

EXHIBIT 2

2D CIVIL NO. B150337

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION FOUR

| | | |
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| GIL N. MELEIKOWSKY, M.D. |) | |
| |) | |
| Plaintiff and Petitioner, |) | Los Angeles Superior |
| |) | Court Case No. BC233153 |
| v. |) | |
| |) | |
| SUPERIOR COURT FOR THE COUNTY |) | |
| OF LOS ANGELES, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| TENET HEALTHSYSTEM et al., |) | |
| |) | |
| Real Parties in Interest. |) | |
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APPLICATION OF
CALIFORNIA ACADEMY OF ATTORNEYS FOR
HEALTH CARE PROFESSIONALS
FOR LEAVE TO FILE AMICUS CURIAE LETTER BRIEF
IN SUPPORT OF PETITION

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01291

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APPLICATION OF
CALIFORNIA ACADEMY OF ATTORNEYS FOR
HEALTH CARE PROFESSIONALS
FOR LEAVE TO FILE AMICUS CURIAE LETTER BRIEF
IN SUPPORT OF PETITION

TO THE HONORABLE CHARLES S. VOGEL, PRESIDING JUSTICE, AND THE
HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE
SECOND APPELLATE DISTRICT, DIVISION FOUR:

The California Academy of Attorneys for Health Care Professionals (hereafter
"Applicant") requests leave to file the attached amicus curiae letter brief in this case in
support of petitioner Gil N. Meleikowsky, M.D.

The Academy is a professional association of California attorneys who are experienced in representation of health care professionals (physicians, nurses, psychologists, MFCC's and chiropractors among others) in hospital peer review matters as well as in administrative cases involving license discipline before the various boards within the California Department of Consumer Affairs. Members of the Academy are nominated by their peers for membership based on substantial experience in this specialized field.

The Academy has long had a strong interest in seeking fundamental fairness for physicians who have had their staff privileges and membership summarily suspended prior to the commencement of hospital peer review discipline proceedings. It has been the experience of members of the Academy that abuse of summary suspensions is more common than proper use of this drastic mechanism. The proposed letter brief of this amicus brings to the Court the perspective of practicing defense attorneys who must confront for their client improperly imposed summary suspensions as frequently as they are imposed around the state. A summary suspension is supposed to be used only in exceptional cases where prompt action is necessary to avoid imminent danger to a hospitalized patient. When there is no imminent danger and no need for prompt action, a physician is supposed to retain his medical staff membership and clinical privileges until a judicial review committee of his peers reaches a decision and that decision is affirmed by the hospital governing board. The summary suspension is most often used to deprive the physician of his livelihood at the outset of peer review proceedings, often shutting off income and resources which the suspended physician would otherwise be able to use to defend himself or herself.

Therefore, applicant respectfully urges this Court to grant leave to file the proposed amicus curiae letter brief so that it will have the benefit of the unique perspective of the Academy.

Dated: May 17, 2001.

Respectfully submitted,

RUSSELL IUNGERICH
A Professional Law Corporation

By 
Russell Iungerich

Attorneys for Amicus Curiae
CALIFORNIA ACADEMY OF ATTORNEYS
FOR HEALTH CARE PROFESSIONALS

RI:tkb

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 3580 Wilshire Boulevard, Suite 1920, Los Angeles, California 90010. I am employed by a member of the bar of this court.

On May 17, 2001, I served the within APPLICATION OF CALIFORNIA ACADEMY OF ATTORNEYS FOR HEALTH CARE PROFESSIONALS FOR LEAVE TO FILE AMICUS CURIAE LETTER BRIEF IN SUPPORT OF PETITION in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 17th day of May, 2001, at Los Angeles, California.



Trudy K. Bird

SERVICE LIST
Mileikowsky v. Superior Court (Tenet Healthsystem)
Court of Appeal No. B150337

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SERVICE LIST
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Court of Appeal No. B150337

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**CALIFORNIA ACADEMY OF ATTORNEYS
FOR HEALTH CARE PROFESSIONALS**

President
Russell Iungerich
3580 Wilshire Boulevard
Suite 1920
Los Angeles, CA 90010

May 17, 2001

BY MESSENGER

Hon. Charles S. Vogel, Presiding Justice,
and the Honorable Associate Justices
Court of Appeal, Second Appellate District,
Division Four
300 South Spring Street, Rm. 2228
Los Angeles, CA 90013

Re: Amicus Curiae Letter in Support of Petition for Writ of Mandate
Mileikowsky v. Superior Court (Tenet Healthcare Corp.)
2d Civil No. B150037 (Division Four)

Honorable Justices:

The California Academy of Attorneys for Health Care Professionals requests that this amicus curiae letter be filed in support of the petition for writ of mandate of Dr. Mileikowsky. The Academy is a professional association of California attorneys who are experienced in representation of health care professionals (physicians, nurses, psychologists, MFCC's and chiropractors among others) in hospital peer review matters as well as in administrative cases involving license discipline before the various boards within the California Department of Consumer Affairs. Members of the Academy are nominated by their peers for membership based on substantial experience in this specialized field.

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Amicus Curiae Letter
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Page Two

The Academy has long had a strong interest in seeking fundamental fairness for physicians who have had their staff privileges and membership summarily suspended prior to the commencement of hospital peer review discipline proceedings. It has been the experience of members of the Academy that abuse of summary suspensions is more common than proper use of this drastic mechanism. A summary suspension is supposed to be used only in exceptional cases where prompt action is necessary to avoid imminent danger to a hospitalized patient. When there is no imminent danger and no need for prompt action, a physician is supposed to retain his medical staff membership and clinical privileges until a judicial review committee of his peers reaches a decision and that decision is affirmed by the hospital governing board.

Prior to the summary suspension in this case, Dr. Mileikowsky had vested property rights in his membership and privileges. In *Edwards v. Fresno Comm. Hosp.* (1974) 38 Cal.App.3d 702, 705, the Court of Appeal held that "although the term 'hospital privileges' connotes personal activity and personal rights maybe incidentally involved in the exercise of those privileges, the essential nature of a qualified physician's right to use the facilities of a hospital is a property right which directly relates to the pursuit of his livelihood." The California Supreme Court in *Anton v. San Antonio Comm. Hosp.* (1977) 19 Cal.3d 802, 825, held that a physician's right to his or her medical staff privileges, once obtained, is a fundamental vested right which cannot be divested except in accordance with the common law of fair procedure. See also *Bergeron v. Desert Hosp. Corp.* (1990) 221 Cal.App.3d 146, 151.

An abusive summary suspension calls out for prompt judicial review because of the detrimental consequences to the improperly suspended physician pending a final decision in the peer review process. This case involves the total destruction of the portion of Dr. Mileikowsky's obstetrics and gynecology practice at Encino-Tarzana Regional Medical Center, which was built up prior to any notice of charges against him and without there being any imminent danger to the health of any individual. *Young v. Board of Medical Examiners* (1928) 93 Cal.App. 73, 75, held that "While the occupation of a physician more commonly is referred to as a profession, nevertheless it may properly be included within the broader word of 'business.'" See also *Crutchett*

v. *Lawton* (1934) 139 Cal.App. 411, 412-414; *Washington v. Blampin* (1964) 226 Cal.App.2d 604, 606-608.

It is a well established principle of California equity jurisprudence that the curtailment or destruction of a business is manifestly irreparable injury justifying an injunction. *Greenfield v. Board of City Planning Commissioners* (1935) 6 Cal.App.2d 515, 519; *McCammon v. City of Redwood City* (1957) 149 Cal.App.2d 421, 424; *Neary v. Town of Los Altos Hills* (1959) 172 Cal.App.2d 721, 729-730. Also the abrogation of the type of property right involved in a summary suspension “. . . is too important to the individual to relegate it to exclusive administrative extinction.” *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144. If administrative and/or judicial review of a summary suspension is not prompt but must await a final decision by a hospital’s medical staff judicial review committee (JRC), the physician’s practice is forfeited usually for a period of years. Judicial review committees are composed of uncompensated volunteer physicians who usually meet on weekday evenings. Just scheduling dates to accommodate everyone’s calendar usually results in only a few hours of hearing every month. While a hearing on a bifurcated issue, such as whether there is imminent danger to justify a summary suspension, can take place quickly, the physician facing charges needs to have time to prepare his case on the merits as to all charges. In order to obtain the necessary time to prepare, he should not be put out of business at the hospital on spurious charges as to which there is no imminent danger to anyone.

The repercussions of an unlawful summary suspension far transcend the restriction and suspension itself. First of all, the summarily suspended physician’s patients are denied the physician of their choice and must necessarily seek a replacement. When these patients leave the suspended physician’s practice, they are not there if he or she prevails ultimately on the merits of all charges.

Secondly, a summary suspension damages the professional reputation of the suspended physician in the eyes of the other physicians and health care entities that refer patients to his practice. This injury results in substantial economic loss to his ability to practice his profession and to rebuild his practice, if and when he is exonerated. Unlike a

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temporary restraining order or a preliminary injunction proceeding, the charging parties who bring an illegal or bad faith summary suspension do not have to post a bond to compensate the injured physician for damages resulting from improper use of this drastic remedy.

Thirdly, as a result of the operation of both California and federal law, summary suspension at one hospital begins a ripple effect in the medical profession adversely impacting the physician's career. The hospital will submit a report to the Medical Board of California pursuant to section 805 of the Business and Professions Code within fifteen (15) days of the summary suspension. The wrongful and false assertion that Dr. Mileikowsky places patients in "imminent danger" thus becomes available to the public, hospitals, and insurance companies before any administrative hearing. When Dr. Mileikowsky seeks reappointment or new privileges at another hospital, California law requires that hospital to make an inquiry as to whether an "805 report" is in Dr. Mileikowsky's file. The stark reality is that after the hospital receives notice of the adverse "805 report" based on medical disciplinary cause or reason, Dr. Mileikowsky is or will be at great risk in any future credentialing process. The onus of defending against a summary suspension report at multiple hospital is too great a burden to place on the suspended physician when the the parties bringing charges have not proved any charges, let alone the basis for summary suspension, by "clear and convincing evidence." By summarily suspending Dr. Mileikowsky, the principals at Tenet Healthcare have branded and stigmatized Dr. Mileikowsky as a "bad doctor." This action causes a domino effect adversely affecting his staff membership and privileges at all other hospitals. Mark Twain's observation that "A lie makes it half way around the world before the truth has a chance to put its shoes on" is exactly what has happened and will continue to happen here unless this Court agrees with the petitioner that there must be a prompt resolution of the legitimacy of the summary suspension in the hospital administrative proceeding and, if not promptly done there, then by a superior court on early judicial review of the legitimacy of the summary suspension.

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This Court should grant an alternative writ because of the absence of precedent in California with respect to summary suspensions and their reviewability in superior court prior to conclusion of the administrative hearing on the non-summary suspension charges. Normally, a practitioner's privileges are not suspended or terminated until after a hospital peer review hearing has been held and final decision has been rendered on appellate review by the hospital's board of directors. The one exception to that rule has been codified in Business and Professions Code section 809.5, which became effective January 1, 1990. Under section 809.5, a peer review body may immediately suspend the clinical privileges of a licentiate only "where the failure to take that action may result in an imminent danger to the health of any individual"

A perusal of either Deering's or West's California codes will reveal that there are no annotations for section 809.5. Unless this Court grants an alternative writ in this case and proceeds to consider Dr. Mileikowsky's challenge to the lawfulness of the summary suspension on the merits, the important issues presented by his petition will once again evade judicial review and its concomitant possibility of a published precedential decision.

It is the Academy's position that "imminent danger" cannot be shown with old charts and where the hospital and its medical staff do not act with any sense of immediacy. The facts of *Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 150-151, are instructive as to the "immediacy" required for a summary suspension of a physician's staff membership and clinical privileges. In *Cipriotti*, the first incident occurred on December 7, 1979. The second incident occurred four days later on December 11. The opinion then notes that "Immediately following the December 11 incident, Dr. Gross met with Dr. Weiland, the department chairman, and recommended that petitioner's privileges be summarily suspended." 147 Cal.App.3d at 151. As regards the "imminent danger" criterion in Business and Professional Code section 809.5, the dictionary definition of "imminent" means "likely to happen without delay; impending, threatening" and "likely to occur at any moment, impending." *Doheny West Homeowner's Ass'n v. American Guarantee & Liability Ins. Co.* (1997) 60 Cal.App.4th 400, 406, citing dictionary definitions.

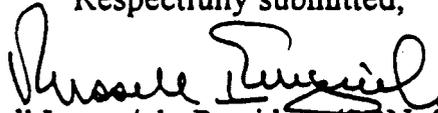
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Volpicelli v. Jared Sydney Torrance Memorial Hosp. (1980) 109 Cal.App.3d 242, 251-253, upheld a preliminary injunction reinstating a physician to a hospital medical staff pending a hospital administrative hearing. Dr. Volpicelli had been on that medical staff for 18 years before being terminated without the notice and hearing required by the bylaws of the hospital. *Volpicelli* stands for the proposition that Dr. Mileikowsky should be similarly entitled to reinstatement pending his hospital hearing absent a clear showing that his care poses an "imminent danger to the health of any individual" as required by statute.

Accordingly, the Academy urges this Court to grant an alternative writ and ultimately hold that where the medical staff/hospital does not grant a prompt hearing to determine whether the requisite "imminent danger" supports the drastic action of summary suspension, then the suspended physician should be entitled to immediate judicial review without further exhaustion of hospital administrative remedies and to have the superior court promptly determine whether the drastic action of summary suspension is supported by the requisite "imminent danger." Unless this Court grants the alternative writ and so holds, the criteria of Business and Professions Code section 809.5 become a right without a remedy -- a situation that the law generally abhors.

Respectfully submitted,



Russell Iungerich, President (SBN: 043440)
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PROOF OF SERVICE BY MAIL

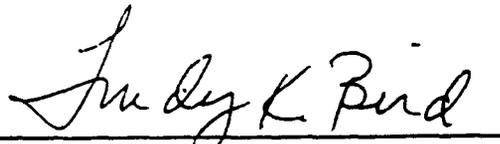
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On May 17, 2001, I served the within AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR WRIT OF MANDATE in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California:

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I declare under penalty of perjury that the foregoing is true and correct.
Executed this 17th day of May, 2001, at Los Angeles, California.



Trudy K. Bird

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