred by sovereign immunity because the FAC alleges that they acted unlawfully, acted outside the scope of their authority, and took ministerial actions. MBC Oppo. 8. While these types of allegations may affect whether an official is entitled to the separate protection of absolute immunity from Section 1983 damages actions (discussed below), Peterson cites no authority for the position that they overcome *sovereign immunity*, and this positions would contradict its fundamental principles.

Accordingly, the state-law claims against the MBC Defendants are DISMISSED WITH PREJUDICE.[5]

### C. Federal Claims Against the MBC Defendants

The MBC Defendants move to dismiss the claims based on federal law and the U.S. Constitution. *See* MBC Mot. 6–17.[6]

#### i. Official Capacity

First, the MBC Defendants argue that they are entitled to sovereign immunity to the extent the federal claims are against them in their official capacities. MBC Mot. 6–7. As noted above, suits against state officials in their official capacities are generally suits against the state and barred by sovereign immunity. *Pennhurst*, 465 U.S. at 102–103. And as noted, *Ex parte Young* creates an exception to that immunity for suits challenging the constitutionality of officials' actions and seeking prospective injunctive relief. *Id.*

Peterson has not adequately pleaded that this case falls into *Ex parte Young*'s ambit. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

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[5] Because the state-law claims are dismissed on this basis, there is no need to address the MBC Defendants' argument that they are also immune under state statute.

[6] For the reasons explained below, Peterson has not shown that the HCQIA creates a private right of action, so that claim is dismissed with prejudice on this basis.

*Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (internal quotation marks and citations omitted). The typical example is a complaint that asks that officials be enjoined from violating federal law. *See id.* (collecting examples).

Here, the complaint is backward-looking. All of the causes of action are about discrete past events and seek monetary redress for Peterson's past injuries. There is no indication that the MBC Defendants are currently or are imminently going to carry out another alleged violation of federal law. Accordingly, *Ex parte Young* is inapplicable. *See id.* While the UCL claim *can* lead to prospective relief, it is not cognizable under *Ex parte Young* as a state-law claim. Future antitrust violations can lead to injunctive relief too, *see* 15 U.S.C. § 26, but that claim is dismissed on other grounds and, in any case, Peterson does not plead anything about future antitrust harm. Indeed, the complaint references injunctive relief exactly once: in asking that the defendants be enjoined under the UCL. *See* FAC at 54. In short, the complaint does not allege any "ongoing violation of federal law" or seek "relief properly characterized as prospective" to halt that violation. *Verizon*, 535 U.S. at 645. Peterson has leave to amend if he believes he can satisfy this requirement.

**ii. Absolute Immunity**

The MBC Defendants argue that they are entitled to absolute immunity from damages liability. *See* MBC Mot. 9–10.

As a general matter, state executive officials "are absolutely immune from § 1983 suits if they perform 'special functions' which, because of their similarity to

functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability." *Buckwalter v. Nevada Bd. of Med. Examiners*, 678 F.3d 737, 740 (9th Cir. 2012), *as amended* (June 8, 2012) (internal quotation marks and citations omitted). To determine whether the MBC Defendants are entitled to absolute immunity, I look to the "nature of the function performed, not the identity of the actor who performed it." *Id.* (internal quotation marks and citation omitted). Judges and prosecutors perform the "paradigmatic" functions entitled to absolute immunity. *Id.* Accordingly, courts examine whether the defendants' functions are "analogous" to those of a judge or prosecutor. *Id.* This immunity can extend to administrative proceedings. *Butz v. Economou*, 438 U.S. 478, 517 (1978).

The Ninth Circuit has repeatedly held that certain quasi-prosecutorial and quasi-judicial functions of the members of independent state medical boards are entitled to absolute immunity because they are "functionally comparable to judges." *See Buckwalter*, 678 F.3d at 740; *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999). Peterson does not dispute that the MBC shares all of the salient features that led the court to extend protection to other states' similar boards. But, as the Ninth Circuit has also explained, this holding alone does not settle the case because absolute immunity is assessed action-by-action. *Buckwalter*, 678 F.3d at 740. Accordingly, the question is whether the challenged actions are "judicial" or "closely associated with the judicial process." *Id.* (internal quotation marks and citation omitted).

Peterson argues that several types of alleged actions are not entitled to immunity: steering certain

procedures to county medical facilities, kickbacks, medical billing fraud, threats of physician discipline, actual discipline, price fixing, bid ridding, discrimination, retaliation, Sutter controlling the disciplinary process, and "Due Process violations." MBC Oppo. 10.

Peterson's allegations and argument on this issue are not sufficient to state a claim that survives an immunity challenge. The relevant portion of Peterson's brief cites more than one-hundred paragraphs from the FAC with virtually no elaboration. *See id.* But he never attempts to show what behavior each MBC Defendant did to expose him to liability. The MBC Defendants sat on the board or were officers of it at different times, some of which appear not to be connected to the events of this case. The paragraphs that Peterson cites often refer to *Sutter's* actions, not the actions of MBC members. *See, e.g.*, FAC ¶ 43 ("As a result of its "MediCal Strategy", Sutter performed only profitable procedures, steering away unprofitable procedures to county medical facilities."). Indeed, Peterson's core theories about steering, kickbacks, billing fraud, and price fixing are that *Sutter* carried them out. Other allegations that Peterson cites simply refer vaguely to things that MBC *as an institution* did. *See, e.g.*, *id.* ¶ 124 (alleging that MBC engages in race discrimination in the disciplinary process). Yet MBC cannot itself be held liable, and each MBC Defendant can only be held liable for his or her own actions, not actions attributed only generally to the agency. *Buckwalter*, 678 F.3d at 737. Further, at least some of this behavior, even if properly pleaded, appears to be shielded by absolute immunity, such as that involved in the disciplinary process—even if it were discriminatory. *See Mishler*, 191 F.3d at 1008 ("There is no

question that acts occurring during the disciplinary hearing process fall within the scope of absolute immunity."); *Cleavinger v. Saxner*, 474 U.S. 193, 199–200 (1985) ("Such immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." (internal quotation marks and citation omitted)).

As far as I can tell, and as far as Peterson argues in his brief, *see* MBC Oppo. 23, the only MBC Defendants about whom there are specific allegations are Lozano (the employee who investigated the accusations against Peterson) and Whitney (the executive director who signed the second accusation). *See* FAC ¶¶ 90, 169. But it is unclear which of the actual claims, if any, are premised on these allegations, as opposed to the actions of the MBC members; Peterson's brief does not clarify this. And while it is not entirely possible to determine because of the state of the allegations, there is a colorable argument that these acts are entitled to absolute immunity too. *See Mishler*, 191 F.3d at 1008 (holding that "signing the disciplinary complaint under penalty of perjury is entitled to absolute immunity").

I will grant leave to amend so that Peterson can make clear which defendants took which alleged actions that allegedly violated specific rights. In drafting the amended complaint, Peterson should be mindful of the principles of immunity discussed above.[7]

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[7] Because the state of the claims is unclear, I do not address the MBC Defendants' alternative argument that the claims are time-barred.

### iii. Antitrust Claim

The MBC Defendants move to dismiss the antitrust claim against them.[8] *See* MBC Mot. 12–13.

#### 1. State-Action Immunity

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To state a claim under the Act, a plaintiff must plead: "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court established an exception to the Sherman Act: It does "not apply to anticompetitive restraints imposed by the States as an act of government." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991) (internal quotation marks and citation omitted). To determine whether a state's actions are immune from Sherman-Act liability, courts employ a two-step test: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,

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[8] The antitrust claim is not brought under Section 1983, so that statute's immunity doctrines do not apply.

445 U.S. 97, 105 (1980) (internal quotation marks and citations omitted).

The MBC Defendants have not shown that the alleged antitrust violations here fall within *Parker*'s exception. Peterson alleges that the MBC Defendants engaged in anticompetitive behavior by using their authority to give unlawful preference to Sutter and punish physicians that did not adequately comply with its demands. *See* FAC ¶¶ 225–36. The MBC Defendants have pointed to no "clearly articulated and affirmatively expressed . . . state policy" in favor of that type of behavior. *Midcal*, 445 U.S. at 105. The MBC Defendants' argument is, instead, that "MBC investigatory, charging, and reprimand procedures which Plaintiff complains form part of the State's comprehensive disciplinary structure for its medical profession." MBC Mot. 13. That is correct, but that a state has generally given the MBC regulatory authority over this broad area does not mean that it has affirmatively chosen a policy of pursuing the *specific* alleged anti-competitive behavior at issue.

### 2. Statute of Limitations

The MBC Defendants also argue that the antitrust claim is time-barred.[9] As the parties agree, the statute of limitations on the antitrust claim is four years after the cause of action accrues. *See* 15 U.S.C. § 15b. An antirust claim accrues "each time a plaintiff is injured by an act of the defendants." *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1194 (9th Cir. 1980). A motion to dismiss based on a statute of

[9] The Sutter Defendants also make this argument, and the reasons stated in this section apply equally to them.

limitations can only be granted when its running "is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (internal quotation marks and citation omitted). The MBC Defendants argue that "[b]ecause Plaintiff's claims under the Sherman Act ran no later than sometime in 2017, his attempt to pursue those claims in this 2021 lawsuit are time barred." MBC Mot. 14. It contends that "the complaint lists the last overt act by MBC and its board members toward Plaintiff as occurring in 2013, when Plaintiff entered a stipulated settlement." *Id.*

Peterson first responds that the discovery rule postpones the running of the statute, because he did not know of the alleged anti-competitive behavior until late 2019, when the California Attorney General's investigation was publicized. MBC Oppo. 20. The problem for Peterson is that, in this Circuit, accrual of antitrust claims is governed by an injury rule, not the discovery rule. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274 (9th Cir. 1988); *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1209 (N.D. Cal. 2015) (Koh, J.) (extensively surveying authorities). The Ninth Circuit has explicitly contrasted a discovery rule for accrual with the "accrual rule applicable to antitrust suits." *Beneficial Standard*, 851 F.2d at 274–75. Under that antitrust-specific rule, "the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs." *Id.* Peterson cites no contrary authority.

In the section of his brief on the antitrust claim's statute of limitations, Peterson relies solely on the discovery rule. *See* MBC Oppo. 20. Other sections of

his brief do, however, refer to several other tolling doctrines. I will assume that he contends that those doctrines toll this claim as well.

One is the continuing violations doctrine. *Id.* 14–15. "Antitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (internal quotation marks and citations omitted). "But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.*

Peterson has identified no overt act within the limitations period. The allegation he relies on is that "Sutter, its peer review panel and the "CMB's" [sic] unlawful conduct constitutes an ongoing anti-competitive restraint of trade." FAC ¶ 264. That allegation is threadbare and conclusory, so it fails to satisfy Peterson's burden to plead that the claim is tolled. The allegation, moreover, does not identify any injury to Peterson, but the continuing violation doctrine "is one in which the *plaintiff's interests* are repeatedly invaded and a cause of action arises each time *the plaintiff is injured*." *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987) (emphasis added). Peterson identifies no injury to him that occurred within the limitations period. Peterson also appears to rely on the allegation that he continues to suffer damages to his reputation and business, *see* FAC ¶ 341, but the doctrine only tolls the claim for continuing *violations*, not simply when the *harm happens to last*

into the limitations period. *See Klehr*, 521 U.S. at 189 (explaining that the doctrine requires a new "act" that "injures" the plaintiff).

Next is the fraudulent concealment doctrine. Antitrust statutes of limitations "may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012). Peterson must "plead facts showing that [the defendants] affirmatively misled [him], and that [he] had neither actual nor constructive knowledge of the facts giving rise to its claim despite [his] diligence in trying to uncover those facts." *Conmar Corp. v. Mitsui & Co. (U.S.A.)*, 858 F.2d 499, 502 (9th Cir. 1988). A plaintiff has constructive knowledge if he "had enough information to warrant an investigation which, if reasonably diligent, would have led to the discovery of the fraud." *Hexcel*, 681 F.3d at 1060. And the plaintiff must plead facts supporting its showing of diligence. *Id.* Because it sounds in fraud, fraudulent concealment must be pleaded with particularity under FRCP 9(b). *See Vanella v. Ford Motor Co.*, No. 3:19-CV-07956-WHO, 2020 WL 887975, at *5 (N.D. Cal. Feb. 24, 2020). That means that Peterson must plead with "particularity the circumstances constituting the fraud," and the allegations must "be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citation omitted).

"Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct

charged." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted).

Peterson has failed to adequately allege that the doctrine applies. First, much of what he discusses is simply that he was never told the relevant information, but that is insufficient to constitute fraudulent concealment. *Conmar*, 858 F.2d at 502. Second, his pleading does not satisfy Rule 9(b). He vaguely discusses that the Sutter Defendants hid their actions in closed meetings and by using attorney client privilege. *See* Opposition to the Sutter Mot. ("Sutter Oppo.") [Dkt. No. 66] 12–13. Even assuming that this would be sufficient to constitute fraudulent concealment, Peterson must plead the "who, what, when, where, and how" of these alleged acts. *Vess*, 317 F.3d at 1106. He has leave to amend to do so.

Another is the "overt act" doctrine from conspiracy law. But it does not toll the claim because, as explained above when discussing the continuing violation doctrine, Peterson has identified no overt act against him in the limitations period. *See People ex rel. Kennedy v. Beaumont Inv.*, Ltd., 111 Cal. App. 4th 102, 111 (2003), *as modified on denial of reh'g* (Sept. 9, 2003).

The final tolling doctrine referenced in Peterson's brief is equitable tolling. But the high bar for it is not met for largely the same reasons that fraudulent concealment is not: Peterson has not, as he must, pointed to some "extraordinary" external event beyond his control that prevented him from discovering this information. *See Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255 (2016).

Because I cannot say that leave to amend is futile, Peterson has leave to amend if he wishes to more clearly plead why these doctrines apply.

### D. MBC Defendants Conclusion

The State of California is not a party to this case. The MBC is dismissed with prejudice due to sovereign immunity. The state-law claims against the MBC Defendants are dismissed with prejudice due to sovereign immunity. The federal claims against the MBC Defendants are dismissed with leave to amend so that Peterson can adequately plead that *Ex parte Young* applies and that the MBC Defendants are not entitled to absolute immunity for damages. The antitrust claim is dismissed with leave to amend so that Peterson can plead that it is tolled.

## II. SUTTER DEFENDANTS' MOTION TO DISMISS

The Sutter Defendants move to dismiss all of the claims against them as time-barred, barred by claim preclusion, and for failing to state a claim. *See* Sutter Defendants' Motion to Dismiss ("Sutter Mot.") [Dkt. No. 61].

### A. Statute of Limitations on Federal Civil Rights Claims

As noted, a motion to dismiss based on a statute of limitations can only be granted when its running "is apparent on the face of the complaint." *Huynh*, 465 F.3d at 997 (internal quotation marks and citation omitted). Section 1983, the basis for Peterson's federal civil rights claims, borrows the "personal injury statute of limitations of the state in which the cause of action arose." *Alameda Books, Inc. v. City of Los*

*Angeles*, 631 F.3d 1031, 1041 (9th Cir. 2011). As the parties agree, California's personal injury statute of limitations is two years from when the claim accrues. *See* Cal. Civ. P. Code § 335.1. But "federal law controls the question of when a claim *accrues*." *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000) (emphasis added). Absent a rule delaying accrual or tolling the statute, "a claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Id.*

The events that make up the core of this case occurred from 2009 to 2013, so the defendants argue that the claims are time-barred no matter which of them triggered the limitations period. Peterson relies on a number of doctrines to delay accrual or toll the statute. For the reasons that follow, I agree with him that it is not established on the face of the complaint that he did know or should have known of the facts underlying two of his federal civil rights claims until November 2019, when the kickbacks were made public. But I agree with the Sutter Defendants that the other two claims are time-barred.

Peterson frames the first of his arguments in terms of the discovery rule. The federal accrual standard is essentially the same as the discovery rule. *See Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008). And California law's discovery rule (which some courts appear to have applied in Section 1983 cases) is identical in substance: It "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox v. Ethicon Endo-Surgery*, Inc., 35 Cal. 4th 797, 807 (2005). A reason to discover exists when the plaintiff has reason "at least to

suspect a factual basis for its elements." *Id.* (internal quotation marks and citation omitted). Both rules require the plaintiff to adequately show his diligence. *See id.*; *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 940 (9th Cir. 2009).

Peterson's first claim alleges that the Sutter Defendants violated his First Amendment rights by "punishing" him with the peer review process when he "refused" to accept kickbacks. FAC ¶¶ 142–45. The second claim alleges that he was denied constitutional due process because the peer review and MBC accusation processes were tainted. *Id.* ¶¶ 153–88. The third claim alleges discrimination based on the fact that he his African American and, it seems, based on the "protected class" of his patients who were indigent or on MediCal. *Id.* ¶¶ 200–11. The fourth claim alleges failure to prevent discrimination and retaliation premised on this. *Id.* ¶¶ 214–24.

Peterson has plausibly alleged that the discovery rule saves the First Amendment and due process claims. He alleges that the Sutter Defendants maintained a *secret* policy of providing kickbacks to compliant doctors and punishing uncompliant ones. *See* Sutter Oppo. 11. He has adequately pleaded that he could not reasonably have discovered that information until it was made public in November 2019, when the previously confidential California Attorney General investigation was publicized. *See Lukovsky*, 535 F.3d at 1048 (holding that a claim accrues when the plaintiff knows or has reason to know the "underlying facts" and the "cause" of the injury); *Bibeau v. Pac. Nw. Rsch. Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999), opinion amended on denial of reh'g, 208 F.3d 831 (9th Cir. 2000) ("[T]he statute only begins to run

once a plaintiff has knowledge of the 'critical facts' of his injury, which are that he has been hurt and who has inflicted the injury." (emphasis added)). Because of the nature of the alleged violation here, "what [Peterson] knew and when [he] knew it are questions of fact." *Bibeau*, 188 F.3d at 1108.

The two discrimination-based claims are not saved by the discovery rule. The Ninth Circuit has expressly held that, in an employment discrimination case, the claim accrues when the plaintiff is subject to an adverse employment action, not when the plaintiff suspects it was discriminatory. *Lukovsky*, 535 F.3d at 1050. Though Peterson does not allege *employment* discrimination, he alleges discrimination in supervision by medical authorities. The Ninth Circuit's decision emphasized that the federal accrual standard applies across disparate case types. *Id.* at 1049. In fact, in an on-point case about discipline from a state medical board that alleged religious discrimination, the Ninth Circuit held that the claim accrued when the plaintiff was denied license reinstatement—that is, when the adverse action was taken. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 927 (9th Cir. 2004). Accordingly, the discrimination claims accrued when Sutter took the allegedly unlawful acts.

Nor are the discrimination claims saved by the other miscellaneous doctrines that Peterson invokes. He has not shown any "continuing violation" because he has not pointed to a way he was discriminated against within the limitations period. *See Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir. 1982), *opinion modified on denial of reh'g*, No. 79-4110, 1982 WL 308873 (9th Cir. June 11, 1982) (federal doctrine); *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1192

(2013) (state doctrine). He cannot rely on equitable tolling because he has not shown that he diligently pursued investigating this issue after the allegedly discriminatory events, that any "extraordinary" external circumstance stood in the way of filing the claim, or that there is a "technical forfeiture" of his rights that would be unjust to enforce. *Menominee*, 577 U.S. t 255 (federal standard); *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003), *as modified* (Aug. 27, 2003) (state standard). He cannot rely on the fraudulent concealment doctrine because he does not allege an affirmative act that kept him from discovering the information, as opposed to merely not revealing it. *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 637 (2007). And he cannot rely on the "overt act" doctrine from conspiracy liability because he alleges no "overt act" contributing to a civil conspiracy to discriminate that occurred within the limitations period. *Kennedy*, 111 Cal. App. 4th at 111.

I cannot say that it would be futile to grant leave to amend to plead that the discrimination claims are tolled. Peterson has leave to amend.

**B. Statute of Limitations on Antitrust Claims**

As discussed in section I.C.iii.2 above concerning the MBC Defendants, the federal antitrust claims are subject to a somewhat different analysis based on antitrust-specific accrual rules. And for the reasons explained there, the antitrust claims against the Sutter Defendants are also dismissed as time-barred.

### C. Statute of Limitations on State-Law Claims

Each of Peterson's state-law claims has a specific statute of limitations, but the parties agree that they range between one and four years; because the challenged events ended in 2013 and the lawsuit was filed in 2021, neither has pointed to anything that turns on these differences. Instead, just as with the federal civil rights claims, the parties' dispute is whether accrual is delayed by the discovery rule or otherwise tolled. The heart of all of the state-law claims is that the Sutter Defendants' peer review process was unlawfully tainted by retaliatory animus and that the Sutter Defendants "used" the MBC discipline process to punish Peterson for not complying with their alleged kickback scheme.

Peterson first argues that the discovery rule saves the claims. As noted, California's discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox*, 35 Cal. 4th at 807. Again, a reason to discover exists when the plaintiff has reason "at least to suspect a factual basis for [the cause of action's] elements." *Id.* (internal quotation marks and citation omitted).

For the reasons explained above, Peterson has adequately alleged that he could not reasonably have discovered the facts underlying and cause of *some* of these injuries earlier than when the California Attorney General investigation was made public. He was certainly aware of the actions taken that injured him, but it is plausible he did not and could not have known that those actions were part of a larger unlawful scheme—so he would not have been on notice to bring his action. In particular, he plausibly

would not have been on notice sufficient to bring the breach of contract, breach of the covenant of good faith and fair dealing, negligence, intentional infliction of emotional distress ("IIED"), negligent infliction of emotional distress, and UCL claims. Having knowledge of the elements of those claims depends on having knowledge of the kickbacks. To take one example, Peterson alleges that the *violation* of the covenant of good faith and fair dealing was precisely that the treatment of him was pretextual and part of this scheme. To take another example, what is "outrageous" for purposes of the IIED claim, he alleges, is the secret rationale of the Sutter Defendants' actions.

Not all of the claims qualify under this doctrine. Knowing the facts underpinning the interference with contractual relationships and business disparagement claims does not depend on knowing the allegedly unlawful motivation. Put another way, Peterson had an entire claim for both of these when his professional prospects were allegedly harmed by the Sutter Defendants' actions. *See Fox*, 35 Cal. 4th at 807. He may not have known the internal motive for those actions, but that is not relevant because he was aware of all pertinent facts. In another vein, the Unruh Act claim does not survive because it is for discrimination. As explained above, the federal accrual standard *is* the discovery rule, and Ninth Circuit precedent holds that the discovery rule is satisfied when the adverse discriminatory event occurs, regardless of actual knowledge of discriminatory motive. Peterson has cited no contrary authority from the California courts applying their discovery rule differently.

I therefore turn to whether the grab-bag of tolling doctrines saves these three claims. They do not. The

Unruh Act claim does not qualify for the same reasons the federal discrimination claims do not, as explained above. There, I applied California's doctrine (and the federal one) to each of the theories Peterson puts forward, but none save the discrimination claim. The interference with contractual relations and business disparagement claims also do not qualify. Even assuming that the continuing violation doctrine applies to claims like these, Peterson has pointed to no invasion of his rights of this kind within the limitations period that is part of a broader course of unlawful conduct. *See Aryeh*, 55 Cal. 4th at 1192. He cannot rely on equitable tolling because he had full knowledge of the basis of these claims since they accrued, as explained above; nothing turned on the newly discovered kickbacks. *See Lantzy*, 31 Cal. 4th at 370. Because he had full knowledge—not just constructive knowledge—at the time of injury, the fraudulent concealment doctrine has no role to play here. *See Grisham*, 40 Cal. 4th at 637. And again, he has not pointed to any "overt act" within the limitations period that is part of a civil conspiracy to commit these torts. *Kennedy*, 111 Cal. App. 4th at 111.

Again, I cannot rule out that there might be some allegation that saves the claims, so leave to amend is granted.

**D. HCQIA Claim**

The Sutter Defendants move to dismiss the claim for retaliation in violation of the HCQIA. *See* Sutter Mot. 10. As a general matter, the HCQIA establishes national standards for professional review of physicians. *See* 42 U.S.C. §§ 1101 *et seq*. The courts of appeals that have addressed the question have unanimously held

that the HCQIA "does not create a private right of action against hospitals, physicians, or other entities involved in peer review activities for failure to comply with HCQIA standards." *Rowell v. Valleycare Health Sys.*, No. C 10-02816 CRB, 2010 WL 4236797, at *2 (N.D. Cal. Oct. 21, 2010) (collecting authorities). Peterson has pointed to no provision that explicitly creates a private right of action and does not argue that there is any indication that Congress implicitly intended to create one. *See Scalia v. Emp. Sols. Staffing Grp., LLC*, 951 F.3d 1097, 1103 (9th Cir. 2020) (discussing this private-right-of-action standard). Accordingly, Peterson has not shown that his claim is cognizable in a private civil suit.[10] It is DISMISSED WITH PREJUDICE against all defendants.

**E. Claim Preclusion**

In the alternative, the Sutter Defendants argue that all of these matters are subject to claim preclusion from the 2012 lawsuit that Peterson brought against Stollman and Perry. I address only the claims that survive the analysis so far: the First Amendment, due process, and specific state-law claims discussed above.

In a federal-question case like this, "federal courts participate in developing uniform federal rules of res judicata." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (internal quotation marks, alteration, and citation omitted). "The preclusive effect of a judgment is defined

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[10] The two state-court cases that Peterson cites do not hold or suggest that the HCQIA creates a private right of action for his claim. *See Fahlen v. Sutter Cent. Valley Hosps.*, 58 Cal. 4th 655, 685 (2014); *Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 480 (2001).

by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Id.* at 892 In claim preclusion, "a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Id.* (internal quotation marks and citation omitted). To apply, there must be "(1) an identity of claims in the two actions; (2) a final judgment on the merits in the first action; and (3) identity or privity between the parties in the two actions." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850 (9th Cir. 2000). "[I]dentity of claims exists when two suits arise from 'the same transactional nucleus of facts.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) (internal quotation marks and citation omitted).

The parties argue over several aspects of the doctrine, such as identity of the claims, whether the parties are in privity, and even whether the previous judgment was procured by fraud. The Sutter Defendants' argument that the claims are precluded fails for a more fundamental reason: Claim preclusion applies only to claims that were or *could have been* brought in the first action. *See, e.g.*, *Frank*, 216 F.3d at 850; *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Said otherwise, it only applies when the party had a "full and fair opportunity" to litigate the claim earlier. *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (internal quotation marks and citation omitted). But, as I have explained, at this point it is plausible that the claims I address here could not have been brought in the 2012 suit because a reasonable person would not have known he could bring them

until late 2019 at the earliest.[11] As the Ninth Circuit has explained, "[t]he rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated." *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739 (9th Cir. 1984) (internal quotation marks and citation omitted). Or as the Second Circuit put it, "[i]f significant new evidence is uncovered subsequent to the proceeding said to result in an estoppel of the present action, then it cannot be found that a party was afforded a full and fair opportunity to present his case in the absence of that evidence." *Khandhar v. Elfenbein*, 943 F.2d 244, 249 (2d Cir. 1991). The claims are not precluded on the face of the complaint. This issue may be re-raised once the record is developed and it is established what Peterson knew (or should have known) and when he knew it.

**F. UCL Standing**

The Sutter Defendants argue that Peterson has not alleged that he possesses statutory standing under the UCL. To possess statutory standing, a party must have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 322 (2011) (internal quotation marks and citation omitted). The Sutter Defendants argue only that Peterson does not *allege* any losses, but the FAC alleges that his client pool was shrunk by the kickback scheme. FAC ¶ 371.

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[11] There is no evidence that Peterson took discovery in the earlier suit that would have turned up this information.

While that allegation appears to be relatively speculative and perhaps will not be cognizable, it is an allegation of loss and so is sufficient to defeat the Sutter Defendants' cursory argument. Whether it is too speculative or attenuated can be answered at a later stage and has not been challenged today.

### G. Sutter Defendants Conclusion

The claims for federal discrimination, violation of the Unruh Act, intentional interference with contractual relations, and business disparagement are dismissed with leave to amend. The motion to dismiss is otherwise denied.

## CONCLUSION

The MBC Defendants' motion is GRANTED WITH PREJUDICE to the extent the FAC is against the State of California and the MBC and on the state-law claims against the MBC Defendants. It is GRANTED WITH LEAVE TO AMEND on the federal claims against the MBC Defendants. The Sutter Defendants' motion is GRANTED WITH PREJUDICE on the HCQIA claim. It is GRANTED WITH LEAVE TO AMEND on the federal discrimination, Unruh Act, intentional interference with contractual relations, and business disparagement claims. It is DENIED IN PART on the other claims.

**IT IS SO ORDERED.**

Dated: February 2, 2022

/s/ William H. Orrick
United States District Judge

**ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 5, 2025)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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RALPH PETERSON, M.D.,

*Plaintiff-Appellant,*

v.

SUTTER MEDICAL FOUNDATION, ET AL.,

*Defendants-Appellees.*

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No. 23-2911

D.C. No.3:21-cv-04908-WHO
Northern District of California
San Francisco, California

Before: CALLAHAN and LEE, Circuit Judges, and RASH, District Judge.*

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**ORDER**

The panel has voted to deny the petition for panel rehearing. Judge Callahan and Judge Lee have voted to deny the petition for rehearing en banc and Judge

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* The Honorable Scott H. Rash, United States District Judge for the District of Arizona, sitting by designation.

Rash recommends denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing and the petition for rehearing en banc are denied.

## CONSTITUTIONARY AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. amend. XIV, § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1983**
**(pertinent part)**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

**15 U.S.C. § 15b**

Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS § 15, 15a, or 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

**42 U.S.C. § 1320a-7b(b)**
**(pertinent part)**

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind-

> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

[ . . . ]

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person-

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program,

[ . . . ]

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

**42 U.S.C. § 1395nn.**
**(Limitation on certain physician referrals)**
**(pertinent part)**

(a) Prohibition of certain referrals.

(1) In general. Except as provided in subsection (b), if a physician (or an immediate family member of such physician) has a financial relationship with an entity specified in paragraph (2), then—

(A) the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under this title [42 USCS §§ 1395 et seq.], and

(B) the entity may not present or cause to be presented a claim under this title [42 USCS §§ 1395 et seq.] or bill to any individual, third party payor, or other entity for designated

health services furnished pursuant to a referral prohibited under subparagraph (A).

[ . . . ]

**Cal. Code Civ. Proc. § 425.16**
**(California Anti-SLAPP statute)**
**(pertinent part)**

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

(b)

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

[ . . . ]

e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any

written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

**Cal. Code Civ. Proc. § 335.1**
**(California statute of limitations)**

Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

**Cal. Civ. Code § 47(b)**
**(Litigation privilege)**

A privileged publication or broadcast is one made:

(b)In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2

**Cal. Bus. & Prof. Code § 805**
**(Peer review; Reports) (pertinent part)**

(a) As used in this section, the following terms have the following definitions: (1)

(A) "Peer review" means both of the following:

(i) A process in which a peer review body reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct of licentiates to make recommendations for quality improvement and education, if necessary, in order to do either or both of the following:

(I) Determine whether a licentiate may practice or continue to practice in a health care facility, clinic, or other setting providing medical services, and, if so, to determine the parameters of that practice.

(II) Assess and improve the quality of care rendered in a health care facility, clinic, or other setting providing medical services.

(ii) Any other activities of a peer review body as specified in subparagraph (B).

(B) "Peer review body" includes:

(i) A medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code or of a facility certified to participate in the federal Medicare program as an ambulatory surgical center.

(7) "805 report" means the written report required under subdivision (b).

(b) The chief of staff of a medical or professional staff or other chief executive officer, medical director, or administrator of any peer review body and the chief executive officer or administrator of any licensed health care facility or clinic shall file an 805 report with the relevant agency within 15 days after the effective date on which any of the following occur as a result of an action of a peer review body:

(1) A licentiate's application for staff privileges or membership is denied or rejected for a medical disciplinary cause or reason.

(2) A licentiate's membership, staff privileges, or employment is terminated or revoked for a medical disciplinary cause or reason.

(3) Restrictions are imposed, or voluntarily accepted, on staff privileges, membership, or employment for a cumulative total of 30 days or more for any 12 month period, for a medical disciplinary cause or reason.

(c) If a licentiate takes any action listed in paragraph (1), (2), or (3) after receiving notice of a pending investigation initiated for a medical disciplinary cause or reason or after receiving notice that their application for membership or staff privileges is denied or will be denied for a medical disciplinary cause or reason, the chief of staff of a medical or professional staff or other chief executive officer, medical director, or administrator of any peer review body and the chief executive officer or administrator of any licensed health care facility or clinic where the licentiate is employed or has staff privileges or membership

or where the licentiate applied for staff privileges or membership, or sought the renewal thereof, shall file an 805 report with the relevant agency within 15 days after the licentiate takes the action.

(1) Resigns or takes a leave of absence from membership, staff privileges, or employment.

[ . . . ]

**SECOND AMENDED COMPLAINT**
**(MARCH 14, 2022)**

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA, OAKLAND DIVISION

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RALPH PETERSON, M.D.,

*Plaintiff,*

v. Case No.: 3:21-cv-04908
SECOND AMENDED COMPLAINT

SUTTER BAY MEDICAL FOUNDATION; SUTTER BAY HOSPITALS; NEIL STOLLMAN, M.D., ROD PERRY, M.D., PHILIP RICH, M.D. CATHY L. LOZANO (Board Investigator), KRISTINA LAWSON, (Board Member) HOWARD KRAUSS, M.D., (Board Member) RANDY HAWKINS, M.D., (Board Member) RICHARD D. FANTOZZI, M.D., (Board Member) DEV GNANADEV, M.D., (Board Member) RONALD LEWIS, M.D., (Board Member) LAURIE ROSE LUBIANO, (Board Member) ASIF MAHMOOD, M.D.(Board Member) RICHARD

THORP, M.D., (Board Member) FELIX YIP, M.D.(Board Member) & DOES 1-10,

*Defendants.*

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## SECOND AMENDED COMPLAINT

1. Plaintiff, RALPH PETERSON, M.D. ("Physician" or "Peterson"), by and through his counsel of record, Kevin Mirch and Marie C. Mirch, alleges, avers and complains as follows:

## PARTIES

2. At all times relevant hereto, Ralph Peterson, M.D., was a physician licensed to practice in California, residing and practicing medicine in Oakland, California.

3. At all times relevant hereto, Sutter Bay Medical Foundation, was an IRC § 501(c)(3) tax-exempt California Corporation, legally and validly existing and doing business in Alameda County. Sutter East Bay Medical Foundation is a former California corporation that was merged into Sutter Bay Medical Foundation in 2017.

4. At all times relevant hereto, Sutter Bay Hospitals was an IRC § 501(c)(3) tax-exempt California Corporation, legally and validly existing and doing business in Alameda County. Sutter East Bay Hospitals is a former California nonprofit corporation that merged into the surviving Sutter Bay Hospitals corporation on or about March 1, 2018.

5. At all times relevant hereto, Alta Bates Summit Medical Center was a dba of Sutter Bay Hospitals .

6. At all times relevant hereto, Sutter Bay Medical Foundation, Sutter Bay Hospital and Sutter Alta Bates Summit Hospital are referred to as "Sutter".

7. At all times relevant hereto, Neil Stollman, M.D. was a physician licensed to practice in the State of California and doing business in Alameda County. At all times relevant hereto, Dr. Stollman acted in his individual capacity and as an agent on behalf of the Sutter defendants.

8. At all times relevant hereto, Rod Perry, M.D. was a physician licensed to practice in the State of California and working for Alta Bates as Chair for it Department of Medicine. At all times relevant hereto, Dr. Perry acted in his individual capacity and as an agent on behalf of the Sutter defendants.

9. At all times relevant hereto, Philip Rich, M.D. was a physician licensed to practice in the State of California and working for Alta Bates as President of its Medical Staff. At all times relevant hereto, Dr. Rich acted in his individual capacity and as an agent on behalf of the Sutter defendants.

10. Defendants Stollman, Perry and Rich are referred to as the peer review panel or peer review panel members.

11. At all times relevant hereto, Cathy Lozano was a former employee investigator for the California Medical Board ("MBC").

12. At all times relevant hereto, Kristina Lawson was a Public Member of the Medical Board of California. Her term as Board Member is set to run from 10/21/15-6/1/22. Ms. Lawson is also an attorney and a Partner at Hanson Bridgett LLP. In 2020, Ms.

Lawson was elected President of the "MBC". Hanson & Bridgett is sometimes referred to as the "Sutter attorney or Sutter lawyers", peer review panel attorneys and/or the "MBC attorneys".

13. At all times relevant hereto, Howard Krauss, M.D. was a Physician Member of the Medical Board of California. His term as Board Member ran from 8/20/13-6/1/21.

14. At all times relevant hereto, Randy Hawkins, M.D. was a Physician Member of the Medical Board of California. His term as a Board Member is set to run from 3/4/15-6/1/24.

15. At all times relevant hereto, Dev Gnanadev, M.D. was a Physician Member of the Medical Board of California. His term as Board Member is set to run from 12/21/11-6/1/22.

16. At all times relevant hereto, Ronald Lewis, M.D. was a Member of the Medical Board of California. His term as Board Member was set to run from 8/20/13-6/1/21.

17. At all times relevant hereto, Laurie Rose Lubiano was a Public Member of the Medical Board of California. Her term as Board Member is set to run from 12/17/18-6/1/24.

18. At all times relevant hereto, Asif Mahmood, M.D. was a Physician Member of the Medical Board of California. His term as Board Member is set to run from 6/3/19-6/1/23.

19. At all times relevant hereto, Richard Thorp, M.D. was a Physician Member of the Medical Board of California. His term as Board Member is set to run from 7/26/19-6/1/23.

20. At all times relevant hereto, Felix Yip, M.D. was a Physician Member of the Medical Board of California. His term as Board Member is set to run from 1/30/13-6/1/22.

21. Defendants Lawson, Krause, Hawkins, Fantozzi, Gnanadev, Lewis, Lubiano, Mahmood, Thorp, and Yip are collectively referred to as the "MBC" or "MBC members".

22. "California Medical Board" or "MBC" refers collectively to the individuals, not the California Medical Board as an entity, Members of the Medical Board of California, namely Kristina Lawson, Howard Krauss, M.D., Randy Hawkins, M.D., Richard Fantozzi, Dev Gnanadev, M.D., Ronald Lewis, M.D., Laurie Rose Lubiano, Asif Mahmood, M.D., Richard Thorp, M.D., Felix Yip, M.D..

23. At all times relevant hereto, the California Medical Board was composed of a majority of physicians.

24. Defendant Does 1-10, are individuals, corporations, partnerships, trusts, limited liability companies and/or any other entity that by their specific conduct are responsible for damages alleged herein. At such time as their true names and identities are known, Plaintiff will seek leave to amend this complaint to add the same.

25. Plaintiff has exhausted his administrative remedies prior to filing this suit.

**JURISDICTION & VENUE**

26. The Jurisdiction of this case is conferred by Sections 28 U.S.C. Section 1331, 1343(3) and (4), and 42 U.S.C. Section 1983, 28 U.S.C. Sections 2201, 2202,

and the fifth and fourteenth amendments to the United States Constitution. Specifically, Plaintiff brings this action to secure equitable relief and damages from actions initiated by defendants under color of law, which are violative of rights, privileges, and immunities guaranteed him by the United States Constitution, and directly under and through Article I, section 10, Clause 1 and the first, fourteenth amendments to the United States Constitution.

27. This action seeks redress for the deprivation of Plaintiff's constitution and civil rights and includes ancillary claims related thereto. Plaintiff's constitutional and civil rights are guaranteed by the Due Process Clause of the First, Fourth, Fifth and Fourteenth amendment to the United States Constitution, Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2), Clayton Act (15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53), Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (AKS), and The Stark Law (42 USC § 1395nn).

28. Venue is proper pursuant to 28 U.S.C. Section 1391(a) and (b) as the conduct from which this action arises occurred in Alameda County, State of California.

**FACTS**

**SUTTER HEALTHCARE**

29. During January 1996, Sutter Healthcare (Sutter) was formed from a merger between Sacramento-based Sutter Health and California Healthcare System. Sutter operates as an IRC § 501(c)(3) tax exempt corporation.

30. At all times relevant hereto, Sutter Bay Medical Foundation operated as Sutter Health ("Sutter") and controls and owns a network of 24 hospitals with

53,000 employees, over 5200 physicians, 14,000 clinicians and business professionals. Sutter provides outpatient services, research facilities, home health and hospice care. Sutter monopolizes and controls healthcare and medical discipline in Northern California.

31. At all times relevant hereto, Sutter used a number of unlawful strategies to finance and operate its consolidation and monopoly of Northern California healthcare. Sutter's Strategies are hereinafter referred to as "Sutter's Medical Strategy".

32. Sutter uses medical discipline to control physician referrals, acquisition of physician practices and to punish non-cooperating physicians thereby undermining their credibility as a witness and destroying their medical practices.

33. Sutter controls medical discipline by strategic placement of its "cooperating or compliant physicians" and/or attorneys on institutional peer review panels and the "MBC". Sutter's peer review panels and the MBC participated in strategic discipline used to divert its own malpractice onto Dr. Peterson and other uncooperative physicians.

34. As a result of its "Medical Strategy", Sutter performed only profitable procedures, steering away unprofitable procedures to county medical facilities.

35. Revenues generated from Sutter's "Medical Strategy" were used to pay unlawful "kickbacks" and to acquire physician medical practices.

36. At all times relevant hereto, Sutter's "Medical Strategy" violated Federal and State Constitutions, HCQIA, Income Tax, Stark, Anti-Kickback, Medicare,

Medical and False Claims ("anti-kickback") laws and related statutes, rules and regulations.

37. The Medicare and Medicaid Patient Protection Act, also known as the AntiKickback Statute, 42 U.S.C. § 1320a-7b(b) (AKS), prohibits physician "kickbacks" which corrupt competent medical treatment decisions resulting in more expensive, unnecessary and/or harmful care being provided to vulnerable patients.

**ALTA BATES SUMMIT ACQUISITION**

38. On December 28, 1999, Oakland's Summit Medical Center merged with Berkeley's Alta Bates Medical Center forming Alta Bates Summit Medical Center (Alta Bates). Shortly thereafter, Alta Bates became a Sutter affiliate.

39. At all times relevant hereto, Sutter/Alta Bates was a certified Medicare provider. As a Medicare approved entity, Sutter/Alta Bates was prohibited from discriminating against physicians and/or "protected class" patients.

40. At all times relevant hereto, Alta Bates was the East Bay's (Oakland's) largest private, not-for-profit medical center serving Oakland's indigent and under served Medical community.

**SUTTER'S "MEDI-CAL STRATEGY".**

41. At all times relevant hereto, Sutter's "Medical Strategy" involved the profitization of MediCal procedures through unlawful steering and illegal billing practices.

42. At all times relevant hereto, Sutter monopolized and controlled healthcare in Northern California.

43. At all times relevant hereto, Hanson Bridget (HB) represented Sutter.

44. At all times relevant hereto, HB health care practice was one of California's largest law firms, and served clients in every segment of the health care industry, including long-term care facilities, senior housing and care communities, federally qualified health centers, hospitals, and hospital systems, integrated delivery systems, physician groups, medical staffs, long-term care facilities, senior housing and care communities, home health agencies, hospices, and trade associations.

45. At all times relevant hereto, HB advised Sutter with respect to a myriad of laws regulating and restricting its ability to do business with other providers, payers, and vendors. A substantial part of relationship with Sutter involved issues arising from Sutter's operations, including dealing with federal and state regulators and taxing authorities; advising it about reimbursement questions; managing relationships with patients, residents, and vendors; advising on labor, employment, and executive compensation issues; and performing medical staff credentialing and quality assurance activities. HB also provides litigation and dispute resolution services that were oriented toward the specialized issues with which Sutter dealt as providers of health care. HB knew and approved the unlawful kickback scheme used by Sutter.

46. At all times relevant hereto, Sutter controlled Network Vendors that assembled Healthcare Provider Networks (physicians). The Network Vendors negotiated the prices for medical services and products sold by the Healthcare Providers (physicians) in those networks. The Network Vendors then offered Employers,

Healthcare Benefits Trusts and Third Party Administrators (Medicare/Medical) access to their Provider Networks. The Network Vendors operating in Northern California include, but were not limited to, Third Party Medicare / MediCal administrators, including, but not limited to, Community Health Plan, Blue Shield of California, Anthem Blue Cross, Aetna, CIGNA, and United Healthcare.

47. At all times relevant hereto, medical reimbursement negotiated by the Network Vendors and paid to Sutter substantially exceeded that paid to other Medical providers, including but not limited to, Dr. Peterson.

48. Sutter's unlawful billing practices, included, but were not limited to: chargemaster manipulation, up-coding, requiring the performance of unnecessary medical procedures, charging for unused materials and demanding payment for physician "on-call" coverage.

49. At all times relevant hereto, Sutter paid cooperating physicians unlawful "kickbacks" out of Medical funds to steer to or away from Sutter depending upon the profitability of the medical procedure.

50. Defendants Stollman, Perry and Rich were members of Sutter's peer review panels and cooperating physicians.

51. Sutter used the physician disciplinary process to secure doctor cooperation in its unlawful steering of "protected class" patients. Sutter secured control over its peer review panel members and the "MBC" by strategically placing its "cooperating physicians", attorneys and allies on its peer review panel and/or the "MBC".

52. Sutter punished non-cooperating physicians by relentless disciplinary actions conducted through its facilities' and Third Party Payer Peer Review Panels and credentialing boards it controlled. As a result of this process, non-cooperating physicians' medical practices were substantially impaired and/or failed, allowing Sutter to purchase the same at substantially reduced amounts.

53. At all times relevant hereto, Sutter interfered with the sale of impaired or failing medical practices by misrepresenting discipline imposed on physicians to potential buyers.

54. Sutter's "Medical Strategy" directly impacted Oakland's indigent and under served patient community by reducing funds and physician access for medical care.

**DR. PETERSON**

55. Dr. Peterson is an African American physician and UC-Berkeley graduate born and raised in Oakland, California ("Oakland").

56. During 1972, Dr. Peterson's brother, Roland Peterson, was shot and killed by a police officer in Long Beach, California. *See, Peterson v. City of Long Beach*, 24 Cal.3d 238 (Cal. 1979). Because of that incident, Dr. Peterson has acted as a mentor and advocate for various individuals and/or organizations, including, but not limited to Oakland's indigent and under served Medical patient community.

57. From 1983, Dr. Peterson has practiced internal and gastroenterology medicine in Census Tract 4093, a Health Manpower Shortage Area (HMSA), pursuant

to 42 U.S.C. § 254n, serving Oakland's indigent and under served Medical community.

58. From 1999 through 2009, Dr. Peterson's limited his privileges at Sutter's Alta Bates medical center to endoscopy procedures, only using its out-patient facilities.

59. Prior to February 12, 2009, Dr. Zealous Wylie, the "Big GI Group", took "call" for Dr. Peterson.

60. After February 12, 2009, Sutter gained control of the "Big GI Group", installing Dr. Stollman as its CEO.

61. At all times relevant hereto, Dr. Stollman received unlawful "kickbacks" disguised as employment and/or consulting contract payments from Sutter.

62. At all times relevant hereto, Sutter concealed its payment of unlawful "kickbacks" from Dr. Peterson.

**PEER REVIEW SCHEME**
**"CALL COVERAGE EXCUSE".**

63. On February 2, 2009, Alta Bates Physician Peer Review Board members, Drs. Perry and Stollman, ordered Dr. Peterson to appear at Alta Bates without explanation. That meeting was rescheduled to February 12, 2009.

64. On February 6, 2009, Dr. Peterson requested a formal HCQIA meeting and notice of allegations from Drs. Perry and Stollman. Drs. Perry and Stollman failed, refused and/or neglected to provide that information.

65. On February 12, 2009, Dr. Perry ordered Dr. Peterson to increase his "call coverage" because of 3 quality of care patient issues that he allegedly failed

to respond to through his answering service. In lieu of additional coverage, Dr. Peterson was told by Dr. Perry that he could pay a fee to Dr. Stollman for the same.

66. At all times relevant hereto, Sutter controlled all available Alta Bates "call" approved physicians through the payment of unlawful "kickbacks", threats and/or the medical disciplinary process.

67. On March 25, 2009, Dr. Peterson requested call coverage from Dr. Stollman. Dr. Stollman refused to cover without payment of an unreasonable fee.

68. On March 26, 2009, Dr. Rich ordered Dr. Peterson to resign his Alta Bates privileges due to his failure to obtain additional "call coverage".

69. On March 30, 2009, Dr. Peterson refused to resign or "steer away" his unprofitable indigent and under served Medical patients to AHS (Alameda Health Services).

70. On April 1, 2009, Dr. Peterson's privileges were summarily suspended without a hearing. There was no patient complaint or investigation.

71. On April 6, 2009, Sutter constructively terminated Dr. Peterson's privileges at Alta Bates by forcing him to resign under threat of Peer Review and "MBC" discipline.

72. On April 8, 2009, Sutter prepared and published to the National Practitioner Data Bank a false Adverse Action Report (Form 805) stating Dr. Peterson had resigned to avoid further investigation into various quality of care complaints.

73. On April 15, 2009, "MBC" received Sutter's Form 805.

74. During August 2009, Dr. Peterson announced the opening of an independent endoscopy suite to compete against Sutter and serving Oakland's indigent and under served Medical community.

75. On or about November 4, 2009, Dr. Peterson was listed as a percipient and expert witness for Dr. Ernest Bonner, another African American Physician, who also cared for Oakland's indigent and under served community and refused to cooperate with Sutter in its unlawful Medical strategy.

**805 — INVESTIGATION**
**(Accusation #12-2009-1985-92).**

76. On November 18, 2009, Dr. Peterson received a notice from "MBC" that its investigator Cathy Lozano was conducting an investigation into the allegations contained in Sutter's Form 805 dated April 9, 2009.

77. On or about November 21, 2009, Dr. Peterson was informed by the "Medical Board Enforcement Program/Investigation Group" that a formal ACCUSATION had been filed by the MBC (#12-2009-1985-92).

78. On December 1, 2009, "MBC" provided Dr. Peterson a "comprehensive summary" of the "Form 805 Complaint" without supporting exhibits and/or a complete investigation. The "comprehensive summary" contained a number of false and/or misleading statements (ACCUSATION #12-2009-1985-92).

79. Sometime during 2010, Lozano /MBC Lozano's investigation showed that no calls were made from

Sutter's emergency room to Dr. Peterson. Lozano concealed her investigation from Dr. Peterson.

80. On October 27, 2010, Lozano notified Dr. Peterson that Accusation No. 12¬2009-1985-92 was "submitted to a medical consultant" who determined that the allegations were "not considered extreme enough to warrant pursuing administrative action" against him. Neither the MBC nor Lozano informed Dr. Peterson that Sutter, its peer review panel and MBC were targeting Peterson because he refused to steer his "protected class" physicians or the payment of unlawful "kickbacks" to Stollman, Perry and Rich.

**B.E. COMPLAINT**

81. B. Edwards (B.E.) was an internal medicine patient of Dr. Peterson's from mid-1980's through September 10, 2009.

82. As part of B.E.'s care, Dr. Peterson arranged appointments on February 18, 2008 March 3, 2008, October 10, 2008 and September 10, 2009 with cardiologists. B.E. did not present at any of these appointments.

83. On September 9, 2009, B.E. presented at Sutter with after suffering a transient ischemic attack (TIA). Sutter performed a CT Scan which showed a 92% blockage of B.E.'s right carotid artery. Sutter did not disclose to Dr. Peterson the results of B.E.'s CT Scan, and discharged her without treatment or additional tests. Sutter's discharge constituted "steering" B.E. to county healthcare facilities.

84. On September 10, 2009, Dr. Peterson referred B.E. to another cardiologist. B.E. did not present at

that appointment, instead seeking care from Sutter's emergency ward.

85. On September 21, 2009, BE suffered a stroke and was treated at a Palo Alto Medical Center facility in Dublin, California.

86. BE's stroke was treated by Sutter.

87. During 2010, Sutter encouraged and participated with B.E. in filing an unfounded medical board complaint against Dr. Peterson (Complaint Control # 12-2010-2407-08). Sutter encouraged and participated in the filing in order to defer its own malpractice in failing to properly treat B.E.

88. On April 16, 2011, Dr. Peterson was electronically interviewed by Lozano with respect to B.E. complaint #12-2010-2407-08 (B.E.). Lozano knew and concealed from Dr. Peterson Sutter's malpractice in steering away B.E..

89. During 2010 through September 17, 2013, "MBC" investigated Accusation No. 12–2010-2047-08 during which it was determined that Sutter had discovered BE's right carotid artery blockage, but, failed, refused and/or neglected to treat her. Instead, she was steered away to county medical facilities.

90. On October 3, 2011, "MBC" Executive Director Linda Whitney signed Accusation #12-2010-2047-08, which concealed Sutter's refusal and/or failure to diagnose, treat and it causing B.E.'s September 21, 2009 stroke.

91. On November 11, 2011, River City Medical Group informed Dr. Peterson that because of the "MBC" Accusations, his GI Specialty agreement was terminated effective November 30, 2011.

92. On January 2, 2012, Dr. Peterson requested that the "MBC's " disciplinary action Accusation No. 12-2009-1985-92 (Sutter Alta Bates) be dismissed based on Investigator Lozano's letter dated October 27, 2010.

93. MBC failed, refused and/or neglected to timely dismiss or close Complaint/Accusation No. 12-2009-1985-92 .

94. On January 12, 2012, Dr. Peterson's Cigna provider contract was terminated due to "MBC" online accusations concerning an "[un]acceptable history relative to all types of investigations / disciplinary actions", unrestricted admitting or surgical privileges within his GI speciality; and, an inability to demonstrate "continuity of care devoted to ambulatory care".

95. On February 15, 2012, Dr. Peterson's Health Net provider contract was terminated due to the allegations in "MBC" Case No.: 12-2010-204708 (B.E).

96. On March 12, 2012, Dr. Peterson's Wells Fargo mortgage loan application was denied.

97. At all times relevant hereto, "MBC" failed, refused and/or neglected to provide Dr. Peterson his complete file and/or any evidence supporting the allegations alleged in "MBC" Accusations 12-2009-1985-92 and/or 12-2010-2047-08 (B.E.).

98. On November 19, 2012, Dr. Peterson filed, in pro per, an action in Superior Court in Oakland, Alameda County against Drs. Perry and Stollman for misusing the physician disciplinary process (Case No. RG12656812). The action was not against Sutter and did not involve its scheme to pay kickbacks out of

Medical funds to physicians that refused to take Medical patients.

99. During January of 2013, Dr. Peterson appeared before the "MBC" as a witness for Dr. Bonner, an African American physician, who also treated Oakland's indigent and under served patients. "MBC" did not allow Dr. Peterson to testify for Dr. Bonner.

100. On January 28, 2013, Drs. Perry and Stollman filed a Special Motion to Strike Dr. Peterson's Complaint misstating the facts and existing law which was supported by THREE (3) fabricated declarations signed by Defendants Stollman, Perry and Joanne Jell.

101. On January 28, 2013, Hanson & Bridgett represented Sutter, its peer review panel members, other Healthcare Company Providers and the "MBC". This conflict was not disclosed to Dr. Peterson.

102. Starting at least as early as 2013, Sutter was the subject of a California Attorney General investigation concerning the unlawful payment of "kickbacks" to its compliant physicians. At the same time, a separate investigation was being conducted into the "MBC" discrimination against African American and Hispanic physicians. Neither the "kickback" nor discrimination investigations were ever disclosed to Dr. Peterson and were concealed from the public.

103. On April 2, 2013, Dr. Peterson was denied physician provider status with Hill Physicians Medical Group.

104. On or about April 12, 2013, Aleshia Coenen-Washington (Plaintiff) as Conservator of the Person and Estate of B. Edwards ("B.E.") filed suit against Dr. Peterson in the Superior Court of California, County of

Alameda, Civil-Unlimited Jurisdiction, Case No. RG-12650611. Attached to her complaint was Accusation #12-2010-2407-08.

105. At all times relevant hereto, "B.E.'s" case was prompted, perpetuated and encouraged by Sutter, its peer review panel members and the MBC in retaliation for Dr. Peterson refusing to cooperate in Sutter's "MediCal Strategy", for appearing as a percipient and expert witness for Dr. Bonner, and to deflect its B.E. malpractice upon Dr. Peterson.

106. On or about April 23, 2013, a legislative plan was proposed to "strip" the "MBC" of its physician investigative authority due to accountability issues related to fabricated investigations. The proposed legislation and reasons for the same were concealed from Dr. Peterson and the Court.

107. On May 8, 2013, the Superior Court issued a tentative order against Dr. Peterson in *Peterson v. Drs. Perry & Stollman*.

108. As of May 8, 2013, Dr. Peterson did not know that Drs. Stollman and Perry were receiving "kickbacks" and/or that Sutter and the "MBC" were being investigated by the State of California for discrimination, unlawful kickbacks and/or that it had an irreconcilable conflict existed with it using Hanson & Bridgett which represented the Sutter, its peer review panel members and the "MBC".

109. Dr. Peterson did not learn about these investigations until the airing of a December 2020 report by 60 Minutes. Sutter, its peer review panel members, the "MBC", and Hanson & Bridget had concealed these investigations and conflicts through confidential

settlements and false declarations paying "kickbacks" and threatening other witnesses with discipline.

110. On June 21, 2013, Dr. Peterson was denied physician provider status with Alta Bates Medical Group.

111. On July 17, 2013, MBC determined that there were no quality of care issues in B.E.'s treatment, but did not disclose that finding to Dr. Peterson.

112. On August 31, 2013, Dr. Peterson requested documents from the California Attorney General's Office for "MBC" Case: 12-2010-2047-08 (B.E.). Dr. Peterson agreed to pay for all copying charges related to his request.

113. On September 12, 2013, the Superior Court entered an order of judgment in *Aleshia Coenen-Washington as conservator for B. Edwards v. Dr. Peterson*, in favor of Dr. Peterson, M.D. (Defendant), dismissing that action with prejudice.

114. On October 16, 2013, Dr. Peterson was denied physician provider status with Blue Shield of California.

115. On October 31, 2013, Sutter returned $46,000,000.00 to the State of California for excessive charges for anesthesia. These charges were up-coded following false diagnosis by Sutter's cooperating physicians.

116. Following Sutter's payment, Dr. Peterson was subjected to continuing and ongoing disciplinary investigations by Peer Review Panels controlled by Sutter which denied Dr. Peterson's physician provider applications and did not renew ongoing contracts.

117. On or about, December 18, 2013, "MBC" stated that its Board investigation revealed that during 2005 to 2009, Dr. Peterson did not "maintain sufficient record keeping regarding your [Dr. Peterson's] care and treatment of B. Edwards' diabetes and hypertension, as more fully described in Accusation No. 12-2010-204798" (B.E.).

118. The December 18, 2013 findings were not alleged in the underlying accusation.

119. Upon information and belief, the Bette Edwards Accusation was fabricated in order prevent Dr. Peterson from questioning Sutter's MediCal Strategy (scheme).

120. On February 20, 2014, the Supreme Court of California decided *Fahlen v. Sutter Central Valley Hospital*, No. S205568 finding jurisdiction for violations of HCQIA and/or state related actions do not need to be conditioned on prior successful mandamus challenges to a hospital's quasi-judicial decision to restrict or terminate medical staff privileges because a mandamus court could foreclose the physician's statutory right to litigate whistleblower retaliation. HB served as counsel for Sutter in *Fahlen, supra*.

**PHYSICIAN PROVIDER STATUS**
**(Denied / Not Renewed)**

121. During March of 2014, Drs. Peterson and Bonner agreed to plan and implement a multi-medical professional disciplines clinics to serve more of the medical needs for Oakland's indigent and underserved patient community. After Sutter became aware of Drs. Peterson and Bonner's plans to open multiple

physician discipline clinics, the "MBC" escalated disciplinary actions against the 2 physicians.

122. Starting in 2014, Dr. Peterson's reimbursements from Third Party Payers for medical services provided to his patients started to be reduced.

123. On or about April 18, 2014, "MBC" retaliated against Dr. Bonner by posting a notice on the Internet that his medical license was revoked.

124. At the same time, Medi-Cal terminated Dr. Bonner's provider status because of the "MBC" notice. Dr. Bonner's license was revoked for failing to complete a continuing education course that was not offered locally.

125. On May 16, 2014, Dr. Peterson was denied physician provider status with Aetna. At that time Dr. Peterson did not know that "MBC" and Lozano had informed Aetna credentialing that Drs. Peterson and Bonner were the subject of ongoing investigations.

126. Aetna denied Dr. Peterson's physician provider status after Defendant Lozano informed it about Board problems associated with both Drs. Peterson and Bonner.

127. On or about September 10, 2014, a Qui Tam action was filed under seal against Sutter by a former compliance officer, Laurie Hanvey, for paying unlawful fees to its compliant physicians in violation of the Federal and State Stark Laws, False Claims Act[1] (FCA & CFCA) complaint. The Qui Tam action was not unsealed until November 18, 2019.

128. On September 29, 2014, African American CEO Wright Lassiter III was forced to resign from AHS after seeking to restructure a $200 million debt owed

to the Alameda County. This debt had accumulated as a result of Sutter steering unprofitable Medical business to its facilities and keeping profitable procedures for itself.

129. On October 28, 2015, Hanson & Bridgett Attorney Kristina D. Lawson was appointed to "MBC".

130. From October 2015 through present, HB has represented Sutter and its cooperating physicians in allegations of Medicare/Medical kickbacks. It has participated in planning and advice regarding the payment of unlawful kickbacks to cooperating physicians.

131. At all times relevant hereto, Lawson knew as a partner at HB, and as a "MBC" member that unlawful kickbacks were being paid by its client, Sutter, to physicians cooperating in the kickback scheme. Lawson benefitted financially from attorney fee payments made by Sutter and its cooperating physicians to HB.

132. From October 2015 through present, MBC has failed, refused and/or otherwise neglected to investigate and/or discipline Sutter physicians that received unlawful kickbacks paid out of Medical funds. Instead, the MBC investigated and harassed Dr. Peterson in an attempt to suffocate any allegation of Medicare/Medical fraud.

133. On December 30, 2015, the First Appellate Court of California dismissed, in an Unpublished Opinion, Dr. Peterson's Appeal from the Superior Court Oder dismissing his case against Drs. Perry and Stollman. Drs. Stollman and Perry were represented by Hanson & Bridgett.

134. During 2016, Dr. Peterson's medical reimbursements (per procedure) continued to decline and his current provider contracts were not renewed without cause. At the same time, Sutter's medical reimbursements (per procedure) increased.

135. On February 2016, Dr. Peterson filed a Petition for Review with the California Supreme Court (*Peterson v. Perry, Stollman*).

136. During 2017, Dr. Peterson's medical reimbursements (per procedure) continued to decline and his current Provider contracts were not renewed. At the same time, Sutter's medical reimbursements for the same procedures increased.

137. During January 2017, the California Research Bureau (California Library) issued its "Demographics of Disciplinary Action by the Medical Board of California (2003-2013)" Report finding that the "MBC" discriminated against African American and Hispanic physicians in its disciplinary process. This report was concealed ("buried").

138. During June 2017, Dr. Peterson applied for "provider status" with HealthNet.

139. During September of 2017, Dr. Peterson was denied provider status with HealthNet based on statements made by the MBC employees to credentialing committees and online information regarding the same.

140. During June-September 2017, the MBC knew and refused to investigate charges that Sutter's "cooperating physicians" were receiving kickbacks to upcode (mis-diagnose) Medical patients and charge for services not provided.

141. During 2018, Dr. Peterson's medical reimbursements (per procedure) continued to decline and his current provider contracts were not renewed. At the same time, Sutter's medical reimbursements (per procedure) increased.

142. On or about, January 5, 2018, Dr. Peterson met with Alameda Health Services executives (AHS) regarding the sale of his medical practice and endoscopy suite. Dr. Peterson provided financial data to AHS. During initial negotiations, Dr. Peterson was told that AHS CEO Delvecchio Finley was committed to providing care to Oakland's indigent and under served patient community. Delvecchio Finley is African American.

143. On or about March 26, 2018, the University of California Berkeley released a study done by its Petris Center on Health Care Markets and Consumer Welfare College confirming that Sutter's consolidation of healthcare had substantially increased the cost of care in Northern California without an increase in quality of care. That consolidation had decreased available care to Oakland's indigent and under served community.

144. On or about March 30, 2018, California's Attorney General Becerra sued Sutter Health for anti-competitive behavior after completing a six-year investigation into its anti-competitive practices. The six-year investigation has never been released to the public.

145. On or about October 21, 2018, Dr. Bonner filed a complaint against the "MBC" after claiming that Investigator Lozano had been fabricating "MBC" investigations (*Bonner v. California Board of Medicine, et. al.*, United States District Court for the Eastern District of California Oakland Division, Case 2:17-cv-

00445-KJM-DB). The Bonner complaint alleged years of "MBC" abuse, including, but not limited to, systematic discrimination against him.

146. During 2019, Eserick "TJ" Watkins was appointed to the "MBC".

147. During April 12, 2019, Sutter returned $30 million to Medicare for up-coding (mis-diagnosing) charges associated with services provided at Palo Alto Medical Foundation.

148. On or about November 14, 2019, the Sacramento Bee first reported that: "Sutter [had agreed] to pay $30 million to settle secret Kickback lawsuit; whistleblower to get slice". This article was leaked as Sutter's settlement was confidential with related investigations concealed from the General Public. The kickbacks discussed in the article involved "referral fees" ("kickbacks") paid to its "compliant physicians", but did not mention Stollman, Perry and/or Rich.

149. On or about November 18, 2019, the California Attorney General's office issued a statement that from September 1, 2012 through September 30, 2014, Sutter's physician referral payment programs violated "Stark" statutes and that Sutter had been reimbursed for the physician "kickbacks" by Medical.

150. On or about December 20, 2019, Sutter agreed to pay out $575 million in damages and to have its business operations monitored for 10 years as part of a settlement with the State of California in AG Becerra's anti-competitive action against the hospital. The settlement precluded disclosure of the AG investigation report.

151. During November or December of 2019, Dr. Peterson's negotiations with Alameda Health System (Alameda Health) ceased without explanation.

152. Pursuant to a December 20, 2019 consent decree, Sutter agreed not to engage in anti-competitive practices, including, but not limited to, paying physician "kickbacks disguised as salaries or consulting fees.

153. In Mid-December 2019, Sutter agreed to limit its charges for out-of-network services providing public access to its pricing, quality, and cost information. Sutter also agreed to stop measures that denied patients access to lower cost plans and stop all-or-nothing contracting deals, allowing insurers, employers, and self-funded payers to include some of Sutter's hospitals, clinics, or other commercial products in their plans' network. Sutter also agreed to make facilities such as their rural hospitals and Sutter hospitals in San Francisco available to insurers, employers, and self-funded payers that use its system. Prior to this agreement, Sutter had unlawfully steered away unprofitable protected class patients procedures by paying "kickbacks" to cooperating physicians.

154. On or about November 13, 2020, HB partner Kristina Daniel Lawson was elected "MBC" President.

155. On or about November 25, 2020, CEO Delvecchio Finley was forced to resign from AHS after questioning Sutter's anti-competitive and discriminatory policies. Alameda Health serves Oakland's indigent and under served patient community through Highland, Alameda and San Leandro hospitals.

156. On August 3, 2021, Sutter Health and its Affiliates admitted up-coding violations and agreed to

pay $90 million to Settle False Claims Act allegation of upcoding various Medicare programs.

157. On January 10, 2021, "MBC" member Lawson became Hanson & Bridgett's managing partner.

158. During July of 2021, Dr. Peterson's provider contract with FirstHealth was not reinstated because of statements made by MBC and false online information related thereto.

159. On or about August 30, 2021, Sutter Health and its Affiliates (Sutter Bay Medical Foundation (dba Palo Alto Medical Foundation), Sutter East Bay Medical Foundation, Sutter Pacific Medical Foundation, Sutter Valley Medical Foundation (dba Sutter Gould Medical Foundation and Sutter Medical Foundation) (collectively, "Sutter Health")) agreed to pay $90 million for violations of False Claims Act ("up-coding", billing for products and services not provided, unbundling, billing for medically unnecessary services, double billing, and billing Medical for ineligible patients) various Medicare Programs.

160. On or about November 17, 2021, MBC Member Watkins filed a whistleblower claim with the State of California Auditor's Office against the "MBC" claiming that "preferred" and/or cooperative physicians were exempt from Board discipline causing substantial harm to patients in California.

161. From 2019-November 17, 2021, Watkins was ostracized by other members of the "MBC" for his unrelenting pushback against their decisions regarding physician disciplined for "preferred" and/or "cooperating" physicians.

162. Defendant Lawson openly undermined Watkins' complaint by stating that his concerns have been investigated at length and that the board is committed to protecting consumers and ensuring access to quality medical care. This is false as "MBC" has not investigated and/or disciplined any physician involved in the "kickback for referral" charges confirmed the State's Attorney General's Office.

163. During March 2022, Dr. Peterson requested a copy of the Watkins whistleblower complaint which has not been provided under the auspice of a "confidential ongoing investigation" by the State's Auditor's Office.

164. At all times relevant hereto, Dr. Peterson did not know and could not have discovered that the "MBC" preferred "cooperating physicians" exempting them from discipline as meeting regarding the same were taken during "closed door" (confidential) meetings.

**FIRST CLAIM FOR RELIEF**
**(Civil Rights-Violation**
**of First Amendment — All Defendants)**

165. Plaintiff incorporates by reference all the previous allegations of this complaint as if more fully set forth herein.

166. At all times relevant hereto, Dr. Peterson was a patient advocate for Oakland's indigent and under served patient community.

167. At all times relevant hereto, Dr. Peterson and members of his medical practice provided non-incidental, truthful, not misleading, and relevant information which directly advanced the states' substantial interest

in providing medical care to Oakland's indigent and under served patients. This information includes, but was not limited to: advising those patients to "present" at Sutter's Alta Bates Summit Hospital when needing emergency care without considering whether related procedures were profitable; how to sign up for Medical coverage; provided forms and instruction for filling out Medical documents; and by directly communicating with Medical to arrange for coverage for those patients.

168. Sutter's "MediCal Strategy" (conspiracy) discouraged and punished "non-compliant" physicians that referred unprofitable Medical patient procedures to State and/or County facilities. AHS (Alameda Health Services) received and provided medical care for unprofitable procedures resulting in it incurring substantial debt which jeopardized its ongoing business.

169. Sutter paid unlawful "kickbacks" and attorney fees to its cooperating physicians that intentionally misdiagnosed (up-coded) and steered away patients (Stollman, Perry and Rich) and "MBC". Sutter punished un-cooperating physician advocates (Dr. Peterson) for providing correct diagnosis and Medical information to his qualifying patients.

170. Sutter targeted Dr. Peterson in order to stifle his patient advocacy when he refused to accept kickbacks for steering/overbilling and educating Oakland's indigent and under served patients.

171. From February 2009 through the date of this complaint, Sutter and the "MBC" individual Defendants have and continues to use the disciplinary process (Peer Reviews and "MBC") to stifle Dr. Peterson's patient advocacy and education by initiating unfounded disciplinary actions and spreading false rumors

regarding the quality of care provided through his medical practice and endoscopy suite business. The conduct designed to stifle Dr. Peterson's patient advocacy, includes, but is not limited to, the following:

1. Sutter Alta Bates Peer Review Action dated February 2, 2009.
2. 1st "MBC" Case No.: 12-2009-198592.
3. 2nd "MBC" Case No.: 12-2010-204708.
4. Encouraging BE to file a civil complaint against Dr. Peterson.
5. From 2014 through 2021, placing false information on its website about Dr. Peterson settling his disciplinary cases to avoid further Board Investigations.
6. From 2009 through 2021, "warning" various Healthcare companies about Dr. Peterson's ongoing financial, medical malpractice, "peer review" and "MBC" problems. Those Healthcare companies falsely advised, include, but are not limited to: Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group. The statements were false.
7. From 2009 through 2021, "warning" prospective physician partners and employees about Dr. Peterson's ongoing medical malpractice (BE), "peer review" and "MBC" disciplinary problems. These statements were false.
8. During January 2018, warning, threatening and/or otherwise interfering with AHS's

acquisition of Dr. Peterson's medical practice and endoscopy suite. The warnings, threats and/or other interference included statements by Sutter, HB and "MBC" employees about ongoing financial, medical malpractice (BE) and disciplinary problems associated with the "MBC" and Peer Review Panels operating at other Healthcare companies (*e.g.*, Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group). Those statements were false.

172. From 2015 to the present, Lawson, and from 2019 to the present Howard Krause, M.D. Randy Hawkins, M.D., Ronald Lewis, M.D., Dev Gnanadev, M.D., Laurie Rose Lubiano, Asif Mahmood, M.D., Richard Thorp, M.D., and Felix Yip, M.D. were aware of and participated in Sutter's Medical Strategy conspiracy by failing to investigate and/or impose discipline on the Sutter's cooperating physicians that received unlawful kickbacks paid from Medical funds. That conduct resulted in discrimination against the Dr. Peterson and other "non-compliant" physicians as well as their Medical patients. Because the unlawful kickbacks depleted the Medical fund pools, those patients were denied proper healthcare. This denial is discriminatory.

173. Starting in 2015, Lawson knew as a partner in HB and a "MBC" member that unlawful kickbacks for referrals were being paid to Sutter's cooperating physicians.

174. Starting in 2019, Krause, Hawkins, Lewis, Gnanadev, Lubiano, Asif Mahmood, Thorp, and Yip knew and participated in the scheme because Board

Member Watkins had complained directly to them about preferential "MBC" treatment for Sutter's cooperating physicians.

175. At all times relevant hereto, "MBC" had a duty to investigate and impose discipline on Sutter's "cooperating physicians" that were receiving unlawful kickbacks.

176. At no time did "MBC" or its members initiate and/or investigate the Medicare/Medical fraud alleged herein. Instead, Dr. Peterson and other "non-compliant" physicians were the subject of disciplinary harassment.

177. At all times relevant hereto, Sutter, its peer review panels, including panels it controlled, and the "MBC" have acted under "color of law" through its control of public and quasi-public medical disciplinary peer review panels [committees, boards], including, but not limited to, Alta Bates Summit Peer Review Board, "MBC", National Practitioner's Data Bank and other similar third party peer review healthcare organization panels which imposed discipline to suppress Dr. Peterson's right to advocate, educate, provide medical services and serve as a witness in actions in related matters (*e.g.*, *Bonner v. MBC, supra.*).

178. The conduct complained of herein occurred under color of law and exceed these Board Members legitimate managerial duties. Those duties do not include participating in a scheme to defraud Medical, thereby stifling Dr. Peterson patient advocacy.

179. At all times relevant hereto, Sutter controlled the disciplinary process by paying unlawful "kickbacks" and fees to panel/board members and their attorneys, and threatening disciplinary action against other

doctors. Those kickbacks continue and are ongoing resulting in prospective damages to Dr. Peterson and his protected class of patients.

180. Dr. Peterson has diligently pursued and exhausted all legal remedies available to him before filing this action.

181. Dr. Peterson could not have discovered and/or otherwise learned about Sutter's Medical Strategy (conspiracy or scheme) earlier than November 2019, because Sutter, Peer Review Panels and "MBC" members intentionally concealed the MediCal conspiracy by the following conduct: (1) "MBC" designated Lozano's investigation as "ongoing", refusing to release the findings or her employment file asserting privacy concerns; (2) Qui Tam actions, including but not limited to the Harvey case were filed during 2014, but remained under seal until after 2018 when the Federal government intervened in the in those cases. Settlement of Harvey and other Qui Tam actions were subject to confidentiality provisions that prevented disclosure; (3) Various California Attorney General and Federal investigations have been designated as "ongoing" which prevented disclosure of the same until after November 2019; (4) "MBC" Member Watkins' whistleblower complaint filed in November 2021 with the State Auditors Office is currently designated as "ongoing" and not published based on "confidentiality" concerns; (5) Since 2015 "MBC" Member and HB Partner/CEO Lawson has repeatedly denied any wrongdoing by Sutter or the "MBC" despite complaints by "MBC" Member Watkins and the State's Attorney General's office alleging the payment of kickbacks to various Sutter preferred physicians from 2012 through November 11, 2021; (6) Sutter, Lawson

and the "MBC" members knew that Federal and State authorities were investigating Sutter for unlawful patient referral kickbacks; (7) During 2019, "MBC" Member Watkins complained about "preferred physicians" being protected from Board discipline during closed door meetings. Watkins was ostracized and isolated from other Board Members in order to conceal that misconduct causing him to filing a whistleblower complaint with the State's Auditor's Office. The State's Auditor's Office has refused to release the Watkins' complaint citing confidentiality concerns. Other Board Members including Lawson have publicly denied the "preferential treatment" being afforded Sutter's "cooperating physicians" in order to conceal the same from the public; (8) Lozano threatened Dr. Peterson with "MBC" discipline if he testified in the Bonner action; and, (9) Sutter filed false declarations in Peterson v. Stohlman in order to conceal the above alleged conduct.

182. This unlawful conduct is intentional, reckless, continuing, ongoing and corrupt.

183. The MBC defendants are currently violating federal law by the conduct alleged herein and are imminently going to carry out further violations of federal and state law. Plaintiff seeks injunctive relief to prohibit future conduct that violates federal law.

184. At all times relevant hereto, Dr. Peterson did not and could not have known and/or discovered Sutter's Medical scheme to control physician referrals through the systematic misuse of the disciplinary process, as ongoing investigations, qui tam actions, and confidential settlement and attorney-client communications concealed the same from Dr. Peterson. The attorney-client communications were by and between HB employees/ partners at HB and Sutter, its Peer

Review Panels and other Healthcare credentialing employees. Moreover, "MBC" used "closed door" sessions to secrete these abuses from Dr. Peterson and the general public.

185. As a proximate cause of Sutter's violation of Dr. Peterson's First Amendment Rights, he has suffered damages to his person, reputation, medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial.

186. Dr. Peterson requests and order from this Court precluding the ongoing and/or prospective retaliation against Dr. Peterson.

187. Dr. Peterson has no other remedy at law against Sutter, its Peer Review panels and the current "MBC" members to prevent prospective violations of his First Amendment rights.

188. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this action, the exact amount of which will be determined at the time of trial or by motion thereafter.

189. At all times relevant hereto, these Defendants have acted with reckless, corrupt and wanton disregard for Dr. Peterson's personal, financial well being and civil rights mandating an award of punitive and/or exemplary damages in an amount to be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**SECOND CLAIM FOR RELIEF**
**(Civil Rights-Due Process — All Defendants)**

190. Plaintiff incorporates by reference all the previous allegations of this complaint as if more fully set forth herein.

191. As part of Sutter's Medical Strategy, it used the medical disciplinary process to threaten, discipline and impugn Dr. Peterson and other non-compliant physicians that refused to take unlawful kickbacks.

192. At all times relevant hereto, Dr. Peterson's medical licenses and hospital privileges were property rights entitled to constitutionally protected due process.

193. Dr. Peterson was subjected to unfounded discipline by Sutter's peer review panels, various healthcare peer review panels it controlled and members and the "MBC" because he refused to cooperate in the "Medical Strategy" conspiracy.

**PEER REVIEW**

194. From February 2, 2009 through May 11, 2009, Dr. Peterson's was subjected to unlawful Peer Review at Sutter's Alta Bates Summit Hospital ("Alta Bates"), consisting of THREE (3) fabricated quality of care complaints allegedly caused by his failure to take "call" from the Alta Bates emergency room.

195. On April 1, 2014, Dr. Peterson was summarily suspended without a formal hearing.

196. On April 6, 2014, Dr. Peterson's privileges were constructively terminated.

197. On April 8, 2009, Sutter posited the false Form 805 with the "MBC".

198. Dr. Peterson was denied a formal hearing and notice of the allegations against him.

199. Because Sutter paid "kickbacks" and fees to its cooperating physicians and attorneys representing Sutter, its peer review panels (Stollman, Perry and Rich) and "MBC" (officers, executive directors and board members), Dr. Peterson suffered fabricated discipline denying him due process mandated by the Fifth Amendment of the United States Constitution, and the HCQIA.

**1ST "MBC" ACTION**

200. On or about, October 3, 2009, MBC Accusation No. 12-2009-1985-92 was filed alleging misconduct described, at least in part, in Sutter's Form 805 (failure to return calls made from Sutter's emergency room).

201. On or about, October 27, 2010, "MBC's" investigation ended.

202. The "MBC" investigation was conducted by Cathy Lozano.

203. The investigation findings were fabricated, as evidence contained and concealed in MBC files showed that no calls were made from Sutter's emergency room on the days in question.

204. At all times relevant hereto, the "MBC" knew that Investigator Lozano was fabricating investigations to substantiate improper conduct against uncooperative physicians (*e.g.*, Dr. Bonner).

205. Because the Lozano investigation was fabricated Dr. Peterson was subjected to unnecessary disciplinary process thereby denying him due process protected under the Fifth Amendment and HCQIA.

**2ND MBC ACCUSATION**

206. On or about, October 3, 2010, a second "MBC" complaint, Accusation No. 12¬2010-204708, was filed by "MBC" against Dr. Peterson claiming substandard care of patient B.E.

207. Accusation No. 12-2010-204708 was assigned to Investigator Lozano.

208. On January 2, 2012, Dr. Peterson complained to "MBC" about Investigator Lozano ignoring pertinent facts.

209. MBC refused to dismiss and/or otherwise investigate Lozano's investigations despite other complaints regarding the same conduct.

210. On or about July 17, 2013, a stipulated settlement was reached after threats of further discipline were made against Dr. Peterson.

211. After the settlement, Sutter convinced B.E.'s conservator to file an unfounded civil lawsuit against Dr. Peterson in order to defer its own malpractice liability.

212. Dr. Peterson was denied his Fifth Amendment Due Process Rights by concealing the evidence of the conspiracy between Sutter, "MBC" and their same attorneys that improperly used the medical disciplinary process.

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213. On November 19, 2012, Dr. Peterson filed a civil action against Drs. Stollman and Perry as members of Sutter's peer review panel.

214. On or about December 30, 2015, Dr. Peterson's complaint was dismissed based on 3 false and/or misleading declarations that concealed "kickbacks" and attorney fees paid by Sutter, its peer review panel members and MBC.

215. On November 11, 2013, Dr. Peterson appealed the Superior Court ruling to the 1st Appellate Court for the State of California.

216. On December 30, 2015 the Appellate Court dismissed Dr. Peterson's appeal.

217. On February 8, 2016, Dr. Peterson filed a writ to the California Supreme Court.

218. On March 23, 2016, the California Supreme Court denied Dr. Peterson's writ for certiorari.

219. At each litigation stage, the Defendants concealed unlawful "kickbacks" and fees paid to Sutter's peer review panel members, the MBC and/or their attorneys.

220. Sutter's proffering of false declarations violating Dr. Peterson's Fifth Amendment Due Process rights and the HCQIA.

**HEALTHCARE PROVIDERS "PRETEXT".**

221. From February 2009 through the filing of this complaint, Dr. Peterson was denied due process by a number of healthcare Peer Review and Credentialing

Panels, including, but not limited to: Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group.

222. In each instance, the Peer Review Panels used as Pretext for denial prior and ongoing investigations by Sutter's Peer Review Panels and "MBC".

223. At all times relevant hereto, Dr. Peterson's current and prospective contracts were terminated or denied medical provider status based on the false Form 805, 2 MBC accusations, the BE malpractice filing, and statements that ongoing and/or prospective investigations were "on-going".

224. At all times relevant hereto, Sutter controlled the medical disciplinary process by paying its peer review panel members and MBC physicians/attorneys unlawful "kickbacks" from Medical pools.

225. After 2015 to the present, Lawson, and from 2019 thereafter, Krause, Hawkins, Lewis, Gnanadev, Lubiano, Asif Mahmood, Thorp and Yip were aware of and participated in Sutter's Medical Strategy conspiracy by not correcting the false allegations against Dr. Peterson, and failing to investigate or impose discipline on Sutter's cooperating physicians. That conduct resulted in Dr. Peterson being subject false and exaggerated discipline by Sutter's Peer Review Panels and "MBC". The false and exaggerated findings escalated from 2009 through the filing of this complaint. The underlying findings escalated as Lawson and the "MBC" Defendants attempted to conceal the unlawful referral kickbacks paid to Sutter's "preferred physicians".

226. Starting in 2019, Krause, Hawkins, Lewis, Gnanadev, Lubiano, Mahmood, Thorp, and Yip knew and participated in the scheme even after Watkins had complained about preferential disciplinary treatment afforded to Sutter's cooperating physicians.

227. At all times relevant hereto, "MBC" had a duty to investigate and impose discipline on Sutter's "cooperating physicians".

228. At no time did "MBC" or its members initiate and/or investigate the Medicare/Medical fraud allegations. Instead, they contrived and/or exaggerated ongoing investigations and findings against Dr. Peterson.

229. The contrived findings and investigations related thereto violated Dr. Peterson's due process rights as he was not afforded notice and an opportunity to contest the same.

230. At all times relevant hereto, Sutter, its peer review panels, including panels it controlled, and the "MBC" Defendants have acted under "color of law" through its control of public and quasi-public medical disciplinary peer review panels [committees, boards], including, but not limited to, Alta Bates Summit Peer Review Board, "MBC", National Practitioner's Data Bank and other similar third party peer review healthcare organization panels which published false disciplinary findings in violation of Dr. Peterson's due process rights.

231. The conduct complained of herein occurred under color of law and exceeded "MBC" Members' managerial duties. Those duties do not include participating in a scheme to defraud Medical and conceal and conceal that conduct by impugning Dr. Peterson's credibility.

232. At all times relevant hereto, Sutter controlled the disciplinary process by paying unlawful "kickbacks" and fees to panel/board members while threatening further disciplinary action. Those kickbacks continue and are ongoing resulting in prospective damages to Dr. Peterson and his protected class of patients.

233. Dr. Peterson has diligently pursued and exhausted all legal remedies available to him before filing this action.

234. Dr. Peterson could not have discovered and/or otherwise learned about Sutter's Medical Strategy (conspiracy or scheme) earlier than November 2019, because Sutter, its Peer Review Panels and "MBC" Defendants intentionally concealed the MediCal conspiracy by the following conduct: (1) "MBC" designated Lozano's investigation as "ongoing", refusing to release the findings or her employment file asserting privacy concerns; (2) Qui Tam actions, including but not limited to the Harvey case were filed during 2014, but remained under seal until after 2018 when the Federal government intervened in the in those cases. Settlement of Harvey and other Qui Tam actions were subject to confidentiality provisions that prevented disclosure; (3) Various California Attorney General and Federal investigations have been designated as "ongoing" which prevented disclosure of the same until after November 2019; (4) "MBC" Member Watkins' whistleblower complaint filed in November 2021 with the State Auditors Office is currently designated as "ongoing" and not published based on "confidentiality" concerns; (5) Since 2015 "MBC" Member and HB Partner/CEO Lawson has repeatedly denied any wrongdoing by Sutter or the "MBC" despite complaints by "MBC" Member Watkins and the State's

Attorney General's office alleging the payment of kickbacks to various Sutter preferred physicians from 2012 through November 11, 2021; (6) Sutter, Lawson and the "MBC" members knew that Federal and State authorities were investigating Sutter for unlawful patient referral kickbacks; (7) During 2019, "MBC" Member Watkins complained about "preferred physicians" being protected from Board discipline during closed door meetings. Watkins was ostracized and isolated from other Board Members in order to conceal that misconduct causing him to filing a whistleblower complaint with the State's Auditor's Office. The State's Auditor's Office has refused to release the Watkins' complaint citing confidentiality concerns. Other Board Members including Lawson have publicly denied the "preferential treatment" being afforded Sutter's "cooperating physicians" in order to conceal the same from the public; (8) Lozano threatened Dr. Peterson with "MBC" discipline if he testified in the Bonner action; and, (9) Sutter filed false declarations in Peterson v. Stohlman in order to conceal the above alleged conduct.

235. This unlawful conduct is intentional, reckless, continuing, ongoing and corrupt.

236. The MBC defendants are currently violating federal law by the conduct alleged herein and are imminently going to carry out further violations of federal and state law. Plaintiff seeks injunctive relief to prohibit future conduct that violates federal and state law.

237. At all times relevant hereto, Dr. Peterson did not and could not have known and/or discovered Sutter's Medical scheme to control physician referrals through the systematic misuse of the disciplinary process, as ongoing investigations, qui tam actions, and confidential

settlement and attorney-client protected communications concealed the same from Dr. Peterson. The attorney-client communications were by and between HB employees/ partners at HB and Sutter, its Peer Review Panels and other Healthcare credentialing employees. Moreover, "MBC" used "closed door" sessions to secrete these abuses from Dr. Peterson and the general public.

238. These contrived disciplinary findings resulted in Dr. Peterson's applications for provider status being denied and/or ongoing contracts not being renewed with Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group. The dates of the applications and denied renewals are alleged above.

239. Sutter, its peer review panel members and the "MBC" Defendants intentionally violated Dr. Peterson's due process rights fabricating and disseminating investigations, findings and declarations to undermine a fair adjudication of the issues alleged herein.

240. As a proximate cause of Sutter's violation of Dr. Peterson's Fifth Amendment Due Process rights, he has suffered substantial damage to his person, reputation, medical practice, and endoscopy business in excess of $100,000.00, the exact amount of which will be determined at the time of trial. These damages include current and future lost profits. Dr. Peterson requests and order from this Court precluding the ongoing and/or prospective retaliation against Dr. Peterson.

241. Dr. Peterson has no other remedy at law to prevent Defendants continued violations of his due

process rights and is seeking injunctive relief to prevent prospective damages related thereto.

242. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this action, the exact amount of which will be determined at the time of trial or by motion thereafter.

243. At all times relevant hereto, Sutter acted with reckless and wanton disregard for Dr. Peterson's Due Process rights which mandate an award of punitive and/or exemplary damages in an amount to be determined at the time of trial. WHEREFORE, Plaintiff prays for relief as set forth below.

**THIRD CLAIM FOR RELIEF**
**(Civil Rights-"Protected Class" Discrimination — All Defendants)**

244. Plaintiff incorporates by reference all the previous allegations of this complaint as if more fully set forth herein.

245. During January 2017, the California Research Bureau (California Library) issued a report entitled "Demographics of Disciplinary Action by the Medical Board of California (2003-2013)" which found that the "MBC" discriminated against African American and Hispanic physicians in its disciplinary process. This report was concealed ("buried").

246. As early as November 18, 2018, the California Attorney General's office confirmed that Sutter's physician referral payment programs violated "Stark" statutes and that Sutter had been reimbursed for the physician "kickbacks" out of Medical funds. This

conduct constituted Medical fraud which continued after June 19, 2019 through 2021.

247. From June 20, 2019 through the present, the "MBC" Defendants failed to initiate investigations or discipline into the Medical fraud because the doctors involved were Sutter's preferred physicians represented by HB. Board Member Lawson was a partner of HB and later elected to president of the "MBC".

248. June 20, 2019 through the present, Dr. Peterson treated indigent and under served patients that were part of a "protected class" based on their race, color, religion or creed, national origin or ancestry, sex (including gender, pregnancy, sexual orientation, and gender identity), age, physical or mental disability and/or veteran status. Those individuals were Medical patients.

249. From June 20, 2019 through the present, Sutter's Medical conspiracy discriminated against Dr. Peterson and his "protected class" patients by converting Medical funds available for protected class patient care and segregating those patients by profitability of procedures.

250. From June 20, 2019 through the present, Sutter, its physician peer review panel members and the "MBC" Defendants acted under "color of law" outside the scope of their authority in violation of state and federal statutes, rules and regulations by failing to investigate and discipline known Medical physician fraud.

251. During 2019, Watkins complained about Sutter's preferred physicians not being properly disciplined for improper care.

252. From June 20, 2019 through the present, Krause, Hawkins, Lewis, Gnanadev, Lubiano, Asif Mahmood, Thorp and Yip were aware of and participated in Sutter's Medical Strategy conspiracy by failing to investigate and/or impose discipline on physicians that they knew participated in the Medical fraud.

253. In furtherance of that scheme, Defendants exaggerated, contrived and disseminated false disciplinary findings about Dr. Peterson to healthcare administrators in order to impugn his professional reputation and conceal the unlawful conduct from the public.

254. As alleged above, Sutter's Medical conspiracy involved the steering of "protected class" patients resulted in unlawful segregation of minority physicians (Dr. Peterson) and their protected class patients in violation of the 14th Amendment to the United States Constitution, Title VII of Civil Rights Act of 1964, and other related state and federal statutes, rules and regulations related thereto. This steering continued after June 20, 2019 through 2021.

255. At all times relevant hereto, Sutter, its Peer Review Panels and the "MBC" Defendants knew that Defendants' conduct reduced Medical funds available for "protected class patients" and segregated the same away from Dr. Peterson and other African American Hispanic physicians. This resulted in the loss of otherwise available medical care for those protected class patients.

256. As a proximate cause of Defendants' discrimination, Dr. Peterson has suffered substantial damage to his personal health, reputation, medical practice and endoscopy business resulting in damages substan-

tially in excess of $100,000.00, the exact amount of which will be determined at the time of trial.

257. Dr. Peterson has no other remedy at law to prevent Defendants continued violations of his constitutionally protected right and is seeking injunctive relief to prevent prospective damages related thereto.

258. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this action, the exact amount of which will be determined at the time of trial or by motion thereafter.

259. At all times relevant hereto, Defendants have acted with reckless and wanton disregard for Dr. Peterson's personal and financial well being mandating an award of punitive and/or exemplary damages in an amount to be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**FOURTH CAUSE OF ACTION**
**(Failure to Prevent Discrimination and Retaliation — All Defendants)**

260. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

261. At all times relevant hereto, Sutter, its peer review panel members, the "MBC" and their common attorneys acted under color of law.

262. At all times relevant hereto, Sutter, its peer review panel members, the "MBC" and their attorneys knew that Dr. Peterson was an African American phy-

sician, advocate and medical provider for his "protected class" patients.

263. At all times relevant hereto, Sutter paid "kickbacks" to cooperating physicians to unlawfully steer "protected class" patients. When Dr. Peterson, and other African American physicians, refused to take "kickbacks" Sutter manipulated California's medical disciplinary process to undermine their credibility before regulators and courts.

264. As early as January 2017, Sutter, its Peer Review Panels and the "MBC" knew that its manipulation of California's disciplinary process discriminated against Dr. Peterson and other African American physicians resulting in unlawful segregation, limiting medical services and care provided to "protected class" patients.

265. From June 20, 2019 to the present, Defendants intentionally failed and refused to take remedial action to prevent the unlawful discrimination against Dr. Peterson and his "protected class" patients.

266. As a direct and proximate result of Defendants' failure to prevent this discrimination, Dr. Peterson and his "protected class" patients suffered personal health, reputation, medical practice and endoscopy business damages substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial.

267. As a proximate cause of Defendants' misconduct, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Plaintiff's damages will be determined at trial.

268. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this action, the exact amount of which will be determined at the time of trial or by motion thereafter.

269. At all times relevant hereto, Defendants acted with reckless and wanton disregard for Dr. Peterson's personal and financial well being mandating an award of punitive and/or exemplary damages in an amount to be determined at the time of trial.

WHEREFORE, Plaintiffs pray for relief as set forth below.

**FIFTH CLAIM FOR RELIEF**
**(Anti-Trust Interference with Current Business Relationships — Sutter)**

270. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

271. From June 20, 2017 to the present, Sutter used its Medical strategy to monopolize and control healthcare in Northern California through the acquisition and subsequent control of physician referrals, the nature of services provided and billing related thereto.

272. From June 20, 2017 to the present, Sutter used market consolidation through acquisition, to control more than 5,200 physicians in Northern California.

273. From June 20, 2017 to the present, Sutter's market consolidation increased medical costs without delivering proportionate quality of care. During the

same time, outpatient costs and insurance premiums increased from 17 to 55% and now are 35% higher in Northern California. During the same time, Medical services available to Oakland's indigent and under served patient community substantially declined.

274. From June 20, 2017 to the present, Sutter used unlawful patient referral kickbacks and up-coding to steer profitable Medical procedures to it and unprofitable ones to county facilities such as Alameda Health Services (AHS).

275. From June 20, 2017 through the present, the steering of unprofitable procedures to AHS caused that entity to incur substantial debt thus impairing its viability and care available for its protected class patients.

276. From June 20, 2017 through the present, Sutter's steering and payment of kickbacks reduced Medical funds available for legitimate procedures.

277. From June 20, 2017 through the present, Dr. Peterson's Medical reimbursements substantially declined thus impairing the viability of his medical practice and endoscopy business. As a result, Dr. Peterson's protected class patients have suffered a decline in available medical care.

278. From June 20, 2017 through the present, Sutter retaliated against Dr. Peterson by representing to other healthcare companies that his ongoing disciplinary problems made him a potential liability.

279. From June 20, 2017 through the present, Dr. Peterson's applications for provider status were denied, reduced and/or not renewed with Aetna, Anthem Blue Cross, Cigna, Blue Shield of California, Kaiser Perm-

anente of CA, Oscar Health Plan of California, Sharp Health Plan, Sutter Health Plus, Western Health Advantage, Covered California and/or Alameda Health Services (AHS).

280. Starting during 2018, Dr. Peterson was solicited by AHS to sell his practice and endoscopy suite.

281. During December of 2019, Sutter interfered with the AHS sale pointing to ongoing problems with the "MBC" and financial difficulties caused by health-care companies reducing his medical reimbursements, not approving his applications for provider status and failing to renew his ongoing contracts. After which, AHS refused to continue with negotiations for the purchase of his medical practice and endoscopy suite.

282. At all times relevant hereto, Sutter's scheme substantially affected and occurred in interstate commerce.

283. Sutter's conduct was an intentional violation of the Sherman Anti-Trust Act causing substantial damage to Dr. Peterson's medical practice and endoscopy business. This conduct undermining competition in Northern California's medical industry.

284. As a direct and proximate result of Sutter's violation of the Sherman Anti-Trust Act, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business. The damages related thereto substantially exceed $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

285. As a proximate cause of Sutter's violation of the Sherman Anti-Trust Act, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

286. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

287. At all times relevant hereto, Sutter had advanced knowledge of the damages that would be caused by the conduct alleged herein, but nonetheless, continued to act with wanton and reckless disregard, oppression, fraud, and/or malice mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**SIXTH CLAIM FOR RELIEF (Anti-Competitive Practices Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and Section 4 of the Clayton Act, 15 U.S.C. § 15 — Conspiracy to Restrain Trade — SUTTER)**

288. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

289. From June 20, 2017 through present, Sutter's anti-competitive practice included unlawful business and government intervention by the "MBC" that restricted and reduced the medical services and competition related thereto in Northern California.

290. From June 20, 2017 through the present, Sutter's anti-competitive practices adversely impacted public health care by reduced medical services available to Oakland's indigent and under served patient community.

291. From June 20, 2017, Sutter's anti-competitive practices included, but were not limited to price fixing, bid rigging, and boycotts of non-compliant physicians, such as Dr. Peterson.

292. From June 20, 2017 through the present, Sutter paid unlawful "kickbacks" to its cooperating physicians and attorneys that served on or worked for its peer review panels and the "MBC" as follows:

1. Price Fixing: Sutter artificially inflated medical costs by manipulating chargemaster compendiums; up-coding medical services provided; requiring that additional and unnecessary medical procedures be performed; charging for unused materials; and demanding payment for physician "on-call" coverage.

2. Boycotts: Sutter used its peer review and the "MBC" medical license disciplinary process to undermine the professional reputation of Dr. Peterson and other physicians that refused to participate in its unlawful "Medical Strategy". As a result of the medical disciplinary process, Dr. Peterson was boycotted

by patients and other healthcare providers including, but not limited to: Anthem Blue Cross, Cigna, Blue Shield of California, Kaiser Permanente of CA, Oscar Health Plan of California, Sharp Health Plan, Sutter Health Plus and Western Health Advantage.

3. Tying: Sutter required its cooperating physicians to provide or tie unnecessary medical services to basic endoscopy services. In order to increase the cost of basic endoscopy procedures, Sutter required physicians to use additional anesthesia physicians even when unnecessary and not normally provided. This was referred a "Total Colonoscopy".

293. Sutter's conduct violated Section 1 of the Sherman Act, 15 U.S.C. § 1 and Section 4 of the Clayton Act; 15 U.S.C. § 15-Conspiracy to Restrain Trade.

294. Sutter, its peer review panels and preferred physicians it placed on the "MBC" knew and intended that its conduct would violate the Sherman Anti-trust and Clayton acts knowing the same would substantially impact Dr. Peterson's medical practice and endoscopy business. Sutter's conduct violated public policy as it reduced medical care available to Oakland's indigent and under served patient community, and was discriminatory.

295. Sutter, its peer review panel and its preferred physicians it placed on the "MBC" deliberately restrained competition by using the medical disciplinary processes to force Dr. Peterson to steer "protected class" patients, over bill, and imposed unfounded discipline upon him after he refused to participate in the same. This restraint violated public policy as its

reduced care available to Oakland's indigent and under served medical patient community, and was discriminatory.

296. As a result of the Sutter's anti-competitive conduct, Dr. Peterson's has been damaged by through its restraint of trade, resulting in damage to his person, reputation, medical practice, endoscopy business and "protected class" patients.

297. The effect of Sutter's conspiracy with its peer review panels and the members it placed on "MBC" has caused a reduction in access to, competent healthcare in Oakland's indigent and under served patient community.

298. Sutter engaged in this unlawful conduct intending to reduce and/or summarily eliminate competition from Dr. Peterson's medical practice and endoscopy business.

299. Dr. Peterson has suffered the type of damages that the antitrust laws were intended to prevent and that would normally arise from similar anti-competitive conduct.

300. Defendants acted in concert and joint action with each other and their acts or acts of omission described herein depriving Dr. Peterson of his statutory and constitutional rights thereby causing him substantial damages.

301. As a direct and proximate result of Sutter's anti-competitive practices, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of

trial. Those damages include actual and prospective lost profits.

302. As a proximate cause of Sutter's anti-competitive practices, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

303. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

304. At all times relevant hereto, Sutter had advanced knowledge of the damages that would be caused by the conduct alleged herein, and continued to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein and mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**SEVENTH CAUSE OF ACTION**
**(Breach of Contract — Sutter)**

305. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

306. Dr. Peterson had an implied contract for diagnostic privileges at Sutter Alta Bates to provide outpatient endoscopy procedures using Sutter's outpatient facilities.

307. The contract was evidenced by adequate legal consideration.

308. Dr. Peterson reasonably relied and performed under his agreements with Sutter.

309. Defendant Sutter was required under the terms of the contract to act reasonably and follow the laws and statutes of the State of California and the United States of America.

310. Defendant breached the contract by violating the HCQIA, paying unlawful "kickbacks" and attorney fees to members of its peer review panel and members of the "MBC" in exchange for unsupported findings against Dr. Peterson.

311. The breaches are material.

312. At all times relevant hereto, Dr. Peterson has requested that Sutter cure these breaches.

313. At all times relevant hereto, Sutter has failed, refused, denied and/or unreasonably neglected to cure these breaches.

314. At all times relevant hereto, Dr. Peterson did not, and could not have known, about Sutter's scheme to control physicians through the systematic misuse of the disciplinary process, as ongoing investigations, qui tam actions, related settlements and attorney-client communications were confidential, and, therefore, concealed from Dr. Peterson. Moreover, "MBC" used

"close door" sessions to secrete these abuses from Dr. Peterson and the general public.

315. As a direct and proximate result of Sutter's breach of contract, Dr. Peterson has sustained and continues to suffer damages to his medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

316. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter. WHEREFORE, Plaintiff prays for relief as set forth below.

**EIGHTH CAUSE OF ACTION**
**(Breach of Covenant of Good Faith & Fair Dealing — Sutter)**

317. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

318. In every contract there is an implied covenant of good faith and fair dealing.

319. At all times relevant hereto, Sutter and Dr. Peterson had a special relationship that required reliance upon the good faith representations and the conduct of each other.

320. Dr. Peterson reasonably relied and performed under his contractual agreements with Sutter.

321. Sutter intentionally breached the covenant of good faith and fair dealing by violating the Sherman

Anti-Trust and Clayton Acts; causing the filing a false Form 805; conspiring to unlawfully pay and/or receive "kickbacks" in exchange for favorable disciplinary rulings; using the medical disciplinary process to force Dr. Peterson to steer his "protected class" patients; making false statements to other healthcare companies about his disciplinary problems thereby causing denial and renewal of his provider status; and, by using the medical disciplinary process to undermine his credibility as a witness.

322. These breaches are material and intentional.

323. At all times relevant hereto, Dr. Peterson has requested that Sutter cure the same.

324. At all times relevant hereto, Sutter has failed, refused, denied and/or unreasonably neglected to cure these breaches.

325. At all times relevant hereto, Dr. Peterson did not, and could not have known, about Sutter's scheme to control physicians through the systematic misuse of the disciplinary process, as ongoing investigations, qui tam actions, related settlements and attorney-client communications were confidential, and, therefore, concealed from Dr. Peterson. Moreover, "MBC" used "close door" sessions to secrete these abuses from Dr. Peterson and the general public.

326. As a direct and proximate result of Sutter's Breach of the Covenant of Good Faith and Fair Dealing, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

327. As a proximate cause of Sutter's Breach of the Covenant of Good Faith and Fair Dealing, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

328. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

329. At all times relevant hereto, Sutter had advanced knowledge of the damages that would be caused by the conduct alleged herein, and continued to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein and mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**NINTH CAUSE OF ACTION**
**(Negligence — Sutter)**

330. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

331. Sutter, its peer review panel members and the "MBC" filed, pursued and perpetuated the following unfounded actions against Dr. Peterson:

1. Sutter Alta Bates Peer Review Action dated February 2, 2009.
2. 1st "MBC" Case No.: 12-2009-198592.
3. 2nd "MBC" Case No.: 12-2010-204708.
4. Encouraging BE to file a civil complaint against Dr. Peterson.
5. From 2014 through 2021, placing false information on its website about Dr. Peterson settling his disciplinary cases to avoid further Board Investigations.
6. From 2009 through 2021, "warning" various Healthcare companies about Dr. Peterson's ongoing financial, medical malpractice, "peer review" and "MBC" problems. Those Healthcare companies falsely advised, include, but are not limited to: Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group. The statements were false.
7. From 2009 through 2021, "warning" prospective physician partners and employees about Dr. Peterson's ongoing medical malpractice (BE), "peer review" and "MBC" disciplinary problems. These statements were false.
8. During January 2018, warning, threatening and/or otherwise interfering with AHS's acquisition of Dr. Peterson's medical practice and endoscopy suite. The warnings, threats and/or other interference included statements by Sutter, HB and "MBC" employees about ongoing financial, medical malpractice (BE)

> and disciplinary problems associated with the "MBC" and Peer Review Panels operating at other Healthcare companies (*e.g.*, Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group). Those statements were false.

332. Sutter, its peer review panel members and the "MBC" used fabricated investigations, false declarations and paid unlawful "kickbacks"/attorney fees to perpetuate these unfounded actions.

333. At all times relevant hereto, Sutter, its peer review panel members and the "MBC" had a duty to conduct a reasonable investigation before filing Form 805 and related disciplinary actions, disclose conflicts of interest, correct false findings on-line data bases (Physicians' National Data Bank), supervise its investigators/officers/directors, and not accept unlawful "kickbacks"/attorney fees in exchange for favorable findings.

334. Sutter, its peer review members and the "MBC" breached each of these duties.

335. Each of these breaches were material.

336. At all times relevant hereto, Dr. Peterson did not, and could not have known, about Sutter's scheme to control physicians through the systematic misuse of the disciplinary process, as ongoing investigations, qui tam actions, related settlements and attorney-client communications were confidential, and, therefore, concealed from Dr. Peterson. Moreover, "MBC" used "close door" sessions to secrete these abuses from Dr. Peterson and the general public.

337. As a direct and proximate result of Defendants' negligence, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

338. As a proximate cause of Defendants' negligence, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

339. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

340. At all times relevant hereto, Defendants had advanced knowledge of the damages that would be caused by the conduct alleged herein, and continued to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein and mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial. WHEREFORE, Plaintiff prays for relief as set forth below.

**TENTH CLAIM FOR RELIEF**
**(Intentional Interference With Current and Prospective Contractual Relationships-Sutter)**

341. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

342. From June 20, 2019 through the present, Sutter, its peer review panel members, and individuals it placed on the "MBC" participated and perpetuated an unlawful Medical scheme which involved paying "kickbacks" to cooperating physicians.

343. From June 20, 2019 to the present, Sutter used unlawful patient referral kickbacks and upcoding to steer profitable Medical procedures to it and unprofitable ones to county facilities such as Alameda Health Services (AHS).

344. From June 20, 2019 through the present, Sutter's steering and payment of kickbacks reduced Medical funds available for legitimate procedures.

345. From June 20, 2019 through the present, Dr. Peterson's MediCal reimbursements have substantially declined thus impairing the viability of his medical practice and endoscopy business. As a result, Dr. Peterson's protected class patients have suffered a decline in available medical care and funds to pay for the same.

346. From June 20, 2019 through the present, Sutter retaliated against Dr. Peterson by representing to other healthcare companies that his ongoing disciplinary problems made him a potential liability.

347. From June 20, 2019 through the present, Dr. Peterson's applications for provider status were denied, reduced and/or not renewed with Aetna, Anthem Blue Cross, Cigna, Blue Shield of California, Kaiser Permanente of CA, Oscar Health Plan of California, Sharp Health Plan, Sutter Health Plus, Western Health Advantage, Covered California and Alameda Health Services. Sutter knew Dr. Peterson had these contractual relationships with these entities.

348. Starting during 2018, Dr. Peterson was solicited by AHS to sell his practice and endoscopy suite.

349. During December of 2019, Sutter interfered with the AHS sale by pointing out ongoing problems with the "MBC" and financial difficulties caused by healthcare companies reducing his medical reimbursements, not approving his applications for provider status and failing to renew ongoing provider contracts. After which, AHS refused to continue negotiations with Dr. Peterson.

350. Because of Sutter's interference alleged herein, Dr. Peterson's actual contractual relationships with current and prospective healthcare providers, including, but not limited to: Anthem Blue Cross, Cigna, Blue Shield of California, Kaiser Permanente of CA, Oscar Health Plan of California, Covered California, Sharp Health Plan, Sutter Health Plus and Western Health Advantage.

351. Sutters' interference was intentional.

352. As a direct and proximate result of Sutter's intentional interference, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business

substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

353. As a proximate cause of Sutter's intentional interference, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

354. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

355. At all times relevant hereto, Sutter had advanced knowledge of the damages that would be caused by the conduct alleged herein, and continued to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein thereby mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**ELEVENTH CAUSE OF ACTION**
**(Business Disparagement — Sutter)**

356. Plaintiff incorporates by reference all the previous paragraphs of this complaint as if more fully set forth herein.

357. From June 20, 2019 through the present, Sutter, its peer review panel members and its agents on the "MBC" intentionally published a number of false statements about Dr. Peterson designed to force him to unlawfully steer his "protected class" patients and to undermine his credibility as a witness.

358. From June 20, 2019 through the present, Sutter and/or its agents serving on the "MBC" intentionally made the following false statements.

> That Dr. Peterson had a number of unresolved disciplinary issues with various healthcare company peer review panels and the "MBC" which made him a liability to approve for provider status.

That statement is false.

359. These statements were made to AHS during December 2019 and/or January 2020 and to credentialing agents for Anthem Blue Cross, Cigna, Blue Shield of California, Kaiser Permanente of CA, Oscar Health Plan of California, Covered California, Sharp Health Plan, Sutter Health Plus and Western Health Advantage.

360. The Sutter intentionally made the defamatory statement in order to cause continuing harm to Plaintiff's medical practice and endoscopy business specifically to cause the same to fail.

361. As a direct and proximate result of Sutter's disparaging statement, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

362. As a proximate cause of Sutter's disparaging statements, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

363. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

364. At all times relevant hereto, Sutter had advanced knowledge of the damages that would be caused by the disparaging statement alleged herein, and continues to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein and mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial. WHEREFORE, Plaintiff prays for relief as set forth below.

**TWELFTH CAUSE OF ACTION**
**(Intentional Infliction of**
**Emotional Distress — Sutter)**

365. Plaintiff incorporates by reference all the previous paragraphs of this complaint as if more fully set forth herein.

366. At all times relevant hereto, Sutter devised a scheme to control medical services in Northern California.

367. Sutter paid unlawful "kickbacks" and used the medical disciplinary process to force physicians to participate and/or cooperate in its "MediCal Strategy". Uncooperative physicians were subjected to unfounded discipline.

368. Dr. Peterson refused to cooperate with Sutter and was subjected to relentless discipline, including, but not limited to:

1. Sutter Alta Bates Peer Review Action dated February 2, 2009.
2. 1st "MBC" Case No.: 12-2009-198592.
3. 2nd "MBC" Case No.: 12-2010-204708.
4. Encouraging BE to file a civil complaint against Dr. Peterson.
5. Placing false information on its website about Dr. Peterson settling his disciplinary cases to avoid further Board Investigations.
6. "Warning" various Healthcare companies about Dr. Peterson's ongoing financial, medical malpractice, "peer review" and "MBC" problems. Those Healthcare companies falsely

advised, include, but are not limited to: Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group. The statements were false.

7. "Warning" prospective physician partners and employees about Dr. Peterson's ongoing medical malpractice (BE), "peer review" and "MBC" disciplinary problems. These statements were false.

8. Warning, threatening and/or otherwise interfering with AHS's acquisition of Dr. Peterson's medical practice and endoscopy suite. The warnings, threats and/or other interference included statements by Sutter, HB and "MBC" employees about ongoing financial, medical malpractice (BE) and disciplinary problems associated with the "MBC" and Peer Review Panels operating at other Healthcare companies (*e.g.*, Aetna, Blue Shield, HealthNet, Cigna, Community Health Plan, Covered California, United Healthcare and Hill Physicians Medical Group). Those statements were false.

369. At all times relevant hereto, Sutter knew that the medical discipline it initiated through its peer review panel members and the "MBC" was unfounded, but perpetuated to conceal unlawful "kickbacks". Sutter knew that by filing those actions and perpetuating the same would cause Dr. Peterson substantial emotional distress.

370. The conduct complained of herein was outside acceptable behavior in any Physician/Health Care setting.

371. Sutter's conduct was intentional, malicious and designed to cause Dr. Peterson substantial humiliation, mental anguish, and emotional and physical distress.

372. Sutter by participating in, confirming, encouraging, and ratifying the same misconduct, has done so with the knowledge that Dr. Peterson's emotional and physical distress damages would escalate to a point that he would quit and/or retire from the practice of medicine thereby leaving his patients without an advocate and/or medical care.

373. At all times relevant hereto, Dr. Peterson did not, and could not have known, about Sutter's scheme to control physicians through the systematic misuse of the disciplinary process, as ongoing investigations, qui tam actions, related settlements and attorney-client communications were confidential, and, therefore, concealed from Dr. Peterson. Moreover, "MBC" used "close door" sessions to secrete these abuses from Dr. Peterson and the general public.

374. Defendants' actions constitute extreme and outrageous conduct.

375. As a direct and proximate result of Sutter's outrageous conduct, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

376. As a proximate cause of Sutter's outrageous conduct, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

377. Plaintiff has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

378. At all times relevant hereto, Sutter has advanced knowledge of the damages that would be caused by the conduct alleged herein, and continued to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein and mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial.

WHEREFORE, Plaintiff requests relief as hereinafter provided.

**THIRTEENTH CAUSE OF ACTION**
**(Negligent Infliction of**
**Emotional Distress — Sutter)**

379. Plaintiff incorporates by reference all the previous paragraphs of this complaint as if more fully set forth herein.

380. In the alternative, if the conduct alleged herein is determined not to be intentional, but instead,

negligent, then Dr. Peterson is entitled to damages related to that negligence for the negligent infliction of his emotional distress. WHEREFORE, Plaintiff requests relief as hereinafter provided.

**FOURTEENTH CAUSE OF ACTION**
**(Violation of Business and Professions Code Sections 17200 et. Seq. — Sutter)**

381. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

382. Plaintiff brings this claim in his individual capacity, and as provided in the Unfair Competition Act, on behalf of himself and the general public as it pertains to Doctors of Color.

383. By engaging in the conduct described herein, Sutter has committed acts of unlawful, unfair, and fraudulent business practices within the meaning of the Unfair Competition Act resulting ongoing harm to Plaintiff.

384. The unlawful, unfair, and fraudulent business practices conducted by Sutter are ongoing and presents a threat and likelihood of continuing discrimination against Plaintiff and other minority doctors.

385. Pursuant to California Code of Civil Procedure § 1021.5, Plaintiffs are entitled to recover damages, reasonable attorneys' fees and costs from Sutter in an amount to be determined at trial.

386. As a direct and proximate result of Sutter's violation of California Business and Professions Code § 17200, Dr. Peterson has sustained and continues to suffer damages to his person, reputation, medical

practice and endoscopy business substantially in excess of $100,000.00, the exact amount of which will be determined at the time of trial. Those damages include actual and prospective lost profits.

387. As a proximate cause of Sutter's violation of California Business and Professions Code § 17200, Dr. Peterson has suffered and will continue to suffer physical and emotional injuries, including humiliation, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Dr. Peterson's damages will be determined at trial.

388. As a proximate cause of Sutter's violation of California Business and Professions Code § 17200, Dr. Peterson has incurred and is entitled to reimbursement for the legal expenses, costs and attorney fees related to the prosecution of this claim the exact amount of which will be determined at the time of trial or by motion thereafter.

389. At all times relevant hereto, Sutter had advanced knowledge of the damages that would be caused by the conduct alleged herein, and continued to act with wanton reckless disregard, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein and mandating an award of punitive and/or exemplary damages to prevent the recurrence of the same. The exact amount of damages will be determined at the time of trial.

WHEREFORE, Plaintiff requests relief as hereinafter provided.

**FIFTEENTH CAUSE OF ACTION**
**(Violation of Unruh Civil Rights Act — Sutter)**

390. Plaintiff incorporates by reference all the allegations of this complaint as if more fully set forth herein.

391. During January 2017, the California Research Bureau (California Library) issued a report entitled "Demographics of Disciplinary Action by the Medical Board of California (2003-2013)" which found that the "MBC" discriminated against African American and Hispanic physicians in its disciplinary process. This report was concealed ("buried").

392. June 20, 2018 through the present, Dr. Peterson treated indigent and under served patients that were part of a "protected class" based on their race, color, religion or creed, national origin or ancestry, sex (including gender, pregnancy, sexual orientation, and gender identity), age, physical or mental disability and/or veteran status. Those individuals were Medical patients.

393. From June 20, 2018 through the present, Sutter's Medical conspiracy discriminated against Dr. Peterson and his "protected class" patients by converting Medical funds available for protected class patient care and segregating those patients by profitability of procedures.

394. In furtherance of its Medical scheme, Sutter exaggerated, contrived and disseminated false disciplinary findings about Dr. Peterson to healthcare administrators in order to impugn his professional reputation and conceal the unlawful conduct from the public.

395. As alleged above, Sutter's Medical conspiracy involved the steering of "protected class" patients resulted in unlawful segregation of minority physicians (Dr. Peterson) and their protected class patients in violation of the Unruh Civil Rights Act.

396. At all times relevant hereto, Sutter, knew that its conduct reduced Medical funds available for "protected class patients" and segregated the same away from Dr. Peterson and other African American Hispanic physicians. This resulted in the loss of otherwise available medical care for those protected class patients and was discriminatory.

397. Plaintiff was subjected to the conduct alleged herein, including, but not limited to, harassment and/or discrimination on the basis of his race, age, as an advocate for "protected class" patients and a whistleblower by Sutter. This conduct resulted prospective and continuing damage to Plaintiff.

398. Plaintiff is informed and believes, and therefore alleges that he was targeted for harassment and/or discrimination on the basis of his race, age, as an advocate for his "protected class" patients, and whistleblower by Defendants.

399. Plaintiff is informed and believes, and thereupon alleges, that it was the routine practice and/or defacto policy of Sutter to target, deny services and/or access to legitimate services promised and approved by Sutter because of his color, age, as an advocate for a "protected class", and other minorities that challenged Sutter's scheme.

400. Sutter denied, aided or incited a denial of/ discriminated or made a distinction that denied full

an equal accommodations, advantages, privileges, and services to Plaintiff and his "protected class patients".

401. The acts or acts of omission of Sutter were a moving force causing Plaintiff's injuries and done because of the Plaintiff's Race.

402. As a direct and proximate result of Sutter's discriminatory conduct, Dr. Peterson has sustained damages including, but not limited to, lost profits from his medical practice and endoscopy business, loss of value of those businesses and personal injuries related thereto. The exact amount of those damages will be proven at the time of trial.

403. As a proximate cause of Sutter's conduct, Dr. Peterson has suffered physical and emotional injuries, including humiliation, distress, depression, anguish, embarrassment, shock, pain, discomfort, fatigue and anxiety. The exact amount of Plaintiff's damages will be determined at trial.

404. As a result of Sutter's conduct, Dr. Peterson has retained counsel to prosecute this action, and accordingly, is entitled to reimbursement for reasonable fees and costs related thereto. The exact amount of attorney fees and costs will be determined at the time of trial or by motion thereafter.

405. At all times relevant hereto, Sutter's acted with reckless and wanton disregard for Dr. Peterson's personal and financial well being, oppression, fraud, and/or malice, ratifying the wrongful conduct described herein which mandates an award of punitive and/or exemplary damages the exact amount of which will be determined at the time of trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

**PRAYER FOR RELIEF**

With respect to the preceding claims for relief, Plaintiff prays for relief as set forth below:

1. That Defendants be ordered to pay to Plaintiff a sum in excess of $100,000.00, the exact amount of which will be proven at the time of trial;

2. That Defendants be ordered to pay to Plaintiff a sum, the exact amount of which will be proven at the time of trial, for Plaintiff's lost earnings, both past and future;

3. That Defendants be ordered to pay Plaintiff a sum in excess of $100,000.00, the exact amount of which will be proven at the time of trial, for Plaintiff's physical and mental pain, and for Plaintiff's personal property damages;

5. That Plaintiffs be awarded exemplary damages, as permitted by law, as a result of Defendant willful and wanton misconduct in a sum in excess of $100,000.00;

6. That Court enjoin these Defendants from prospective violations of state and federal law.

7. That Plaintiffs be awarded the attorney's fees and court costs that Plaintiff incurred in the prosecution of this Complaint; and

8. Pursuant to Business and Professions Code section 17203, that defendants, their successors, agents, representatives, employees and all persons acting in concert with defendants be enjoined from committing acts of unfair competition as alleged in this complaint;

9. Pursuant to Business and Professions Code section 17203, that defendants make full restitution, or disgorgement of money or property unfairly obtained, to Plaintiff to restore all monies owing Plaintiff as a result of the violations of Business and Professions Code section 17200 et seq. alleged in complaint. This amount is in excess of $100,000.00 and will be established according to proof at trial;

10. Pursuant to Business and Professions Code section 17206, that the Court assess a civil penalty in the amount proven at the time of trial against Defendants and each of them for each violation of Business and Professions Code section 17200 et seq., as proved at trial;

11. Plaintiff recover its costs of suit and attorneys fees; and

12. For an award of interest, including prejudgment interest, at the legal rate.

13. Such other and further relief as the court may deem just and equitable in this matter.

**JURY DEMAND**

Plaintiff demands a Jury.

Respectfully submitted this 14th day of March 2022.

Mirch Law Firm LLP

By /s/ Kevin Mirch
Kevin Mirch