1ST CIVIL NO. A131616

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Eden Township Health Care District
Cross-Complainant and Appellant,

v.

Sutter Health et al.
Plaintiffs and Cross-Defendants and Respondents.

On Appeal From The Superior Court of ALAMEDA County
Case No. RG09-481573
Honorable MARSHALL WHITLEY

CITY OF SAN LEANDRO'S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT EDEN TOWNSHIP HEALTH CARE DISTRICT; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT EDEN TOWNSHIP HEALTH CARE DISTRICT

MEYERS, NAVE, RIBACK, SILVER & WILSON
J. Scott Smith (SBN: 151163)
555 Capitol Mall, Suite 1200
Sacramento, California 95814
Telephone: (916) 556-1531
Facsimile: (916) 556-1516

Jayne W. Williams (SBN: 63203)
555 – 12th Street, 15th Floor
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Amicus Curiae City of San Leandro

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPLICATION TO FILE AMICUS CURIAE BRIEF

I. INTRODUCTION.

Under California Rule of Court 8.200(c)(1) the City of San Leandro, California respectfully requests leave to file the accompanying amicus curiae brief in support of appellant Eden Township Health Care District.

II. INTEREST OF AMICUS CURIAE.

The City of San Leandro (the "City") is a California charter city which lies within the boundaries of the Eden Township Health Care District (the "District"). San Leandro's residents are currently served by the San Leandro Hospital including— most importantly— its emergency department and acute care facilities. The San Leandro City Council determined that it is in the interest of the residents of San Leandro to continue to have emergency room and acute care services available at San Leandro Hospital and that the community of San Leandro would be substantially harmed should this facility be shut down and converted entirely to a rehabilitation center as proposed by respondent Sutter Health. (see, Request for Judicial Notice 1, filed herewith).

III. ASSISTANCE TO THE COURT IN DECIDING THE MATTER.

Although the issues are more than adequately addressed in the District's opening and reply briefs, additional amicus curiae support is nonetheless needed to correct a repeated and fundamental misstatement

contained in the respondents' brief. The respondents' arguments start from the premise that during the transactions at issue in this case, "the interest of the district and respondent Eden Medical Center "EMC" were perfectly aligned..." (Respondent's Brief p. 1.); and that the resulting actions by respondent Sutter Health "helped further the District's interest in continued delivery of health care at Eden SLH..." (Respondents' Brief p. 2.) The following amicus curiae brief demonstrates that these statements are simply not true. The interests of the respondents and the District were not perfectly aligned. As private health care providers, the respondents' primary interests were to provide facilities and a level of care that best met their economic interests. These interests are significantly at odds with the public's interests and needs. Respondent Sutter Health intends to close San Leandro Hospital which would result in the discontinuation of critically needed emergency medical and acute care services in San Leandro, only to re-open the entire facility as a rehabilitation center. While this might represent more economically viable health care from the perspective of private entities, the loss of an emergency department serving 27,000 patients per year, and an acute medical center serving 17,000 patients per year is an extraordinary detriment to the surrounding community and to those citizens who the District's governing board is elected to serve. The actual public interest, as reflected by the considered view of the San

Leandro City Council is for the continued permanent operation of emergency room and acute care facilities at San Leandro Hospital.

Providing the court with this important information will assist the court to put Government Section 1090's application to the case in the broader context of the public interest, which is the paramount concern and focus in this appeal. In addition, it will further advance the contention that the respondents' estoppel arguments must fail.

IV. CONCLUSION.

For the foregoing reasons, the City of San Leandro, respectfully request that this court accept the accompanying brief for filing in this case.

DATED: August 8, 2011

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/
J. Scott Smith
Attorneys for Amicus Curiae
City of San Leandro

AMICUS CURIAE BRIEF

I. INTRODUCTION

California's Government Code Section 1090, "like all conflict of interest statutes, is based on the truism that a person cannot serve two masters simultaneously." (*D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, 868, quoting *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 13330.) This case, more than many others, highlights just how important this principle is. At the center of the case is an effort by a private health care company, respondent Sutter Health, to gain control of an important community medical facility so that it can be closed and converted to a more profitable medical enterprise. The end result of this profit-driven effort will be to leave San Leandro residents without badly needed emergency medical and acute care services. This takeover was accomplished through negotiations where one of the principal advisors to appellant Eden Healthcare District, George Bischalaney, was at the same time the Chief Executive Officer of the District and a wholly owned subsidiary of Sutter, respondent Eden Community Hospital. Whether consciously or unconsciously, Mr. Bischalaney's efforts led, in part, to an agreement where Sutter was allowed to purchase San Leandro Hospital at no additional cost and then close the its emergency and acute care departments to convert the entire hospital to a rehabilitation center. While this transaction will no doubt serve well the private interests of Sutter by enhancing its bottom line, it levels substantial and irreparable

harm upon the residents of San Leandro and the populace to whom the District's leaders are supposed to have served with undivided loyalty.

To divert this court's focus on the apparent conflict of interest that permeates this entire transaction, Sutter now argues that there really was no conflict at all because the interests of all the parties were "perfectly aligned" and they "existed and operated to serve the healthcare needs of Alameda County." (Respondents Brief p. 1) This is sheer sophistry. What the respondents might view as serving the healthcare needs of the community will often differ markedly from the actual needs of the community when profitability is removed from the equation of the community's healthcare requirements. The clearest example of this difference is with emergency and acute care services. Emergency departments are by law obligated to treat patients irrespective of their financial ability to pay. (42 U.S.C. § 1395dd.) Faced with declining reimbursements for patient care and increased burdens from previous emergency department closures, emergency and critical care centers are often not profitable. Consequently, in California alone over 70 emergency rooms and trauma centers have closed since 1990. (Laura J. Merislano *Critical Condition, Patient Access Roll in Improving ED Revenue Cycle Management,* (2008) 18 Health Care Registration 2.) According to the American College of Emergency Physicians, over the last decade more than 100,000 in patient beds, and nearly 8,000 intensive care beds have been

closed nationwide in an effort to control costs. (*Emergency Department Visits Jump 5 Million To Hit New High of 119 Million* (2008) ACEP Release.) A 2007 report from the United States Centers for Disease Control and Prevention noted that from 1996-2006, the number of emergency in patient visits rose to 119.2 million. (Pitts SR, Niska RW, Xu J, Burt CW, *National Hospital Ambulatory Medical Care Survey: 2006 Emergency Department Summary,* (2008) National Health Statistics Reports; No 7.) Yet, during that same period of increasing demand on emergency medicine, the nation lost over 700 hospitals and over 400 emergency departments to cost cutting measures. (National Academy of Sciences Publication, *Hospital-Based Emergency Care: At the Breaking Point* (2007) p. 2.)[1] With each closure of an emergency room or critical care facility, there is a corresponding increase in the burden on other surrounding emergency rooms, creating increased economic strain on those operations.

Faced with these pressures, one can see how closure of an emergency department would make economic sense to a private sector health care provider whose primary concern is with bottom line revenues. Yet, with such increasing burdens on emergency and critical care services, no one could rationally suggest that the closure of yet another emergency

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[1] The full text of this book is available at *http://www.nap.edu/openbook.php?record_id=11621&page=2.*

department is in the best interests of the community at large. As a public agency with an elected board, the District is compelled to deliberate the citizenry's vital health care needs without considering narrow private economic interests and profitability. There is no greater heath care need than the continued viability of a busy emergency department and acute care facility. The citizenry that elected the District's leaders are entitled to depend on the assurances that underlie Government Code Section 1090 that the District's leaders will deliberate and decide upon vital health care needs without subordinating the public needs to narrow private economic interests and profitability.

Sadly, in this instance the citizenry of San Leandro's expectation and reliance upon the protection of the public trust that is at the core of Government Code Section 1090 was lost. By reversing the judgment entered below, this court can return to the deserving communities of San Leandro the trust and protection of Section 1090.

II. DISCUSSION

A. Sutter Misleads This Court When It Asserts That the Public Interest Would be Served by Closure of San Leandro Hospital.

On the first page of the respondents' brief, Sutter states in conclusory language:

> "The interest of the District and respondent Eden Medical Center ("EMC") were perfectly aligned in the settlement negotiations – both EMC and the District existed and operated to

> serve the health care needs of Alameda County and wanted Sutter to rebuild Eden and to provide financial backing to support the continued delivering of quality health care in the community they both served."

(Respondent's Brief p. 1.)

Respondents' assertion of a "perfectly aligned" interest is undermined by the fact that Sutter then purports to have determined that the "highest and best use of San Leandro Hospital is to shut down the facility's current use and convert it entirely to an acute rehabilitation complex." Sutter's assertion here of a "perfectly aligned" interest and what constitutes the "highest and best use" stands in sharp contrast to the determination made by the San Leandro City Council, which by Resolution made the following findings:

1. Alameda County currently has only 2.3 beds per 1,000 residents which is well below the national average of 3.3 beds for every 1,000 residents, and thus closure of San Leandro Hospital would severely limit access to health care services in the County;
2. The emergency room at San Leandro Hospital served more than 27,000 patient visits in 2009 and there is, therefore, a continued great need for its emergency care facilities;

3. The closure of San Leandro Hospital will impact the 9 remaining acute care hospitals in Alameda County which are already overburdened and subject to diversion of emergency room services. (Request For Judicial Notice 1.)

Based upon these findings the City Council concluded that:

> The threatened closure of San Leandro Hospital as a full service acute care and emergency services facility represents a devastating potential loss of vital health care services to the citizens of San Leandro and Central Alameda County...

(Request for Judicial Notice 1 & 2.)

These findings and conclusions by the San Leandro City Council hardly supports the respondents' assertion of a "perfectly aligned" interest; nor does the position taken by the City Council of San Leandro reinforce in any manner Sutter's contention that the "highest and best use" of San Leandro Hospital is to shut it down and convert it to a rehabilitation care facility.

Clearly, the findings of the San Leandro City Council shows that San Leandro Hospital is far from being an underutilized community resource. It is only when the Sutter views this vital community resource through the lens of private economic gain and profitability that shutting it down for an alternate use rises to a "highest and best use."

B. The Difference Between Sutter's Interests In Closing The Hospital And The Public Interest In Keeping It Open Highlights The Need For Rigorous Enforcement of Government Code Section 1090.

The stark contrasting views concerning the "highest and best use" of San Leandro Hospital between those pursuing the path of private and narrow economic gain and those reflecting the broader public interest, underscores the necessity for the strict application of the principles of Government Code Section 1090. Government Code Section 1090 embodies the important policy that public officials may not participate in the formation of contracts where the official's interests and loyalties are split. (see, *E.G. Schaffer v. Berinstein* (1956) 140 Cal.App.2nd 278, 289.) It has long been articulated by California courts that this principle "is evolved from the self-evident truth, trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service performed." (*Id* at 290, quoting, *Stockton P&S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 601.) Accordingly, when a public official is unable to give his undivided loyalty to the public interest in relationship to the making of a contract, the contract is void because "the policy of the law being that a public officer and the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large." (*Ibid.*)

As is demonstrated above, the "obligations owed to the public at large" in this instance laid in doing everything possible to ensure the continued operation of the acute care and emergency room services at San Leandro Hospital. The interest of private sector health care providers, such as the respondents in this case, obviously differed. The private interests of Sutter and its subsidiary lay in providing the most economically valuable health care services. In stark terms, to a private health care provider, the "highest and best use" of a health care facility is one that generates the most revenues. To public agencies, the "highest and best use" is that which provides the most needed health care services, and there can be no greater need in the San Leandro and the surrounding environment than for emergency medical care to save peoples lives.

Yet, as is more than adequately demonstrated in the District's opening and reply briefs, the negotiations in this case and the resulting agreements were tainted by the fact that the District was receiving the advice and counseling of individuals whose private and economic interests did not rest primarily or exclusively with the general public welfare. Mr. Bischalaney, the District's own Chief Executive Officer, also served concurrently in the same role for respondent Eden Medical Center, which by then was essentially the subsidiary of Sutter Health. (AA 43, pp. 03133-34 (UMF No. 82), 03086-87 (UMF Nos. 2, 4, 5).) Although he purportedly recused himself from participating in the negotiations on behalf of the

District in some instances, he nonetheless played a significant part in the negotiations, and most importantly, he had a material role in formulating the District's positions on the various issues during negotiations. (AA 43, pp. 03110-21 (UMF Nos. 48-49) 03122-23 (UMF No. 63), 03131-32, 03136-39, (UMF Nos. 88-94).) These negotiations resulted in an agreement that allowed Sutter to take control of San Leandro Hospital for virtually no additional costs in order to close its emergency and acute medical care facilities in favor of the more profitable rehabilitation facility. Consequently, the net impact results of the negotiations was an agreement that sacrificed the interests of the public on the altar of private gain and profit—a sacrifice that Mr. Bischalaney had a duty under Government Code 1090 to avoid.

Though Sutter may contend that Mr. Bischalaney's role in the negotiations was indirect, that dodge will not shield his role from a Section 1090 analysis. A central purpose of Section 1090 is "also to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty." (*Webb v. Superior Court* (1988) 202 Cal.App.3rd 872, 900, quoting, *Terry v. Bender* (1956) 143 Cal.App.2nd 198, 206-207.) Thus, when the light of Section 1090 is shown on Mr. Bischalaney's "indirect role" in the negotiations leading to the agreement to shut down a vital community health facility, the entire transaction must be viewed as tainted. A tainted transaction that results in such a draconian consequence as the

closure of a critically needed emergency room and acute care facility cannot be left to stand.

C. Because of the Important Public Interests at Stake, the Respondents' Estoppel Argument Must Be Rejected.

In the respondents' brief, it is argued that that the District should be barred from raising 1090 as a challenge to the validity of the contracts because the District has supposedly blown "hot and cold" and acted to accept portions of the 2008 agreement. In essence, this is an argument for estoppel in that it is a claim that the District's past negotiating behavior should estop it from now seeking to invalidate the contracts. This argument must fail, not only for the reasons set forth in the District's reply brief, but also because of the importance of the public interests at stake. Simply put, public interests at stake are far too important and vital for this court to restrain itself from questioning the validity of the underlying contracts.

Arising from equity, estoppel in its many forms has always been limited when there is a broader public interest at stake. Because of this, at common law government agencies were not subject to equitable estoppels at all. (see, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497.) However, in *Mansell* the California Supreme Court limited this principle and allowed a government agency to be bound by an equitable estoppel only if the act giving rise to the estoppel was of "sufficient dimension to justify any effect upon the public interest or policy which would result from the raising of an estoppel." (*Ibid*) The corollary to this principal is where

the public interest outweighs any private interest in raising an estoppel, an estoppel argument still cannot be maintained. Since the sole purpose and function of a government agency is to directly carry out the interests of the public, even after *Mansell* "still, 'the general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances.' " (*Parmar v. Board of Equalization* (2011) 196 Cal.App.4th 705, 717, quoting, *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1177.)

In this case, what Sutter is essentially arguing is that even if the court were inclined to believe that Government Code Section 1090 invalidates the underlying transactions, the court should nonetheless uphold those illegal transactions because of actions or decisions that the District may or may not have taken. The impact of such a result, however, would have a clear detrimental impact on the interests of the public at large. It would result in the closure of a critically needed emergency department and critical care facility. Regardless of the negotiating position or strategies the District may have undertaken with respect to the transaction, it should not result in critically injured accident victims or acutely ill patients from receiving urgent and immediate care in an emergency room facility within their community. The real world consequences of the closure of the San Leandro Hospital's emergency room and acute care facilities if the

respondents' arguments were to prevail are simply far too important to allow the case to be decided on mere estoppel grounds.

III. CONCLUSION

For the reasons set forth in the foregoing as well as those set forth in the appellant's opening and reply briefs, amicus curiae the City of San Leandro, respectfully urge this court to reverse the judgment of the trial court.

DATED: August 8, 2011

Respectfully submitted,

MEYERS, NAVE, RIBACK,
SILVER & WILSON

By: /s/
J. Scott Smith
Attorneys for Amicus Curiae
City of San Leandro

CERTIFICATE OF WORD COUNT

Pursuant to CRC 14(c), the text of this brief, including footnotes and excluding the table of contents and the tables of authorities, consists of 3,169 words in 13-point Times New Roman type as counted by the Microsoft Word 2003 word-processing program used to generate the text.

DATED: August ____, 2011

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____
J. Scott Smith

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Sacramento, State of California. My business address is 555 12th Street, Suite 1500, Oakland, California 94607.

On August 8, 2011, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT EDEN TOWNSHIP HEALTH CARE DISTRICT; PROPOSED AMICUS CURIE BRIEF IN SUPPORT OF APPELLANT EDEN TOWNSHIP HEALTH CARE DISTRICT** on the interested parties in this action as follows:

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Executed on August 8, 2011, at Oakland, California.

/S/

Cynthia Sauceda

SERVICE LIST
A131616

Kevin M. Fong
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
San Francisco, CA 94105-7880

Attorneys for Cross-Complainant and Appellant

Stephen L. Goff
DLA Piper
400 Capitol Mall – Suite 2400
Sacramento, CA 95814

Attorneys for Cross-Defendant and Respondent

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

(4 Copies)

Superior Court of California
County of Alameda
Rene C. Davidson Courthouse
1225 Fallon Street
Oakland, CA 94612

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