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8  
9 **SUPERIOR COURT OF CALIFORNIA**

10 **COUNTY OF SAN FRANCISCO**

11 **UNLIMITED JURISDICTION**

12  
13 **OMONDI NYONG'O**

14 **Plaintiff,**

15 **v.**

16 **SUTTER HEALTH, PALO ALTO**  
17 **MEDICAL FOUNDATION, and PALO**  
18 **ALTO FOUNDATION MEDICAL GROUP,**

19 **Defendants.**

Case No. CGC-21-592714

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION TO ENFORCE  
PROTECTIVE ORDER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Hearing Date: April 18, 2022  
Time: 9:00 AM  
Dept.: 302

Amended Complaint Filed: October 13, 2021  
Complaint Filed: June 22, 2021

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**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on April 18, 2022, at 9:00 a.m., or as soon thereafter as this matter may be heard in the above-captioned court, Plaintiff will move for an order to enforce the Protective Order, thereby permitting Plaintiff to produce relevant and non-privileged documents responsive to Defendants' discovery requests.

This motion is made based on the fact that: (1) Defendant Palo Alto Foundation Medical Group ("PAFMG") served document requests demanding these documents; (2) Plaintiff responded that he would produce them; (3) the parties entered into a Stipulated Protective Order specifically permitting their production; (4) Plaintiff went through the time and expense of collecting these documents; and (5) Defendants then objected and threatened to retaliate against Plaintiff if he produced the documents based on confidentiality concerns addressed in the Stipulated Protective Order. Plaintiff has diligently attempted to meet and confer with Defendants. PAFMG has rejected Plaintiff's repeated offers to produce documents responsive to PAFMG's own discovery requests and subject to Stipulated Protective Order that PAFMG negotiated. Informal resolution of the dispute has not been possible.

This motion is based on upon this Notice and the following attached documents: Plaintiff's Memorandum of Points and Authorities, Plaintiff's Separate Statement in Support of Plaintiff's Motion to Compel, the supporting Declaration of Daniel M. Hutchinson, all documents on file in this matter, and such oral and documentary evidence and argument as may be presented at a hearing on this Motion.

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1 **I. INTRODUCTION**

2 This motion addresses the failures of Defendants Sutter Health, Palo Alto Medical  
3 Foundation (“PAMF”), and Palo Alto Foundation Medical Group (“PAFMG”) to adhere to the  
4 Stipulated Protective Order and Defendants’ unprecedented interference with Plaintiff Dr.  
5 Omondi Nyong’o’s ability to produce relevant and non-privileged documents in this litigation.

6 Plaintiff seeks to produce relevant, non-privileged documents in response to PAFMG’s  
7 153 document requests. Importantly, PAFMG’s document requests do not seek any patient care  
8 records, as PAFMG concedes that Dr. Nyong’o’s patient care is not at issue in this case. (*See,*  
9 *e.g.,* Hutchinson Decl. ISO Motion to Compel, Exhibit F at 62 [“[P]atient care concerns are not at  
10 issue in this case.”].) Nevertheless, Plaintiff sought provisions in the Stipulated Protective Order  
11 to address the production of sensitive work records. Through three months of negotiation, such  
12 provisions were added to the Stipulated Protective Order, permitting Plaintiff to access and  
13 produce responsive documents, including his work emails. After the Court entered the Stipulated  
14 Protective Order, Plaintiff painstakingly collected his responsive emails. But, before Plaintiff  
15 could produce the documents, the Sutter Health legal department sent Plaintiff a threatening  
16 communication about him accessing his own records. Despite Plaintiff’s repeated attempts to  
17 address this threat without motion practice, Defendants have now disavowed their own  
18 negotiation and agreement set forth in the Protective Order and insist on placing Plaintiff in a  
19 limbo as to whether he can produce his own work records in this case without facing further  
20 retaliation. Plaintiff therefore brings this motion to enforce the Stipulated Protective Order.

21 Defendants cannot refuse to permit Plaintiff to participate in discovery under the  
22 Stipulated Protective Order, or subject him to a Hobson’s choice where he may either satisfy his  
23 discovery obligations or risk “termination” if he does. The Stipulated Protective Order  
24 specifically contemplates such production from all sources, “regardless of the origin.” (Stipulated  
25 Protective Order at § 3.) Plaintiff’s work emails are relevant, discoverable, and responsive to  
26 PAFMG’s own document requests. Nothing in Defendants’ “policies” overturns or nullifies the  
27 Protective Order or the parties’ discovery obligations. To the contrary, those policies expressly  
28

1 state that Plaintiff may access documents to make a good-faith challenge to Defendants’  
2 discriminatory, retaliatory, and illegal conduct. (Hutchinson Decl., Exs. L-O

3 Plaintiff therefore respectfully requests that the Court enter an order permitting Plaintiff to  
4 produce relevant and non-privileged documents responsive to Defendant PAFMG’s document  
5 requests pursuant to the terms of the Court’s Stipulated Protective Order, so that discovery may  
6 proceed and this matter may be decided on merits without further delay.

7 **II. FACTUAL BACKGROUND**

8 **A. Dr. Nyong’o exemplifies medical excellence.**

9 The dispute between Dr. Nyong’o and Defendants has never been about Dr. Nyong’o’s  
10 patient care, as Defendants admit. (Hutchinson Decl. ISO Motion to Compel, Exhibit F at 62  
11 [“[P]atient care concerns are not at issue in this case.”]; *id.*, Exhibit E at 58 [“Dr. Nyong’o’s  
12 patient care is not at issue in this lawsuit.” “PAFMG will not assert that any of the adverse  
13 actions that PAFMG allegedly took against Dr. Nyong’o were related to his patient care.”];  
14 PAFMG Opposition to Motion to Compel at 7 [“[Dr. Nyong’o] is a highly skilled practitioner  
15 without any patient care concerns.”].)

16 Dr. Nyong’o is a nationally and internationally recognized pediatric eye surgeon—a  
17 surgical ophthalmologist—with an impeccable resume of accomplishments and service. (First  
18 Amended Complaint (FAC) ¶¶ 2, 16.) After training at some of the nation’s most prestigious  
19 universities, medical schools, and teaching hospitals,<sup>1</sup> he began working as a surgeon at Sutter in  
20 2008, where he provided outstanding care to thousands of children, with a focus on treating  
21 children who suffer from blindness and vision loss. (*Id.* ¶¶ 2, 6, 16, 18.) At Sutter, Dr. Nyong’o  
22 earned awards for his outstanding resident teaching, excellent patient care, and commitment to  
23 community service. (*Id.* ¶¶ 2, 17.) In recognition of his excellence, the allied professional  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Dr. Nyong’o completed his undergraduate studies at Brown University, his medical schooling at  
27 the University of California, San Francisco (UCSF) School of Medicine, and his ophthalmology  
28 residency at the University of Washington Eye Institute in Seattle, Washington. Thereafter,  
Dr. Nyong’o trained as a Pediatric Ophthalmology and Strabismus fellow at the University of  
Michigan W.K. Kellogg Eye Center in Ann Arbor, Michigan. He is Board Certified in  
Ophthalmology. (*See* FAC at ¶¶ 2, 16.)

1 associations of Pediatric Ophthalmology and Orthoptics selected Dr. Nyong’o as one of only 12  
2 national pediatric surgical ophthalmologists to serve on the American Orthoptic Council. (*Id.*)

3 In 2015, Dr. Nyong’o became chair of the Department of Ophthalmology. (FAC ¶ 28.)  
4 He was the first—and only—Black physician to chair a department at Defendant PAMF

5 In addition to his medical duties, Dr. Nyong’o has served as the face of Sutter’s  
6 fundraising efforts. (FAC ¶ 2.) He currently holds the title of PAFMG’s Medical Director of  
7 Philanthropy. Dr. Nyong’o was the inaugural award recipient of the Jamplis Community Service  
8 Award for his charitable services in East Africa and at Zuckerberg San Francisco General  
9 Hospital, in the City and County of San Francisco. (*Id.* ¶ 18.) Many patients (or their families)  
10 have made sizable donations to Sutter in gratitude for Dr. Nyong’o’s service. (*Id.*)

11 **B. In response to Dr. Nyong’o challenging racial bias at Sutter, Sutter has**  
12 **subjected Dr. Nyong’o to a pattern of racial discrimination and retaliation.**

13 Despite his impeccable qualifications and years of dedicated service, Sutter subjected  
14 Dr. Nyong’o to a pattern of racial discrimination and retaliation, including pay and promotion  
15 discrimination, down-leveling, biased reviews, heightened scrutiny and racial harassment,  
16 different standards of behavior, and unfair discipline. (FAC ¶ 3.) Sutter senior leadership  
17 repeatedly disrespected, undermined, harassed, stereotyped, applied heightened scrutiny to,  
18 scapegoated, isolated, and disciplined African American staff and doctors—including and  
19 specifically Dr. Nyong’o—due to racial bias. (*Id.* ¶¶ 18-19, 22-23, 24, 25, 26, 27-40, 41-51, 52-  
20 64, 65-69.) Dr. Nyong’o was thereby subjected to Sutter’s glass ceiling for Black doctors, which  
21 limited his pay and career advancement and set him up to be a fall guy for the failures of White  
22 leaders. (*Id.* ¶¶ 20, 23, 24, 26, 27-69.) When Dr. Nyong’o complained about mistreatment,  
23 Sutter retaliated against him with demotions, biased reviews, unfair discipline (including a  
24 demeaning performance improvement plan or “PIP”), and exclusions from work spaces and  
25 professional and leadership opportunities. (*Id.* ¶¶ 23, 27-69.) The PIP characterized his  
26 complaints to his senior leaders in racial stereotypes, casting him as an angry Black man, and  
27 describing his complaining as “intimidating, aggressive, and not collaborative.” (*Id.* ¶ 53.)  
28

1           In addition to the retaliation he suffered for complaining internally, Dr. Nyong’o suffered  
2 retaliation for asserting his legal rights when his internal complaints were treated with hostility.  
3 When Dr. Nyong’o filed his Charge of Discrimination with the Department of Fair Employment  
4 and Housing, Sutter began excluding him from strategy meetings and communications regarding  
5 philanthropy, even though he is PAFMG’s Medical Director of Philanthropy, had previously  
6 always been invited to present on the department’s activities, and played a leading role in the  
7 strategy direction of the department’s philanthropic work. (FAC ¶¶ 65-66.) PAFMG’s White  
8 male CEO also rescinded Dr. Nyong’o’s planned promotion from PAFMG’s Medical Director of  
9 Philanthropy to PAMF-wide Medical Director of Philanthropy. (*Id.* ¶ 68.)

10           Sutter’s discriminatory and retaliatory conduct continued after Dr. Nyong’o filed this  
11 lawsuit. Dr. Nyong’o has been required to work with fewer patient rooms, impaired vision  
12 screening systems for the children, missing (and not replaced) tools, and arbitrary reductions in  
13 staff. (Nyong’o Decl., ¶ 6.) Dr. Nyong’o’s compensation depends in part on the number of  
14 patients he treats. (*Id.* ¶ 4.) To do so effectively, he must have support staff. (*Id.* ¶ 5.) However,  
15 Defendants have refused to hire or assign Dr. Nyong’o required staff, despite his repeated  
16 requests for staffing and his offers to take more patients—and despite the high patient demand  
17 caused by other doctors’ extended absences. (*Id.* ¶ 7.) For example, Sutter refused to hire a  
18 temporary orthoptist while his regular orthoptist was away for an extended maternity leave. (*Id.*  
19 ¶ 8.) Sutter also withdrew one of his two technicians. (*Id.* ¶ 9.) This further reduced Dr.  
20 Nyong’o’s patient capacity and therefore his compensation, leaving him at levels that are  
21 significantly less than his compensation before Sutter discriminatorily demoted him to make him  
22 the fall guy for administrative decisions made by White leaders. (*Id.* ¶ 10.) In fact, *as a result of*  
23 *Defendants’ discrimination and ongoing retaliation, Dr. Nyong’o earned approximately \$40,000*  
24 *less in 2021 than he did eleven years ago, in 2010—and less than in any year since he joined*  
25 *Sutter.* (*Id.* ¶ 11.) Dr. Nyong’o received this low pay despite the fact that 2021 was an excellent  
26 financial year for PAFMG. (*Id.* ¶ 13.)

1           These retaliatory pay reductions continue. Earlier this month, PAFMG notified Dr.  
2 Nyong’o by email of the *third pay cut* since he filed the Complaint. (Nyong’o Decl., ¶ 14.) Dr.  
3 Nyong’o is therefore on pace to make even less monthly in 2022 than in 2021.

4           In addition, Sutter’s retaliation extended to Dr. Nyong’o’s fundraising work directed to  
5 helping the neediest patients at Sutter. (Nyong’o Decl., ¶ 15.) Although Dr. Nyong’o was  
6 promised a promotion from his Pharmacy & Therapeutics (P&T) PAMF committee chair position  
7 to a paid position on the Sutter-wide P&T committee, Sutter withdrew the promotion after Dr.  
8 Nyong’o filed this lawsuit and still has not promoted him. (*Id.* ¶ 16.) In addition, Sutter has  
9 continued to exclude him from fundraising meetings and activities, sidelining him from work that  
10 helps the community. (*Id.* ¶ 17.)

11           As part of his ethical and professional duties as a doctor, Dr. Nyong’o recently published  
12 an article titled *Patching for Amblyopia: A Novel Occlusion Dose Monitor for Glasses Wearers*  
13 *to Track Adherence*, Journal of Binocular Vision and Ocular Motility (Feb. 1, 2022). (Nyong’o  
14 Decl., ¶¶ 23-24.) This article was the culmination of eight years of fundraising and research. (*Id.*  
15 ¶ 25.) It described Dr. Nyong’o’s research study for a patching system device he co-invented to  
16 elevate care for children with lazy eye—the novel occlusion dose monitor device, or “Nyong’o”  
17 device. (*Id.*) Because lazy eye (or amblyopia) is the leading cause of vision loss in children and  
18 young adults and children with lazy eye are 4% of the U.S. population, Dr. Nyong’o rightfully  
19 believes that sharing this research with as wide an audience as possible is absolutely critical. (*Id.*  
20 ¶ 26.)

21           Sutter also apparently agrees that Dr. Nyong’o’s research is important. On March 1,  
22 2022, Sutter’s manager of research communications contacted Dr. Nyong’o with the purpose of  
23 reporting on the findings of his study in Sutter’s research communications and in external media.  
24 (Nyong’o Decl., ¶ 27.) Dr. Nyong’o promptly answered her questions regarding the study. (*Id.*)  
25 However, on a call a few days later, Sutter’s manager of research communications informed Dr.  
26 Nyong’o that she had spoken with two lawyers in Sutter’s Office of the General Counsel about  
27 his research. (*Id.* ¶ 28.) This is the same Office of the General Counsel that, one month earlier,  
28 sent Dr. Nyong’o the threatening communication forbidding him from collecting his own work

1 email for this litigation. (*Id.*) Sutter’s manager of research communications subsequently  
2 informed Dr. Nyong’o that Sutter will provide no internal or external media regarding his critical  
3 research. (*Id.* ¶ 29.) She wrote that Sutter’s Office of the General Counsel told her to “hold off  
4 on communications and media relations around this research.” (*Id.*)

5 This denial of support for Dr. Nyong’o’s important, patient-benefitting research—based  
6 on explicit restrictions dictated by Sutter’s Office of the General Counsel—is unheard of.  
7 (Nyong’o Decl., ¶ 30.) Predictably, it is also personally devastating and soul-crushing for Dr.  
8 Nyong’o. (*Id.*) It undermines eight years of intensive clinical, research, and fundraising work to  
9 ensure this breakthrough. (*Id.*) It impedes the delivery of crucial information about sight-saving  
10 research and innovation to local Bay Area parents of affected children, health institutions,  
11 medical colleagues, the wider United States public, and beyond. (*Id.*) It adversely impacts the  
12 pediatric patients who stand to gain from his work. (*Id.*) Dr. Nyong’o scarcely has words to  
13 express his grief for the children who will now suffer avoidable vision loss because of Sutter’s  
14 refusal to publicize this discovery for them. (*Id.*)

15 As described below in the Procedural Background section, Sutter has continued its  
16 retaliatory and abusive conduct in this very litigation in the form of uncivil and improper  
17 litigation conduct, specious Court filings with demonstrably false statements, abusive, over-the-  
18 top discovery requests designed to punish Dr. Nyong’o for filing this lawsuit, and now with the  
19 current bait-and-switch on a Stipulated Protective Order under which Defendants now insist Dr.  
20 Nyong’o may not produce documents without internal punishment for doing so.

21 C. **Sutter’s treatment of Dr. Nyong’o is consistent with its treatment of other**  
22 **Black doctors and employees.**

23 Dr. Nyong’o’s Complaint describes in detail a “workplace culture which generally  
24 disrespects, undermines, and disciplines African American staff and doctors, including Dr.  
25 Nyong’o, due to racial bias.” (FAC ¶ 19.) Among other things, Defendants impose a glass  
26 ceiling at Sutter and subjects Black doctors to a lack of respect, heightened scrutiny, and toxicity.  
27 (*Id.*, ¶¶ 20-26.) Dr. Nyong’o details specific discriminatory treatment faced by other Black  
28 doctors at Sutter. (*See id.*) In fact, following Dr. Nyong’o’s demotion, there have been no Black

1 leaders in Sutter’s senior ranks. (*Id.* ¶ 21.) Only three of the 354 doctors in any leadership  
2 position across Sutter are Black (less than 1%), and all hold the lowest title, Tier 1 (head of their  
3 individual clinic). (*Id.*)

### 4 **III. PROCEDURAL BACKGROUND**

5 On October 22, 2021, PAFMG served 153 document requests, 31 special interrogatories,  
6 and 17 form interrogatories, and a deposition notice. (Hutchinson Decl., ¶ 2.)

7 On November 2, 2021, the parties held their rule 3.724 conference.<sup>2</sup> (Hutchinson Decl., ¶  
8 4.) At that conference, Plaintiff’s counsel stressed the importance of agreeing to a case protective  
9 order so that production could proceed efficiently and expeditiously. (*Id.*)

10 On November 16, 2021, PAFMG circulated a draft protective order. (Hutchinson Decl., ¶  
11 6.) On December 1, 2021, Plaintiff proposed a substantially revised draft, which added a new  
12 Section 4 addressing “HIPAA-Protected Information” to ensure that work records could be  
13 produced with care, and stated:

14 Accordingly, upon entry of this Order, all Parties shall be entitled to produce  
15 and/or disclose to all Parties in this Litigation any and all Disclosure or Discovery  
16 Material, including any and all “CONFIDENTIAL” Information and/or HIPPA-  
17 Protected Information, regardless of the origin of that Disclosure or Discovery  
18 Material. For example, Plaintiff shall be entitled to access and produce  
19 Disclosure or Discovery Material in his possession, custody, and/or control from  
20 Defendants Sutter Health, PAFMG, and/or PAMF.

21 (Hutchinson Decl., Ex. A.)

22 Plaintiff thereafter followed up by email on December 7, 2021. (Hutchinson Decl., ¶ 8.)  
23 The next day, Plaintiff’s counsel spoke with PAFMG’s counsel by telephone regarding this  
24 language. (*Id.* ¶ 9.) Plaintiff’s counsel further explained that the purpose of this language was to  
25 allow Plaintiff to access and produce the documents that PAFMG requested—*e.g.*, work emails

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26 <sup>2</sup> PAFMG previously filed an *ex parte* Case Management Statement *without* meeting or  
27 conferring with Plaintiff in any respect, in which it falsely stated to the Court: “The party or  
28 parties have met and conferred with all parties on all subjects required by rule 3.724 of the  
California Rules of Court.” Counsel for Dr. Nyong’o immediately reached out to PAFMG to  
identify the misrepresentation and offered it an opportunity to cure its error by conducting the  
meet and confer it had told the Court it already completed. Although PAFMG was aware it had  
made this false statement to the Court, it never corrected it. (Hutchinson Decl., ¶ 3.)  
Unfortunately, Plaintiff’s attempt to model civility to Defendants has not been reciprocated.

1 and other relevant documents accessible through his work computer—without fear of retaliation  
2 from Defendants. (*Id.*) Plaintiff’s counsel explained that Plaintiff was simply unable to produce  
3 documents unless or until all parties agree to the protective order with this language ensuring that  
4 Defendants would not use Plaintiff’s document production in this case as a pretext to engage in  
5 further adverse action against him. (*Id.*) PAFMG’s counsel agreed to that concept and  
6 represented that only Defendants PAFMG and PAMF maintained Plaintiff’s work emails, not  
7 Sutter Health. (*Id.* ¶ 10.) Accordingly, on December 8, 2021, PAFMG sent a revised draft,  
8 which stated:

9           Accordingly, upon entry of this Order, all Parties shall be entitled to produce  
10           and/or disclose to all Parties in this Litigation any and all Disclosure or Discovery  
11           Material, including any and all “CONFIDENTIAL” Information and/or HIPPA-  
12           Protected Information, regardless of the origin of that Disclosure or Discovery  
13           Material. For example, Plaintiff shall be entitled to access and produce Disclosure  
14           or Discovery Material in his possession, custody, and/or control which may  
15           originate from accounts otherwise maintained or owned by Defendants PAMF  
16           and/or PAFMG, which Plaintiff has allowable access to.

17 (*Id.* Ex. B.)

18           Throughout this time, Plaintiff followed up repeatedly with Defendants PAMF and Sutter  
19           Health regarding the protective order, including on December 1, 7, 8, 9, 13, and 16. (Hutchinson  
20           Decl., ¶ 12.) Plaintiff noted that PAMF’s and Sutter Health’s delay “prejudiced both Plaintiff  
21           and PAFMG by delaying discovery.” (Hutchinson Decl., Ex. C.)

22           On December 7, 2021, PAMF and Sutter Health promised that they would “provide any  
23           further edits shortly.” ((Hutchinson Decl., Ex. C.) On December 10, 2021, PAMF and Sutter  
24           Health stated: “I will let you know as soon I have further edits, or approval if there are no further  
25           edits.” (*Id.*) On December 14, 2021, PAMF and Sutter Health stated “we are working to get a  
26           response by the end of this week.” (*Id.*)

27           For its part, PAFMG stated: “We are fine giving [PAMF and Sutter Health] additional  
28           time and don’t feel prejudiced by any delay.” (Hutchinson Decl., Ex. C.)

          With no response from PAMF and Sutter Health forthcoming, Plaintiff and PAFMG  
executed the protective order and moved the Court for its approval. (Hutchinson Decl., ¶ 17.)

1 On December 23, 2021, the Court clerk rejected the protective order because PAMF and Sutter  
2 Health had not signed it. (*Id.* ¶ 18.)

3 Following a mutual extension for all discovery, on December 14, 2021, Plaintiff’s counsel  
4 responded to each of PAFMG’s discovery requests. (Hutchinson Decl., ¶ 19.) Despite the broad  
5 and far-reaching nature of PAFMG’s requests, Plaintiff indicated that he would produce  
6 responsive, non-privileged documents. (*Id.* ¶ 20.) Accordingly, Plaintiff stated in response to  
7 132 of the 153 requests that “Plaintiff will produce any responsive, non-privileged documents in  
8 Plaintiff’s possession, custody, or control.” (*Id.*) For 20 of the 21 remaining requests, Plaintiff  
9 stated that he was unable to produce documents only because he “has no responsive, non-  
10 privileged documents in Plaintiff’s possession, custody, or control.” (*Id.*)

11 On December 29, 2021, PAFMG sent Plaintiff a letter demanding that Plaintiff “produce  
12 all responsive documents,” including all documents from all medical providers that treated  
13 Plaintiff. (Hutchinson Decl., Ex. D.) Because Sutter and PAMF still had not provided comments  
14 to, much less signed, the protective order, Plaintiff was stymied from moving forward. Plaintiff  
15 responded by stating:

16 [A]ny inability of Dr. Nyong’o to provide further information or  
17 documents is, for the most part, a direct result of Defendants Sutter Health’s and  
18 PAMF’s ongoing refusal to agree to an appropriate protective order. . . .

19 Dr. Nyong’o added provisions [to the protective order] guaranteeing that he  
20 could search for and produce documents without fear that Defendants would argue  
21 he violated HIPAA and/or accessed “company” documents without permission.

22 In subsequent calls with PAFMG’s counsel Mick Rubio, including on  
23 December 8, 2021, I explained that Dr. Nyong’o could not produce documents  
24 until all Defendants agreed to those provisions. I explained that Dr. Nyong’o  
25 could not take the risk of producing documents unless or until Defendants  
26 confirmed with certainty that he would not face additional retaliation or reprisals  
27 simply for producing relevant documents. I repeated that message again to  
28 counsel for all parties, telephonically and in writing, on January 5, 2022.

Yet, despite that clear message and Plaintiff’s counsel’s repeated follow-  
up, Defendants Sutter Health and PAMF still have not agreed to those provisions.  
As you know, Dr. Nyong’o sought Court approval of the proposed protective  
order, but the Court declined to do so absent Sutter Health’s and PAMF’s  
agreement. As we have repeatedly informed you, Dr. Nyong’o has every intention  
of producing documents, but simply cannot do so until this issue is resolved.  
Indeed, Sutter Health’s and PAMF’s ongoing silence, without explanation, only  
heightens Dr. Nyong’o’s concern that Defendants will use his document  
production in this case as a pretext to engage in further adverse action against him.

1 Dr. Nyong'o will revisit this issue once Sutter Health and PAMF agree to  
2 the protective order and/or the Court enters a protective order binding on Sutter  
Health and PAMF.

3 (*Id.*, Ex. E.)

4 Finally, on January 6, 2022, PAMF and Sutter Health provided feedback on the protective  
5 order. (Hutchinson Decl., ¶ 23.) While Plaintiff did not believe that any further changes were  
6 warranted, his counsel met and conferred in good faith until all parties signed a final Stipulated  
7 Protective Order with minor changes on January 26, 2022. (*Id.* ¶ 24.) With that Stipulated  
8 Protective Order finally in place, Plaintiff affirmed to PAFMG that he could begin a rolling  
9 production. (*Id.*, Ex. F.) On January 27, 2022, the Court signed the Protective Order. (*Id.* ¶ 26.)

10 Plaintiff immediately went to work retrieving responsive documents. (Nyong'o Decl.,  
11 ¶ 18.) On Saturday, January 29, 2022, and Sunday, January 30, 2022, Plaintiff spent most of his  
12 weekend collecting documents from his work emails responsive to PAFMG's discovery requests.  
13 (*Id.* ¶ 19.) He sent those documents to Plaintiff's counsel through a secure and encrypted online  
14 portal, where they were uploaded automatically to Plaintiff's document review platform. (*Id.*  
15 ¶ 20.)

16 But on Wednesday, February 2, 2022, Sutter Health's Office of the General Counsel  
17 contacted Plaintiff *ex parte*, cc'ing PAFMG CEO Kurt VandeVort, M.D. (Nyong'o Decl., ¶ 21.)  
18 Sutter Health claimed that Plaintiff violated Sutter Health policy, demanded that he destroy the  
19 documents he collected in response to PAFMG's discovery requests, and asked Plaintiff for a  
20 written explanation and attestation regarding his document review and collection for this  
21 litigation. (*Id.*, Ex. A)

22 Plaintiff's counsel contacted Defendants' counsel that same day, alerting Defendants that  
23 their communication was improper because: (1) the Protective Order expressly permits Plaintiff  
24 to produce "any and all Disclosure or Discovery Material, including any and all  
25 'CONFIDENTIAL' Information and/or HIPAA-Protected Information, regardless of the origin of  
26 that Disclosure or Discovery Material"; (2) Defendants' communication seeks *ex parte*  
27 information from a Plaintiff represented by counsel; and (3) Defendants' communication was the  
28

1 latest in a series of discriminatory, retaliatory, and abusive conduct against Plaintiff for engaging  
2 in protected activity. (Hutchinson Decl., Ex. G.)

3 On February 3, 2022, PAMF’s and Sutter Health’s counsel stated that “it looks like an  
4 automated email” and agreed to look into it. (Hutchinson Decl., Ex. H.)

5 The parties then met and conferred two weeks later, on February 15, 2022. (Hutchinson  
6 Decl., ¶ 29.) In the conference, PAMF’s and Sutter Health’s counsel asserted for the first time  
7 that Plaintiff is not permitted to access or produce his work emails in response to PAFMG’s  
8 discovery requests. (*Id.*) Defendant PAFMG joined that position and also contended for the first  
9 time that Plaintiff could not access his emails. (*Id.*) Defendants, however, could not articulate  
10 any law or policy supporting their position. (*Id.*) In an attempt to avoid motion practice,  
11 Plaintiff’s counsel asked Defendants to state their position in writing, including any law or policy  
12 that Defendants believed supported their position. (*Id.*)

13 On February 24, 2022, PAFMG elaborated on its new position, claiming for the first time  
14 that Plaintiff “cannot, for example, access his own medical records.” (Hutchinson Decl., Ex. I.)

15 On February 25, 2022, Plaintiff responded by setting forth—again and in detail—the  
16 above-mentioned procedural history to explain how PAFMG’s new position directly contradicted  
17 its prior statements and agreements, including the fact that PAFMG served discovery requests and  
18 a series of meet and confer letters asking Plaintiff to produce the same work records it now  
19 claimed that Plaintiff could not even access. (Hutchinson Decl., Ex. J.)

20 Throughout this process, PAFMG has suggested that Dr. Nyong’o could produce  
21 responsive documents that he collected from “other” sources, such as any emails from his  
22 personal email account. This request ignores the fact that Defendants did not raise their  
23 objection until *after* Dr. Nyong’o’s responsive documents were collected and placed together in a  
24 single location on his counsel’s document review platform to be reviewed and produced. Plaintiff  
25 explained that “the presence of all documents from Plaintiff together in a single location on  
26 Plaintiff’s counsel’s document review platform means that Plaintiff’s counsel would have to  
27 access all the documents to determine which documents fall into which categories, which  
28 Defendants have wrongly claimed would be improper.” (Hutchinson Decl., Ex. J.) Therefore,

1 the only way for Plaintiff to produce the documents would be for him to go through the exact  
2 same work again of identifying and sending the documents through a secure online portal to his  
3 counsel.

4 On March 1, 2022, PAMF and Sutter Health provided a short email (Hutchinson Decl.,  
5 Ex. K) attaching four documents, the Workforce Confidentiality and Privacy Policy (*Id.*, Ex. L.),  
6 PAMF Confidentiality Agreement (*Id.*, Ex. M.), Sutter Health Use of Internet, Email, Instant  
7 Message, and Texting Policy (*Id.*, Ex. N.), and Sutter Health’s Safeguarding Protected Health  
8 Information Policy (*Id.*, Ex. O.). The PAMF Confidentiality Agreement states that any violation  
9 of Defendants’ policies “may be subject to immediate and disciplinary action, up to and including  
10 termination.” (*Id.*, Ex. M.) Without citing any specific provision, PAMF and Sutter Health  
11 maintained that under these policies Plaintiff cannot access or produce in this litigation *any* “data  
12 maintained by Sutter Health.” (*Id.*, Ex. K) PAFMG stated that PAMF’s and Sutter Health’s  
13 “email addresses our position.” (Hutchinson Decl., Ex. P.)

14 The parties met and conferred again on March 9, 2022. (Hutchinson Decl., ¶ 35.)  
15 Defendants did not withdraw their objections to Plaintiff producing documents. (Hutchinson  
16 Decl., Ex. Q.) Plaintiff therefore files this Motion.

#### 17 **IV. LEGAL STANDARD**

18 California courts generally allow “discovery regarding any matter, not privileged, that is  
19 relevant to the subject matter involved in the pending action or to the determination of any motion  
20 made in that action, if the matter either is itself admissible in evidence or appears reasonably  
21 calculated to lead to the discovery of admissible evidence.” (Cal. Code Civ. Proc. §2017.010.  
22 *See also, e.g., Williams v. Superior Court* (2017) 3 Cal. 5th 531, 538 [“In the absence of privilege,  
23 the right to discovery in this state is a broad one, to be construed liberally so that parties may  
24 ascertain the strength of their case and at trial the truth may be determined.”]) As the California  
25 Supreme Court recently explained, the California Legislature has established a “very liberal and  
26 flexible standard of relevancy,” and any “doubts as to relevance should generally be resolved in  
27 favor of permitting discovery.” (*Id.* at 542 [quoting *Pac. Tel. & Tel. Co. v. Superior Court* (1970)  
28 2 Cal. 3d 161, 173].)

1 In light of California’s liberal rules, the burden is on the party resisting discovery to  
2 justify any objection to production. (*See, e.g., Coy v. Superior Court* (1962) 58 Cal. 2d 210, 220-  
3 21; *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal. 4th 245, 255.)

4 **V. ARGUMENT**

5 The production must proceed. First, the Protective Order specifically contemplates such  
6 production. Second, there is no question that the documents are relevant, discoverable, and  
7 responsive to PAFMG’s own discovery requests. And finally, Defendants have not justified their  
8 objections to Plaintiff’s production. Nothing in Defendants’ “policies” overturns or nullifies the  
9 Protective Order or the parties’ discovery obligations. To the contrary, Defendants’ policies  
10 permit such production. Defendants therefore cannot meet their burden of proving that their  
11 objection is warranted.

12 **A. The Protective Order Specifically Permits Production.**

13 The Court’s Protective Order provides in no uncertain terms that “all Parties shall be  
14 entitled to produce and/or disclose to all Parties in this Litigation any and all Disclosure or  
15 Discovery Material, including any and all ‘CONFIDENTIAL’ Information and/or HIPPA-  
16 Protected Information, regardless of the origin of that Disclosure or Discovery Material.”  
17 (Stipulated Protective Order at § 3.) This Protective Order is binding on all parties.

18 As described above, Plaintiff’s counsel specifically negotiated this language for the  
19 express purpose of allowing Plaintiff to produce from his work emails documents responsive to  
20 PAFMG’s document requests that would also ensure the confidentiality of such materials where  
21 appropriate. For its part, PAFMG repeatedly demanded that Plaintiff produce these documents.  
22 In response, Plaintiff’s counsel clearly explained to all Defendants that Plaintiff would conduct  
23 that search of his company emails as soon as the Court entered the Stipulated Protective Order.

24 To the extent that Defendants believe that Plaintiff’s emails contain any confidential  
25 information, they have a simple remedy: they can designate the documents as confidential under  
26 the Stipulated Protective Order. That is, after all, how a protective order works.

27 In the parties’ meet and confer discussions, PAMF’s and Sutter Health’s counsel has also  
28 made vague references to documents containing confidential patient information. To Plaintiff’s

1 counsel’s knowledge, none of Plaintiff’s responsive emails contain any patient information.<sup>3</sup> To  
2 the contrary, PAFMG’s document request did not seek any patient care records, **as PAFMG**  
3 **conceded that “patient care concerns are not at issue in this case.”** (Hutchinson Decl. ISO  
4 Motion to Compel, Exhibit F at 62; *see also id.*, Exhibit E at 58 [“Dr. Nyong’o’s patient care is  
5 not at issue in this lawsuit.” “PAFMG will not assert that any of the adverse actions that PAFMG  
6 allegedly took against Dr. Nyong’o were related to his patient care.”]; PAFMG Opposition to  
7 Motion to Compel at 7 [“[Dr. Nyong’o] is a highly skilled practitioner without any patient care  
8 concerns.”].)

9 To the extent that Plaintiff’s responsive work emails inadvertently contain any patient care  
10 records, the Stipulated Protective Order specifically addresses this. In fact, the Stipulated  
11 Protective Order provides that all patient information may be anonymized and treated as  
12 confidential. (Stipulated Protective Order, at § 4.3 [“The Designating Party may anonymize  
13 patient ‘CONFIDENTIAL Protected Health Information’ prior to it being served upon another  
14 party.”].) Therefore, if any responsive documents contain patient information, the parties have  
15 already agreed that it can be anonymized and produced, and have taken steps to keep it private  
16 and confidential.

17 **B. Dr. Nyong’o’s Work Emails Are Relevant, Discoverable, and Responsive to**  
18 **PAFMG’s Discovery Requests.**

19 Records regarding Plaintiff’s work experiences are relevant to his employment  
20 discrimination and retaliation claims. (*See Williams*, 3 Cal. 5th at 538 [“[T]he right to discovery  
21 in this state is a broad one, to be construed liberally so that parties may ascertain the strength of  
22 their case and at trial the truth may be determined.”]). Courts routinely find that work emails are  
23 discoverable in employment discrimination and retaliation actions. (*See, e.g., Barbieri v.*  
24 *Cumulus Media, Inc.* (Cal. Super. Aug. 26, 2013) No. CGC-12-521684, 2013 WL 10208661, at  
25 \*3 [noting that “[p]laintiff produced emails sent by Defendant Hammer that are circumstantial  
26

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27 <sup>3</sup> Again, Plaintiff’s counsel are not aware of the specific contents of these documents because  
28 they have been segregated on Plaintiff’s counsel’s document review platform pending resolution  
of this issue.

1 evidence of a pretextual termination”].) Here, Defendant PAFMG sought these records through  
2 its 153 document requests. Because these documents are relevant, discoverable, and responsive  
3 to PAFMG’s document requests, Plaintiff has every right to produce them in litigation subject to  
4 reasonable protections—to which the parties have already agreed—for trade secrets, proprietary,  
5 and private information.<sup>4</sup>

6 **C. Defendants’ Policies Support Plaintiff.**

7 Because the Stipulated Protective Order and California law permit production, that should  
8 end the inquiry. Indeed, no private entity can create a personnel policy that wholesale prohibits  
9 access to evidence. Regardless, even if Defendants object to production on the purported (and  
10 meritless) basis that any of their policies prevent production, Defendants have not cited any  
11 specific provision of these purported policies that would prevent a production consistent with the  
12 Stipulated Protective Order. To the contrary, Defendants’ policies support Plaintiff producing  
13 documents here.

14 Sutter Health’s Workforce Confidentiality and Privacy Policy states that Sutter Health  
15 may not apply any sanction “[w]hen a person reasonably opposes a Sutter practice on the good  
16 faith belief that the practice conflicts with law or regulation.” (Hutchinson Decl., Ex. L.)  
17 Similarly, the PAMF Confidentiality Agreement provides that confidential information may be  
18 disclosed “as permitted or required by law.” (*Id.*, Ex. M.) Sutter Health’s Use of Internet, Email,  
19 Instant Message, and Texting Policy states that “Data or information is accessible and usable  
20 upon demand by an authorized person.” (*Id.*, Ex. N.)<sup>5</sup>

21 Each of these provisions protect Plaintiff: Plaintiff opposes Defendants’ discriminatory  
22 and retaliatory practices as being in “conflict with law.” As “required by law” and subject to a  
23

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24 <sup>4</sup> In addition, the California Constitution affords employees a right to privacy that extends to the  
25 storage of employees’ information on employer-owned computers. *TBG Ins. Servs. Corp. v.*  
26 *Superior Court* (2002) 96 Cal. App. 4th 443, 448-50 (considering a “reasonable expectation of  
27 privacy” in employee’s home computer provided and owned by employer); *Mintz v. Mark*  
*Bartlestein & Assocs.* (C.D. Cal. 2011) 885 F. Supp. 2d 987, 998 (rejecting employer’s argument  
28 that employee had no right to privacy in employer-paid phone line); *see also* Cal. Const. art. I, § I  
(providing inalienable right to privacy).

<sup>5</sup> Sutter Health’s Safeguarding Protected Health Information Policy is inapposite, as it addresses  
only patient health information, which is not responsive to any of PAFMG’s discovery requests.

1 Court Order regarding confidentiality, Plaintiff collected relevant and responsive documents that  
2 are subject to PAFMG's document requests. Through that collection process, he reviewed only  
3 information that was "accessible and usable" to him—his own emails. Accordingly, all of  
4 Plaintiff's actions are consistent with Defendants' policies.

5 **VI. CONCLUSION**

6 For the reasons set forth above, Plaintiff respectfully requests that the Court grant  
7 Plaintiff's motion to enforce the Protective Order, permitting Plaintiff to produce relevant and  
8 non-privileged documents responsive to Defendants' document requests pursuant to the terms of  
9 the Court's Stipulated Protective Order.

10  
11 Dated: March 21, 2022

Respectfully Submitted,

/s/ Daniel M. Hutchinson

Kelly M. Dermody

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Jallé H. Dafa

LIEFF CABRASER HEIMANN &  
BERNSTEIN, LLP

*Attorneys for Plaintiff*

1 **PROOF OF SERVICE**

2 *Nyong'o v. Sutter Health, et al.*

3 San Francisco Superior Court Case No. CGC-21-592714

4 I am a resident of the State of California, over the age of eighteen years, and not a  
5 party to the within action. My business address is: Lieff Cabraser Heimann & Bernstein, LLP,  
6 275 Battery Street, 29th Floor, San Francisco, California 94111. On the date below, I served the  
7 within document:

8 **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO COMPEL;  
9 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

10  Via E-Mail: by transmitting via electronic mail the document listed above to the  
11 email addresses set forth below. During the Coronavirus (Covid-19) pandemic,  
12 this office will be working remotely, not able to send physical mail as usual, and is  
13 therefore using only electronic mail.

14  Via FedEx: By placing a true copy thereof enclosed in a sealed envelope, at a  
15 station designated for collection and processing of envelopes and packages for  
16 overnight delivery by FedEx as part of the ordinary business practices of Lieff  
17 Cabraser Heimann & Bernstein, LLP described below, addressed as follows:

18  Via U.S. Mail: By placing the document listed above in a sealed envelope with  
19 postage thereon fully prepaid, in United States mail in the State of California at  
20 San Francisco, addressed as set forth below.

21  
22 MARCIE ISOM FITZSIMMONS  
23 R. MICK RUBIO  
24 Gordon & Rees LLP  
25 275 Battery Street, Suite 2000  
26 San Francisco, CA 94111  
27 Telephone: (415) 986-5900  
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PALO ALTO MEDICAL  
FOUNDATION

22 I am readily familiar with the firm's practice of collection and processing  
23 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal  
24 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I  
25 am aware that on motion of the party served, service is presumed invalid if postal cancellation  
26 date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

27 I declare under penalty of perjury under the laws of the State of California that the  
28 above is true and correct.

Executed on March 21, 2022 at Oakland, California.

/s/ Frank J. White Jr.  
Frank J. White Jr.