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I. RESPONSE TO INACCURACIES IN BJORNDAL'S STATEMENT OF FACTS.

Bjorndal's Statement of Facts contains numerous factual misstatements, the apparent purpose of which is to convince this Court that Elizabeth, the patient for whom Pena wrote the DNR order for which he was fired, was an intellectually highly functioning patient who issued an Advance Directive stating she did not want a DNR order. The evidence at trial makes clear that this simply is not true.

A. The Evidence at Trial Established that Elizabeth Was Not Mentally Capable of Issuing an Advanced Directive.

Bjorndal cites the trial testimony of Dr. Gary Gathman in support of the false assertion that Elizabeth was a highly functioning patient, who had issued an Advance Directive against a DNR order. Appellee's Brief at p. 4 ("Elizabeth was in the top one percent of patients at SDC in terms of intellectual functioning."). However, on cross-examination, Dr. Gathman had to admit he was totally unfamiliar with this patient. Appellant's Supplemental Excerpt of Record ("hereinafter "ASER") 1-2 (TT 112:9-11). He could not recall ever treating her. ASER 1 (TT 112:12-15). He was never assigned to her housing unit. ASER 1 (TT 112:16-17). He never had any discussion with her concerning her wishes. ASER 1(TT 112:18-20).

The only time Dr. Gathman could recall seeing Elizabeth was in the November 17, 2000 Bioethics Committee meeting (November 17th meeting"). ASER 2 (TT

113:18-22). Everyone present during the November 17th meeting, ***except Elizabeth***, sat around a conference table considering whether or not they would recommend that a DNR order be issued on Elizabeth's behalf.[1] ASER 2 (TT 113:5-10). Elizabeth sat off to the side in a reclining wheel chair. ASER 2 (TT 113-11-17). Dr. Gathman did not say anything to Elizabeth. ASER 2 (TT 2 (TT 113:18-23). Nor did anybody else direct any questions to her. ASER 2 (TT 24-3:1). Nor do the notes of the meeting document any discussion in which Elizabeth was told that her renal failure would eventually reach a point where CPR could do her no good and only do her harm. ASER 3 (TT 16-23). Throughout this critical meeting ,which Bjorndal and others cite in support of the claim that Elizabeth made clear she wanted CPR, ***Elizabeth was asleep***. ASER 2 (TT 20-23). Dr. Gathman's description of Elizabeth's role during the November 17th meeting hardly comports with Bjorndal's assertion that Elizabeth had the mental capacity to issue an advance directive or had been provided the information necessary to make an informed decision concerning CPR.

Dr. Gathman also had to admit on cross-examination that he did not know Elizabeth's IQ. Nor was he aware that she had scored zero on the ability to reason.

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[1] Dr. Gathman admitted that the Bioethics Committee ***only makes recommendations, not orders***, and that the physician attending a patient at the point that the patient seems to be dying has to make the determination whether or not it would be appropriate to administer CPR. ASER 10-11 (TT 96:5-97:7).

ASER 7 (TT 153:4-7). Likewise, he had to admit that his statement that Elizabeth was in the top 1% was not based upon any empirical analysis comparing her IQ scores with the other patients at SDC.; instead, he arrived at that conclusion "only subjectively." ASER 7 (TT 153: 9-13). However, Dr. Gathman's had no basis to make that subjective determination since he could not recall ever having any contact with Elizabeth except at the November 17th meeting and she was asleep throughout the meeting. ASER 7 (TT 153:14-23). Dr. Gathman's testimony that Elizabeth was in the top 1% of the SDC population in terms of intellectual functioning simply lacks any credible basis.

In addition, as mentioned in Appellant's Opening Brief, SDC's own records establish that Elizabeth was not mentally capable of making an informed decision concerning an Advanced Directive. ER 72 (Pl.Tr.Exh 13 ("Due to her developmental delay [...] the Medical Director will act on her behalf for any consents needed while on GAC."), ER 70 (Pl.Tr.Exh. 10)("Rights read and not understood.").

B. The Evidence at Trial Established That Elizabeth Was Not Given the Information Necessary to Make an Informed Decision.

The record in this case is clear that Elizabeth was never given critical information necessary to make an informed decision concerning CPR. As noted in Appellant's Opening Brief, all the doctors involved, including Bjorndal, agreed that

a DNR order was medically appropriate because (1) cardiopulmonary resuscitation ("CPR") would provide no medical benefit to the patient given the advance state of her renal failure, (2) CPR had no reasonable chance of keeping the patient alive and (3) CPR could cause her trauma, including pain, broken ribs, and damage to her organs. ER196-197 (TT 11:25-12:10), 191-92 (TT 224:22-225:23), 165 (TT 340:1-5), 140 (TT 797:4-9). Elizabeth was never told this critical information.

As Dr. Gathman explained, the blood toxicity levels in a patient with end stage renal failure eventually reach a point where CPR will not revive a patient. ASER 9 (TT 95:20-22). Elizabeth was not told this essential fact in the November 17th meeting. ASER 3 (TT 114:20-23). Nor did her treating physician, Dr. Thakor, tell her in the discussion he allegedly[2] had with her about a DNR order that he felt a DNR order was medically appropriate given her medical condition. ASER 12 (TT 814:8-23) & ASER 13 & 14 (TT 815:22-816:9). Nor could he say that he ever told her that CPR would not revive her if her heart stopped due to her renal failure. ASER 14 (TT 816:10-14). Without this essential information, no patient could make an ***informed***

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[2] Dr. Thakor admitted that substantive discussions with patients concerning their care, such as his alleged conversation with Elizabeth concerning DNR, are to be documented in the patient's chart. ASER 15 (TT 805:12-15). No such documentation was offered as an exhibit at trial, nor could Dr. Thakor recall either at trial, or in his deposition three years earlier, ever seeing such a note. ASER 15 & 16 (TT 805:16-24 & TT 807:11-25).

decision concerning whether or not she wanted CPR in Elizabeth's situation.

C. The January 23, 2001 IPP Report Does Not Meet the Requirements of an Advanced Directive.

SDC has a formal policy concerning Advance Directives, which requires a determination that the patient issuing an Advance Directive be mentally competent to do so and has been provided the information necessary to make an informed decision. SDC's policy also requires that a copy of the Advance Directive be put at the front of the patient's medical chart, so that care providers are aware of the Advance Directive. ER 170-71 (TT 109:15-110:4), 165-66 (TT 340:24-341:12). It is undisputed in this case that no Advance Directive against a DNR was documented in the patient's medical records. ER 167 (TT 343:5-13), 137 (TT 1039:10-13).

Bjorndal asserts that the January 23, 2001 IPP report[3] constituted an Advanced Directive from Elizabeth that she wanted CPR. *See* Appellee's Brief at 6. However, there are several fallacies underlying this assertion. First, as Dr. Gathman explained, the IPP team's recommendations concerning a DNR order ***are not binding on anybody!*** ASER 18 (TT 104:11-13). Dr. Gathman also testified that ***DNR orders are not within the IPP team's expertise***. ASER 17 (TT 103:20-25). The IPP team ***does not have a license to practice medicine***. ASER 18 (TT 104:1-3). The IPP team ***does***

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[3] Appellee's Supplemental Excerpt of Record, "SER" 285 (Pl's Exh. #15.

not make competency decisions. ASER 18 (TT 104:6-8).

Moreover, ***Elizabeth was not at the January 23, 2001 IPP meeting***. *See* Appellee's Excerpt of Record (hereinafter "SER") 285 (Pl's Exh #15).[4] Nor does the IPP report state that Elizabeth had been informed that her renal failure would eventually reach the point where CPR could not revive her and could cause her unnecessary trauma. *See* SER 285 (Pl's Exh #15). Nor does the IPP report state that a psychologist had evaluated Elizabeth competence to make an informed decision. Instead, the participants at this meeting were speculating, at best, about what Elizabeth might understand about CPR. *See* SER 285 (Pl's Exh #15).

Some participants at the January 23, 2001 IPP meeting "***expressed opinions that [Elizabeth] might not fully understand what the CPR process entailed***." SER 285 (Pl's Exh #15). At best, the team members who were at the November 17th meeting, "felt that she did understand, ***in a very basic way***, what CPR was." SER 285 (Pl's Exh #15). Moreover, while at one point the report states that the team agreed "she did understand the choice she [allegedly] had made," it goes on to state that "Staff agreed ***she does not understand what was really wrong with her***. ***She only knew that she did not feel well.***" SER 285 (Pl's Exh #15)(emphasis added). The

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[4] Dr. Gathman explained that competency evaluations are not done by the IPP team, they are done by psychologist. ASER 18 (TT 104:6-10)

January 23, 2001 IPP report clearly does not meet the requirements that there be a determination that Elizabeth had the mental capacity to make an informed decision and had been provided the information necessary to do so.

Bjorndal attacks Pena's insistence that he was not aware of any decision Elizabeth allegedly made against a DNR order. *See* Appellee's Brief at 6. However, nowhere in the medical records Pena had at the time, nor any exhibit offered at the trial, is a document signed by Elizabeth in which she states she wants CPR or does not want a DNR order. Nor do the medical records Pena had at the time, nor any exhibit offered at the trial, document any conversation with Elizabeth, in which she was informed that eventually her renal failure would reach the point that CPR could not revive her and in which she allegedly stated she nonetheless wanted CPR. Nor does the IPP report itself purport to be an Advance Directive, putting all care givers on unambiguous notice that a DNR order may not be issued on Elizabeth's behalf. As Dr. Gathman testified, the IPP can only issue ***a recommendation that is not binding on anybody.*** ASER 18 (TT 104:11-13). Moreover, as Dr. Gathman also testified, ***it is the physician attending a patient at the point that the patient seems to be dying who has to make the determination whether or not it would be appropriate to administer CPR***. ASER 10-11 (TT 96:5-97:7). Accordingly, Bjorndal's assertion that the January 23, 2001 IPP report constitutes an Advanced

Directive is not credible.

D. Bjorndal's Cynical Suggestion That Pena Intended to Withhold All Efforts to Sustain Elizabeth's Life Is Refuted by the Testimony of Her Own Witness, Dr. Thakor.

Bjorndal cynically asserts that Pena's DNR order "is a binding instruction to the medical staff to ***withhold all efforts at resucitation, ie to stand back and let the patient die."*** Appellee's Brief at 35 (emphasis added). On the contrary, as Dr. Thakor, Elizabeth's treating physician and a witness called by Bjorndal explained on cross-examination, staff can provide a patient with a DNR order, any and all care and efforts to resuscitate, except CPR. Dr. Thakor's testified as follows:

Q. NOW, IF A DNR ORDER IS ISSUED FOR A PATIENT, THAT MEANS THAT CPR, THE FORMAL CPR PROCESS, WILL NOT BE INITIATED IF THAT PATIENT'S HEART OR LUNGS STOP WORKING; ISN'T THAT RIGHT?

A. THAT'S CORRECT.

Q. IT DOES NOT MEAN YOU WOULD NOT, AS HER TREATING PHYSICIAN, TRY OTHER RESUSCITATIVE EFFORTS. FOR INSTANCE, IF SHE'S HAVING DIFFICULTY BREATHING, EVEN IF THERE'S A DNR, YOU CAN PROVIDE HER OXYGEN, CAN'T YOU?

A. THAT'S CORRECT.

Q. AND IF SHE'S HAVING DIFFICULTY EATING, YOU CAN PROVIDE HER FEEDING BY TUBE, CAN'T YOU?

[...]

19 THE WITNESS: YEAH, THAT'S CORRECT.

20 BY MR. KING:

21 Q. YOU CAN DO ANYTHING THAT MIGHT HELP THE PATIENT'S CONDITION

22 SHORT OF INITIATING THE FORMAL PROCESS OF CPR, EVEN IF THERE'S A

23 DNR IN PLACE; ISN'T THAT RIGHT?

24 A. THAT'S CORRECT.

ASER 19 (TT 801:2-24).

II. THERE WAS A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER OR NOT PENA WAS REQUIRED AS PART OF HIS JOB DUTIES TO SUBMIT HIS FEBRUARY 21, 2001 MEMORANDUM TO BJORNDAL.

On February 21, 2001, just three weeks before he was put on the administrative leave that resulted in his termination, Pena personally delivered a memorandum to Bjorndal, in which he put her on notice of a gross incident of medical neglect that resulted in a patient suffering a coma and being reduced to a vegetative state for the rest of her life. ER 251 (Pena Decl. ¶ 12). Pena explained in his declaration in opposition to summary judgment that:

> On February 21, 2001, I sent Dr. Bjorndal a memorandum concerning a patient who had a seizure, as a result of which, was in a vegetative state. A true and correct copy is attached hereto as Exhibit 6. I wrote the memorandum in a neutral manner so that I could not be accused of disrupting SDC operations. The intent of the memorandum was to put Dr. Bjorndal on notice of an incident of potentially serious malpractice

> that had severely compromised the safety and quality of life of one of SDC's patients. I submitted this memorandum directly to Dr. Bjorndal, as the SDC Medical Director, because my repeated attempts to have prior incidents of patient abuse and medical malpractice investigated that were submitted through the "special incident" reporting system had been to no avail. I was not required to submit this memorandum to Dr. Bjorndal. I did so because as a concerned citizen and a member of the medical community I was attempting to bring to light the serious issues of patient abuse and medical malpractice inflicted on patients at SDC.

Bjorndal argues that this memorandum is not protected by the First Amendment, because "[I]t is undeniable that the plaintiff's official duties required him to report any suspected abuse or neglect, and the mechanism he chose to accomplish that task is immaterial to the constitutional issue presented." *See* Appellee's Brief at 10 & 13-18. The fatal flaw in Bjorndal's argument is that both she and Timothy Meeker, the SDC Executive Director at the relevant time, testified that Pena was not required as part of his job to submit this memorandum to Bjorndal. ER 145 (TT 910:8-19), 146-47 (TT 911:25-912:5), 157-161 (TT 268:14-272:18), 251 (Pena Decl. ¶ 12). Bjorndal testified as follows:

910

13 Q. AND YOU TESTIFIED THAT HE HAD GIVEN YOU A MEMO. SO LET ME
14 HAVE YOU TAKE A LOOK AT THIS, AND IDENTIFY IT. THIS IS, IN
15 FACT, THE MEMO YOU WERE REFERRING TO.
16 (DOCUMENT HANDED TO WITNESS AND COUNSEL.)
17 A. YES.

18 Q. AND IN THIS MEMO -- THIS MEMO IS DATED FEBRUARY 21ST OF
19 2001?
[...]

911

25 Q. DO YOU RECALL HIM GIVING THIS TO YOU?

912

1 A. YES.
2 Q. HE WAS NOT REQUIRED TO BRING THESE THINGS TO YOUR
3 ATTENTION DIRECTLY AS PART OF HIS JOB, WAS HE?
4 A. NO.

ER 145 & 146-47(TT 910:13-18 & 911:25-912:4).

Moreover, Bjorndal's assertion that "the mechanism that he [Pena] chose to accomplish that task is immaterial" is directly contradicted by the testimony of Meeker, who was the author of the SDC policy concerning the proper "mechanism" to report patient abuse and neglect. ER 157-161 (TT 268:14-272:18). Meeker testified that:

268

14 Q. NOW, AS EXECUTIVE DIRECTOR, FROM TIME TO TIME, DO YOU ISSUE
15 DIRECTIVES CONCERNING POLICIES OR MODIFYING POLICIES?
16 A. YES.
[...]

269

Q. OKAY. AND THIS IS THE POLICY THAT WAS IN EFFECT FROM THAT DATE THROUGH THE REST OF THE TIME THAT YOU WERE AT SONOMA DEVELOPMENTAL CENTER CONCERNING ABUSE, MISTREATMENT, OR NEGLECT PREVENTION AND REPORTING; ISN'T THAT RIGHT?

A. YES.

Q. AND THIS SETS FORTH WHAT A EMPLOYEE'S RESPONSIBILITY IS IN TERMS OF REPORTING ANY SUSPECTED PATIENT ABUSE; ISN'T THAT RIGHT?

A. YES.

[...]

271

Q. **AND THEY'RE NOT REQUIRED TO MAKE A REPORT DIRECTLY TO THE**

272

THEIR -- THEIR SUPERVISOR OR -- OR ANY OTHER MEMBER OF MANAGEMENT, ONCE THEY FILE THE INCIDENT REPORT, THEY FULFILLED THEIR OBLIGATION AND THE SYSTEM'S SUPPOSED TO CONTACT THEM, IF APPROPRIATE, TO TAKE AN INTERVIEW FROM THEM, CORRECT?

A. AFTER COMPLETING AND SUBMITTING THE INCIDENT REPORT,

CORRECT.

[...]

A. CORRECT.

Q. **AND IF THEY DO THAT, THEY'RE DOING SOMETHING BEYOND WHAT THEY'RE REQUIRED TO DO AS AN EMPLOYEE; ISN'T THAT RIGHT?**

A. **YES.**

Q. **AND THEY MAY DO IT FOR THEIR OWN PERSONAL, ETHICAL, PROFESSIONAL OR POLITICAL REASONS, BUT THEY'RE NOT REQUIRED TO DO IT UNDER ANY RULE OR REGULATION OF SDC OR DDS.**

A. **CORRECT.**

See ER 157 (TT 268:14-16), 158 (TT 269:9-17), 160-61 (TT 271:25-272:18)(emphasis added).

Bjorndal cites *Garcetti v. Ceballos,* 547 U.S. 372, 126 S.Ct. 1951 (2006), in support of her argument that Pena's February 21, 2001 memorandum is not protected by the First Amendment. *See e.g.* Appellee's Brief at 16-18. In *Ceballos*, however, the Court warned against the type of over-expansive definition of a public employee's job duties that Bjorndal asks this Court to apply in this case. *Ceballos,* 126 S.Ct. at 1961. Applying Bjorndal definition of a public employee's job duties would deny First Amendment protection to a police officer's report that a fellow officer had taken a bribe on the ground that it is a police officer's duty to report criminal activity and uphold the law.

The *Ceballos* Court expressly stated the test is not whether the statement was made "inside the office or publicly." *Id,* 126 S.Ct. at 1959. Likewise, the test is not

whether the subject of the memo "related to the speaker's job." *Id,* 126 S.Ct. at 1959. The controlling factor in *Ceballos* was that "Ceballos wrote his disposition memo **because that is part of what he, as a calendar deputy, was employed to do.**" *Id,* 126 S.Ct. At 1960.) As the calendar deputy, **it was Ceballos's job to prepare the disposition memo in every case**. Accordingly, the Supreme Court held that "If Cellabos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action." *Id* at 1960-61.

Unlike the disposition memo in the *Ceballos* case, Pena was not required as part of his job duties to submit his February 21st memorandum to Dr. Bjorndal. ER 145 (TT 910:8-19), 146-47 (TT 911:25-912:5), 157-161 (TT 268:14-272:18), 251 (Pena Decl. ¶ 12). Nor has there been any suggestion that he wrote it in an inflammatory or misguided manner that would justify his termination.

Pena's declaration in opposition to summary judgment created a disputed material issue of fact concerning whether or not he was required to submit his February 21, 2001 memorandum directly to Bjorndal. ER 251 (Pena Decl. ¶ 12). The jury in this case should have been permitted to decide whether or not Pena was required to submit his February 21, 2001 memorandum to Bjorndal. Based on Bjorndal and Meeker's testimony that Pena was not required to raise his concerns with Bjorndal, the District Court's grant of summary judgment and exclusion of

evidence concerning the contents of the memorandum denied Pena a fair trial. By granting summary judgment and excluding all testimony concerning the contents of the memorandum,[5] the Court denied Pena the opportunity to prove retaliation in one of three ways outlined in, *Colzalter v. City of Salem*, 320 F.3d 968 (9th Cir. 2003); *see also, Allen v. Iranon*, 283 F.3d 1070, 1077-78 (9th Cir.2002) ("This proximity in time constitutes circumstantial evidence of retaliatory motive.").

Moreover, in light of Bjorndal and Meeker's trial testimony, the District Court should have corrected her error and granted Pena's motion to reconsider her summary judgment decision and allow Pena to amend to conform the evidence. *See* ER 136 (TT 981:1-24).[6]

III. THE CIRCUMSTANTIAL EVIDENCE THAT PENA SUBMITTED IN OPPOSITION TO SUMMARY JUDGMENT PRECLUDED SUMMARY JUDGMENT OF PENA'S FIRST AMENDMENT CLAIM BASED UPON HIS FORMAL COMPLAINT TO DHS.

Bjorndal argues that this District Court grant of summary judgment concerning Pena's complaint to the California Department of Health Services ("DHS") was

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[5] The District Court granted Bjorndal's motion *in limine* concerning this memorandum and only allowed extremely limited questioning by Pena's counsel, ***after*** Bjorndal's counsel opened the door by asking her about the memorandum during his direct examination. ER 145-146 (TT 910:8-911:15).

[6] *See* ER 136 (TT 981:1-24) for Pena's request to amend to conform to the evidence in light of Bjorndal and Meeker's trial testimony.

correct because "there [allegedly] is no evidence that defendant ever saw or was told about the complaint, the Department of Health investigation and resulting statement of deficiencies, or the Center's plan of correction." Appellee's Brief at 10, *see also* Appellee's Brief at 19-22. In fact, in opposition to summary judgment of this claim, Pena submitted substantial circumstantial[7] evidence from which a jury could reasonably conclude that Bjorndal was aware of Pena's complaint, despite her denials. That evidence included the following:

- On October 18, 2000, DHS issued the results of its investigation of Pena's complaint that photographs were being removed from patient records at SDC; *See* Pena Decl., para. 9. The California Department of Public Health concluded:

  > **The complaint allegation is (sic) validated during the onsite visit, and a violation(s) of the regulation(s) is issued to the facility. The complaint is substantiated.**

  ER 250 (Pena Dcl. ¶ 9) & 263 (Pena Decl., Exh. 4).

- One week later, on October 25, 2000, Bjorndal met with Pena and instructed him to stop taking photographs of patients. ER 250 (Pena Decl. ¶ 10.

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[7] A plaintiff need not prove allegations with direct evidence; circumstantial evidence is sufficient. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716-17, 103 S.Ct. 1478, 1482-83,(1983); *Settlegoode v. Portland Public Schools* (9th Cir. 2004) 371 F.3d 503, 520("That [a party] had no direct evidence supporting these arguments is of little consequence; circumstantial evidence and inference are sufficient to support a legitimate argument.").

- On the same day, Bjorndal confirmed in writing the meeting with Pena. ER 266 (Pena Decl. Exh. 5).

- Bjorndal admitted in her deposition that she went to see Pena because the fact that Pena was the one taking photographs of patients came up as a "big issue" in an Executive Committee meeting. ER 231-32 (Bjorndal Depo. 57:17-19, 58:21-24; *see also* ER 185 (TT 184:15-24)(Bjorndal's trial testimony).

The fact that Bjorndal met with Pena and told him to stop taking photographs of patients ***just one week after*** the DHS issued it findings and cited SDC for removing photographs from patient records is circumstantial evidence; circumstantial evidence from which a jury could reasonably conclude that the two events were related. *Colzalter,* 320 F.3d at 377, *Allen,* 283 at 1077 (proximity in time). The fact that Bjorndal instructed Pena to stop taking photographs, the very topic of the complaint to the DHS, is circumstantial evidence; circumstantial evidence that she opposed his protected activity. *Colzalter,* 320 F.3d at 377, *Allen,* 283 at 1077 (expressed opposition to speech). Bjorndal's admission that Pena's taking photographs of patients came up as a "big issue" just one week after DHS issued it findings concerning his complaint that photographs were being removed from patient records supports the reasonable inference that the members of the Executive Committee, including Bjorndal, knew it was Pena who complained about photographs being removed from patient records. *Gilbrook v. City of Westminster,* 177 F.3d 839,

856-57 (a defendant's knowledge may be inferred from circumstantial evidence and from evidence of the defendant's actions).

In light of the circumstantial evidence that Pena submitted in opposition to summary judgment concerning his First Amendment claim based upon his DHS complaint, the District Court should not have granted summary judgment of that claim.[8]

IV. THE DISTRICT COURT DENIED PENA A FAIR TRIAL BY EXCLUDING CONTRERAS'S TESTIMONY.

As discussed in Appellant's Opening Brief, Chief Contreras testified in his deposition, and would have testified at trial, that Patti Rees, SDC's Clinical Director, told Meeker and Contreras that Pena had to be fired because he was making allegations that were dangerous to the facility and could expose the facility to multiple lawsuits. In the very same conversation, Meeker instructed Chief Contreras to "dig up dirt" that Meeker could use to fire Pena (Contreras depo. 26:2-25 & 34:11-

[8] Bjorndal attacks Pena for failing to submit a copy of his DHS complaint in the lower court proceedings. *See* Appellee's Brief at 19 & 22. The truth is that Pena was not represented by counsel, nor contemplating a lawsuit, at the time he filed his complaint with DHS and he did not keep a copy of the complaint. However, the DHS October 18, 2000 findings make clear the complaint concerned the removal of photographs from patient records and Bjorndal's testimony makes clear that she knew it was Pena who was taking photographs of patients and placing them in patient records.

24).[9]

Bjorndal attempts to minimize the importance of Chief Contreras testimony by implying that Meeker was not around when Pena was fired by Bjorndal. *See* Appellee's Brief at 24, fn 5 & 25. Contreras's testimony cannot be so easily dismissed in light of the importance of Meeker's relationship with Bjorndal and the timing of the Executive Committee team meeting in which Pena's taking photographs of patients came up as a "big issue."

Meeker interviewed Bjorndal for the position as SDC's Medical Director in the summer of 2000. ASER 20 (TT 266:10-12 & 266:23-25). He was the one who made the decision to hire her. ASER 21 (TT 267:1-2). She started work at SDC in September, 2000 and Meeker was her direct supervisor. ASER 21 (TT 267:2-6). Bjorndal and Meeker met every morning in Executive Committee team meetings to discuss the "hot issues of the day." ER 241 (Meeker Depo.131:17-25), 164 (TT 279:8-19). On October 25, 2000, just one week after the DHS published its conclusion that Pena's complaint about photographs being removed from patient records was substantiated, the "hot topic" was the fact that it was Pena who was taking photographs of patients and putting them in the patients' charts. ER 231-32 (Bjorndal Depo. 57:17-19, 58:21-24). That same day, Bjorndal met with Pena, ER

[9] *See* ER 134 (TT 979:6-20) for Pena's offer of proof.

185 (TT 184:21-24), and told him to stop taking photographs of patient injuries. ER 250-51 (Pena Decl.¶ 10 & 11), 188-90 (TT 203:24-205:4), 155 (TT 539:3-11).

Rule 401 of the Federal Rules of Evidence states that: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Moreover, Rule 402 of the Federal Rules of Evidence states that "all relevant evidence is generally admissible". The fact that Meeker had previously instructed Contreras to "dig up dirt" that Meeker could use to fire Pena certainly meets Rule 401's "any tendency" standard . That is to say, the fact that Meeker previously expressed his opposition to Pena's attempt to expose patient abuse at SDC would tend to make it more probable that Meeker would have shared the same sentiments with Bjorndal when it came to light that it was Pena who was the one taking photographs of patients and putting them in the patients' charts, the very topic of the DHS citation. Bjordal can hardly claim that Meeker was not aware of the DHS citation. Meeker was the one who issued a directive to staff as a result of this citation. ER 162 (TT 277:11-23). Moreover, Bjorndal admitted at trial that part of her job was to be familiar with the directives or policy modifications that Meeker issued to staff. ASER 22 (TT 183:1-25).

V. THE TRIAL COURT ERRED BY EXCLUDING TESTIMONY CONCERNING BJORNDAL'S MOTIVE FOR (1) INSTRUCTING PENA TO STOP TAKING PHOTOGRAPHS OF PATIENTS AND (2) MAKING THE DECISION TO FIRE PENA.

Bjorndal distorts Pena's argument concerning the contents of the *Sonoma Index Tribune* articles. Pena did not seek to have these articles entered into evidence as exhibits. Pena's counsel merely tried to use them at trial to establish Bjorndal's motive for ordering Pena to stop taking photographs and Bjorndal's decision to fire Pena, i.e. to prevent Pena from continuing to document the abuse and neglect to which patients at SDC were being subjected.

The *Sonoma Index Tribune* articles demonstrate that at the time that Bjorndal told Pena to stop taking photograph of patients and made the decision to fire Pena, SDC was under siege. For several months, the local newspaper had been running a series of investigative articles about SDC's failure to prevent and investigate serious incidents of patient abuse. The California Legislature conducted public hearings about the same and passed a statute that demonstrated a total lack of confidence in SDC's (and other developmental centers') track record investigating patient abuse and neglect. The DHS fined SDC $40,000.00 for an incident in which a female patient had been sexually abused, and SDC lost $35 million in federal funding. *See e.g.* ER 94.1-94.33. It is Pena's contention that the events described in the *Sonoma*

Index Tribune articles are the context which provided the motive for Bjorndal's order to Pena to stop taking photographs of patients and her decision to fire him. From this context a jury could reasonably conclude that Bjorndal ordered Pena to stop taking photographs and fired him to prevent Pena from continuing to document the abuse and neglect to which patients at SDC were being subjected.

The intense scrutiny under which SDC was operating at the time that Bjorndal made the decision to fire Pena are historical facts concerning which it is inconceivable Bjorndal would not be aware. Bjorndal was the SDC's Medical Director, who was responsible for patient care.[10] Nonetheless, the District Court would not allow Pena's attorney to question Bjorndal about these historical facts, without Bjorndal ***admitting*** that she was aware of them. *See e.g.* ER 173 (TT 159:15-20), 175 (TT 161:23-24), 176 (TT 162:8-9), 183 (TT 174:12-3), 184 (TT 175:9-10). As discussed in Appellant's Opening Brief, this was the evidentiary standard that the Court set during the pretrial conference concerning the contents of Elizabeth's medical records, ER198-99 (10/29/09 transcript 23:3-23 & 24:6-27:2), and which she applied at trial. ER 173 (TT 159:15-20), 175 (TT 161:23-24), 176 (TT 162:8-9), 183 (TT 174:12-3), 184 (TT 175:9-10).

Accordingly, Pena's counsel confronted Bjorndal at trial with the *Sonoma*

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[10] *See* ER 180 (TT 166: 20-22).

Index Tribune articles concerning the events described above to establish that these events were notorious in her community and issues about which she was surely aware. However, given the District Court's repeated comments to the effect that "if she hasn't seen them, we aren't going to go into it," Bjorndal repeatedly hid behind a convenient lack of memory. ER175 (TT 161:14), 176 (TT 162:25), 177(TT 163:4-5, 10, 22), 178 (TT 164:4, 14, 20, 21-25), 179 (TT 165:1-4), 180 (TT 166:5-9, 15-19), 182 (TT 168:4-9), 183(TT 169:22-23), 183(TT 174:16-21). As a result, testimony concerning the content of these news articles was excluded solely based upon Bjorndal's testimony that she "did not recall" reading these articles. ER 172-73 (TT 158:18-159:7), 142-45 (TT 908:19-910:6), 94.31 (Tribune 7\13\01 article).

The District Court's *in limine* and evidentiary rulings excluding testimony concerning the events described in the *Sonoma Index Tribune* articles prevented Pena for presenting evidence of the context in which Bjordal instructed Pena to stop taking photographs of patients and made the decision to fire Pena. The District Court's rulings denied Pena a fair opportunity to prove that the real reason that Bjorndal instructed Pena to stop taking photographs of patients and made the decision to fire Pena was to prevent Pena from documenting and publically exposing the patient abuse and neglect to which patients at SDC were being subjected. By prohibiting Pena's counsel to question Bjorndal concerning the contents of these news articles,

the District Court denied Pena a fair trial.

VI. THE DISTRICT COURT DENIED PENA A FAIR TRIAL BY REFUSING TO GIVE THE PROBATE CODE INSTRUCTION.

"Preliminarily," Bjorndal asserts that Plaintiff's proposed instruction that was based upon California Probate Code section 4654 ("section 4654") "does not accurately reflect" the content of the section 4654 because that section allegedly "makes no reference to end-of-life care." Appellee's Brief at 31-32. However, as section 4650 makes clear, the division that encompasses section 4654 includes "**the decision to have life-sustaining treatment withheld or withdrawn.**" *See* Cal. Prob.Code.§§ 4650 (a) & (c). In light of section 4650's express statement that the division's provisions "include the decision to have life-sustaining treatment withheld or withdrawn," Bjorndal's assertion that section 4654 does not relate to "end-of-life care" holds no water.

Bjorndal's second argument is similarly flawed because it is based upon two false premises. The first false premise is that Elizabeth had made an "election for CPR." *See* Appellee's Brief at 32. As discussed above, neither the medical records that Pena had available to him at the time he issued the DNR order, nor any trial exhibit, documented any such "election." In fact, it was undisputed that Elizabeth's medical records did not include an Advanced Directive, which would have had to

have been placed at the top of her chart if she had in fact made such an election. ER 167 (TT 343:5-13), 137 (TT 1039:10-13).

The second false premise is that SDC is a health facility "that maintains and operates an emergency department ***to provide emergency services to the public***." *See* Appellee's Brief at 32-35, including fn 19. There is no evidence in this record, nor is it true, that SDC operates an emergency department to provide emergency services to the public. Bjorndal makes this false assertion in order to rely on the California Health & Safety Code provisions that were intended to end discrimination in the provision of emergency health care services. *See* California Legislative Service 1987-88 Regular Session (1987 Laws) Chapter 1225 (Filed with Secretary of State September 27, 1987), which explains that:

> This bill would regulate the treatment of patients brought to hospital emergency rooms and the transfer of those patients to other medical facilities. It would prohibit basing an emergency patient's treatment on the patient's race, ethnicity, religion, national origin, citizenship, age, sex, preexisting medical condition, physical or mental handicap, insurance status, economic status, or ability to pay for medical services, unless the circumstances are medically significant to the provision of appropriate medical care to that individual.

There is no issue in this case concerning the discrimination in the provision of emergency health care services. Accordingly, California Health & Safety Code

section 1317(a) is inapplicable.

Finally, Bjorndal argues that California Health & Safety Code section 1317(a) is the "more specific statute" and, therefore takes precedent over Probate Code section 4654. On the contrary, section 4654 is the more specific and directly related statute. As the statute itself states, the California Legislature passed this legislation because it found that "**prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.**" Cal.Prob.Code § 4650(b)(emphasis added). In this case, it is undisputed that CPR would not improve Elizabeth's "prognosis for recovery" and would cause Elizabeth "unnecessary pain and suffering, while providing nothing medically necessary or beneficial" for her. ER196-197 (TT 11:25-12:10), 191-92 (TT 224:22-225:23), 165 (TT 340:1-5), 140 (TT 797:4-9).

Accordingly, the District Court denied Pena a fair trial by giving a jury instruction that emphasized a patient's right to give or withhold consent to treatment, but refusing to give an instruction concerning a doctor's right to refuse to perform a procedure that would provide the patient no medical benefit and could cause her unnecessary harm.

VII. THE DISTRICT COURT DENIED PENA A FAIR TRIAL BY REFUSING TO GIVE A CLARIFYING COLZALTER INSTRUCTION.

Bjorndal argues that the clarifying jury instructions that Pena requested in response to the jury's repeated requests for clarification concerning what Pena had to prove to establish "pretext" were "argumentative." Appellee's Brief at 36. To support this argument, Bjorndal conveniently omits the first, and the preferred, of three responses that Pena proposed. Moreover, neither of the alternative response proposed by Pena were argumentative.

The first question that the jury posed went directly to the heart of Pena's case. That question was:

> "If only one reason in the adverse action for firing Dr. Pena has merit, does that nullify Pena's whole argument? Meaning: In order to find in favor of the plaintiff, is it necessary that every reason cited in the adverse action terminating Dr. Pena lacks merit?"

ER 139 (11\24\09 jury question). By asking this question, the jury clearly signaled that it was addressing the issue raised by Pena's opening statement of what the evidence would prove, the evidence he presented during the trial, and his closing argument. To wit, that the reasons asserted in the Notice of Adverse Action were

false and merely pretexts to justify firing Pena in retaliation for his speaking out about the patient abuse and neglect to which SDC patients were being subjected. Their questions went straight to the point addressed in *Colzalter, supra*. Was it enough for a plaintiff to prove that ***some*** of the reasons asserted for his termination were pretextual, or must a plaintiff prove that ***every*** reason asserted to justify his firing was false? In *Colzalter, supra*, this Court made clear that if a jury found that some of the reasons asserted for a termination were pretextual, the jury could also find that the pretextual reasons cast doubt on other reasons that otherwise may seem to be true. *Colzalter,* 320 F.3d at 978.

In response to this question, Pena proposed three alternative responses. The first response, which Bjorndal has conveniently ignored, was simply "No." ER 127(DE#257). Based upon this Court's precedent in *Colzalter*, *supra,* this was the simplest and most direct response. As this Court explained in *Colzalter, supra*,

> "A reasonable fact finder could also find that a pretextual explanation such as this one casts doubt on other explanations that, standing alone, might appear to be true."

Id at 978. Accordingly, the jury in this case did not have to find that all the reasons Bjorndal asserted for Pena's firing lacked merit. If the jury concluded that one or more of the reasons asserted by Bjorndal in the notice of adverse action were

pretextual, the jury could also find that the pretextual reasons "cast doubt on other explanations that, standing alone, might appear to be true." Bjorndal apparently ignored this proposed clarifying instruction because she could hardly argue that a simple "no" would be argumentative.

Nor were the other two responses proposed by Pena argumentative. The second proposed response was based directly upon the language from this Court's decision in *Colzalter, supra*, and made clear that if the jury found that "some or all of the reasons Dr. Bjorndal gave for Dr. Pena's termination are false or pretextual, you may, ***but are not required to***, conclude that Dr. Bjorndal's true motivation was retaliation for Dr. Pena's protected activity." ER 128 (DE#257)(emphasis added).

The third response proposed by Dr. Pena was identical to the second, with the addition of the mixed motive defense, pointing out that "if you conclude that [Dr. Bjorndal] has proven that it is more likely than not that she had a non-retaliatory reason to fire Dr. Pena and that she would have fired him for that non-retaliatory reason, despite his protected activity," she could avoid liability. ER 128-29(DE#257). Both of these proposed responses to the jury's questions concerning what Pena had to prove to establish pretext were based upon this Court's precedent and neither were argumentative. Moreover, the District Court acknowledge that what Pena proposed was "correct." ER 124 (TT 1145:25).

Finally, as discussed in Pena's opening brief, the District Court's response to the jury's first question concerning what Pena had to prove to establish pretext was highly prejudicial. ER 126:9-11(TT 48:21-25)("the question you have asked here is not one of the questions on the verdict form that you need to answer.") The jury's question went directly to the heart of the case that Pena's attorneys presented in the opening, throughout the trial, and in the closing, i.e. that the reasons Bjorndal asserted to justify Pena's termination were pretexts to cover up retaliation for his protected activity. By telling the jury that "the question you have asked here is not one of the questions on the verdict form that you need to answer," the District Court essentially told the jury to ignore the argument and evidence upon which Pena's attorneys had based his whole case. By telling the jury that they did not have to decide the very question at the heart of Pena's case, the District Court denied Pena a fair trial.

VIII. CONCLUSION.

For the reasons set forth above, Appellant Van A. Pena respectfully requests that this Court reverse the judgement below and the District Court's order granting

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partial summary judgment, and remand this case for a new trial.

RESPECTFULLY SUBMITTED,

March 3, 2011

/s/_____
Lawrence J. King
Attorney for Plaintiff-Appellant
Van A. Pena, Ph.D., M.D.

CERTIFICATE OF COMPLIANCE

I, Lawrence J. King, attorney for Appellant Van A. Pena, M.D., Ph.D., hereby certify that this reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because it contains 6857 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

March 3, 2011

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2011, I electronically filed this reply brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

/s/
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Docket No. 10-15326

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VAN A. PENA, Ph.D., M.D.,

Plaintiff - Appellant

v.

TIMOTHY MEEKER, M.D., et al.,

Defendant - Appellee

On Appeal from an Order of the United States District Court
for the Northern District of California
and from a Jury Verdict
No. C 00 4009
The Honorable Claudia Wilken, Judge

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