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 8 UNITED STATES DISTRICT COURT
 9 EASTERN DISTRICT OF CALIFORNIA

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 11 DAVID F. JADWIN, D.O.,

12 Plaintiff,

13 v.

14 COUNTY OF KERN, et al.,

15 Defendants.

Civil Action No. 1:07-cv-00026 OWW TAG

ORDER GRANTING PLAINTIFF'S MOTIONS
 IN LIMINE 1-17.

Complaint Filed: January 5, 2007

Trial Date: May 12, 2009

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 17 Plaintiff's Consolidated Motions *in limine* 1-17 were heard by the Court at 12:00 p.m. on May 8,
 18 2009. Based on the papers and oral arguments presented at the hearing, the Court made the following
 19 rulings:

20
 21 **1. Plaintiff's Motion to Exclude Non-Party Witnesses From the Courtroom.**

22 Plaintiff motion *in limine* for an order excluding all witnesses from the courtroom, other than
 23 Plaintiff and a single designated representative of Defendant County of Kern ("Defendant County"),
 24 until they have been dismissed as a witness is granted. F.R.E. Rule 615.

25 **2. Motion to Exclude Evidence and Contentions Not Disclosed During Discovery.**

26 Plaintiff motion *in limine* for an order excluding introduction of any evidence or contention not
 27 disclosed during discovery in this action, including, but not limited to, a poster entitled "Peter's Rules" is
 28 granted. F.R.C.P. 37.

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ORDER GRANTING PLAINTIFF'S MOTIONS IN LIMINE NOS. 1-17 1

1 **3. Motion to Exclude Any Reference to Defendant's Medical Examination as "Independent".**

2 Plaintiff 's motion *in limine* for an order excluding any reference to Dr. Burchuk as an
3 "INDEPENDENT MEDICAL DOCTOR" or Dr. Burchuk's examination of Plaintiff as an
4 "INDEPENDENT MEDICAL EXAMINATION" or "INDEPENDENT MEDICAL EVALUATION"
5 and to Dr. Burchuk's report as an "INDEPENDENT MEDICAL REPORT", or any other terminology
6 that implies that the Rule 35 mental examination of Plaintiff conducted by Defendants' Rule 35
7 examiners (Robert Burchuk, M.D. and David Allen) was of an "independent" nature is granted.

8 Defendant, counsel, and its witnesses are admonished not to introduce any such evidence in any
9 form, and not to suggest, comment directly or indirectly upon, or refer to any such evidence in any way
10 before the jury. [Fed. R. Evid. 401-402; Fed. R. Evid. 403]

11 **4. Motion to Limit Expert Testimony to Disclosed Theories and Opinions.**

12 Plaintiff 's motion *in limine* for an order limiting the testimony of experts only to those theories
13 and opinions stated at their respective depositions or final reports is granted. Fed. R. Civ. Proc., Rule
14 37(c)(1).

15 Further, Defendant, its counsel, and lay witnesses are admonished to avoid eliciting or
16 introducing lay opinion evidence in any way before the jury. Fed. R. Evid., Rule 701.

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18 **5. Speculative Information In The Form Of Opinions Upon Which Any of Defendant's Expert
19 Witnesses Relies In Forming His Opinions.**

20 Plaintiff's motion *in limine* for an order precluding Defendant, its counsel, and any expert
21 witnesses shall from referring to, interrogating about, commenting on, arguing or relying upon or in any
22 other manner attempting to introduce into evidence in any way, any allegations, documents, or written or
23 oral testimony or any reference or inference to **speculative information** in the form of opinions upon
24 which the expert witness relies in forming his or her expert opinions.

25 Plaintiff anticipates that Defendant's experts will offer opinions based on allegations contained in
26 Defendant's Answer, on opinions of non-experts regarding Plaintiff's competence as a pathologist and
27 Chair of Pathology, and on the gossip that pervaded the workplace at KMC.

28 Plaintiff further requests this court to directing defense counsel to caution, warn, and instruct

1 witnesses not to make any reference to such evidence, and to follow this same order.

2
3 **6. Motion to Exclude Evidence of Collateral Sources.**

4 Plaintiff's motion *in limine* for an order precluding Defendant, its counsel, and any expert
5 witnesses shall from referring to, interrogating about, commenting on, arguing or relying upon or in any
6 other manner attempting to introduce into evidence in any way, any allegations, documents, or written or
7 oral testimony or any reference or inference to payments by a collateral source is granted. [Fed. R. Evid.
8 401-402; Fed. R. Evid. 403]

9 The court orders defense counsel to caution, warn, and instruct witnesses not to make any
10 reference to such evidence and to follow the same order.

11 **7. Motion to Exclude Evidence of Prior claims, Defenses, or Parties Herein.**

12 Plaintiff's motion *in limine* for an order precluding Defendant, its counsel, and any expert
13 witnesses shall from referring to, interrogating about, commenting on, arguing or relying upon or in any
14 other manner attempting to introduce into evidence in any way, any allegations, documents, or written or
15 oral testimony or any reference or inference to prior claims, defenses, or parties that have been
16 dismissed from this case is granted. [Fed. R. Evid., Rule 402; Fed. R. Evid., Rule 403].

17 Further, this court admonishes the defendant, its counsel, and its witnesses not to introduce any
18 such evidence in any form, and not to suggest, comment directly or indirectly upon, or refer to any such
19 evidence in any way before the jury.

20 **8. Unpled Defenses.**

21 Plaintiff's motion *in limine* for an order excluding evidence supporting unpled defenses such as
22 undue hardship, health and safety risk, after acquired evidence, avoidable consequences, etc. is granted.
23 [Fed. R. Evid., Rule 402-403].

24 Further, the court admonishes the defendant and its witnesses as well as counsel not to introduce
25 any such evidence in any form, and not to suggest, comment directly or indirectly upon, or refer to any
26 such evidence in any way before the jury.

1 **9. Other Litigation.**

2 Plaintiff 's motion to exclude evidence of other pending litigation between the parties, and/or
3 prior litigation involving Dr. Jadwin. [Fed. R. Evid., Rule 401- 403].

4 Further, the court admonishes the defendant and its witnesses as well as counsel not to introduce
5 any such evidence in any form, and not to suggest, comment directly or indirectly upon, or refer to any
6 such evidence in any way before the jury.

7 **10. Plaintiff's Decisions Relating to Prosecution of This Case.**

8 (Fed. R. Evid., Rule 402.)

9 Plaintiff 's motion to exclude evidence regarding Plaintiff's litigation decisions, such as, the
10 decision:

- 11
- 12 a) not to bring certain claims;
 - 13 b) not to call a listed witness;
 - 14 c) to use videotaped deposition testimony instead of calling a live witness;
 - 15 d) not to introduce any disclosed document into evidence;
 - 16 e) not to call any treating physicians;

17

18 is granted. [Fed. R. Evid., Rule 403].

19 Further, this court admonishes the defendant and its witnesses as well as counsel not to introduce
20 any such evidence in any form, and not to suggest, comment directly or indirectly upon, or refer to any
21 such evidence in any way before the jury.

22 **11. Plaintiffs' Claim For Attorney's Fees And Litigation Expenses Pursuant To California
23 Government Code § 12926; California Labor Code § 2699, California Health & Safety
24 Code § 1278.5(G) And/Or Code Of Civil Procedure § 1021.5, 29 U.S.C. § 2617(A)(3), 42
U.S.C. § 1988, And All Other And Additional Legal Bases.**

25 Plaintiff's motion to exclude evidence of a prevailing plaintiff's right to statutory fees under
26 FEHA, CFRA, and FMLA. [Fed. R. Evid., Rule 402.)

27 Further, this court admonishes the defendant and its witnesses as well as counsel not to introduce
28 any such evidence in any form, and not to suggest, comment directly or indirectly upon, or refer to any

1 such evidence in any way before the jury.

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3 **12. Any Reference That This Lawsuit Or A Verdict In This Case For Plaintiff Or Against**
4 **Defendant, Or Suits Against Health Care Providers And/Or Verdicts In Such Suits For**
5 **Plaintiffs, Generally, Will Or Might Have Any Of The Following Effects:**

6 Plaintiff's Motion *in limine* to exclude any reference that this lawsuit or a verdict in this case for
7 plaintiff or against defendant, or suits against health care providers and/or verdicts in such suits for
8 plaintiffs, generally, will or might have any of the following effects, is granted. [Fed. R. Evid., Rule
9 401, 403].

- 10 • Is, will, or might be a financial burden on the public.
- 11 • Will or might increase the number and/or frequency of medical and/or
12 other health care liability claims.
- 13 • Will or might adversely affect the affordability, accessibility and/or
14 availability of health care and treatment available to the citizens of California
15 or nationally.
- 16 • Will or might adversely affect the reputation, ability, availability and
17 willingness of other health care providers to render health care services in the
18 future, and any reference to the adverse effect a judgment would have upon
19 this or any community's need for additional health care providers.
- 20 • Will or might cause a serious public problem of availability or
21 affordability of health care professional liability insurance in the State of
22 California or nationally.
- 23 • Will or might contribute to a health care crisis in the State of California or
24 nationally.

25 Further, this court orders defense counsel to caution, warn, and instruct witnesses not to make
26 any reference to such evidence, and to follow this same order.

27 Plaintiff specifically reserves and does not waive by this *in limine* item, his right to voir dire the
28 jury on any bias or prejudice toward or against tort reform, the alleged cost and availability of health
care crisis. This *in limine* item is directed at arguments concerning the effect of this lawsuit or a verdict

1 in this case as opposed to juror bias or prejudice on certain publicized topics.

2
3 **13. Motion to Exclude Evidence of Plaintiff's Character.**

4 Plaintiff's motion to exclude evidence of Plaintiff's character is granted. [Fed. R. Evid., Rule
5 401-404]. Because the nature of the conduct is not "semi-automatic" and the number of specific
6 instances cited in the Fifth Affirmative Defense are insufficient to do not support the conclusion that Dr.
7 Jadwin had a habit of reacting physically or vindictively to disagreements, such evidence should be
8 excluded as inadmissible propensity evidence. [Fed. R. Evid., Rule 404]

9 Further, even if true, the so-called "facts" stated in Defendant's responses to Interrogatory No. 3
10 do not support an affirmative defense for unclean hands. The controversies at issue are Plaintiff's taking
11 of medical/recuperative leave, and suing the County for interfering with his medical/recuperative leave
12 rights. Defendants do not include in its responses to Interrogatory No. 3 (1) any allegation that Dr.
13 Jadwin committed any fraud regarding these controversies; (2) any allegation of after acquired evidence;
14 and (3) did NOT fire Dr. Jadwin. Defendant's averments are legally insufficient to support an unclean
15 hands or an equitable estoppel affirmative defense.

16 [Alternatively, Plaintiff's motion to limit evidence of Plaintiff's conduct to those incidents alleged
17 with specificity in Defendant's responses to Interrogatory No. 3 that fall within the period from October
18 of 2005 to October of 2007 is granted. [[Fed. R. Evid., Rule 403]

19 Further, Plaintiff's request for an instruction limiting the jury to using this evidence to an
20 affirmative defense to liability on Plaintiff's FEHA and CFRA retaliation claims is granted.]

21 **14. Motion to Exclude Reference to Plaintiff's Leave as "Continuous" from 12/16/05 to 10/3/06.**

22 Plaintiff's motion *in limine* for an order precluding Defendant, its counsel, and any expert
23 witnesses shall from referring to, interrogating about, commenting on, arguing or relying upon or in any
24 other manner attempting to introduce into evidence in any way, any allegations, documents, or written or
25 oral testimony or any reference or inference to Plaintiff's leave from 12/16/05 to 10/3/06 as being
26 "continuous" is granted. (Fed. R. Evid., Rule 403.)

27 Further, the court admonishes the defendant and its witnesses as well as counsel not to introduce
28 any such evidence in any form, and not to suggest, comment directly or indirectly upon, or refer to any

1 such evidence in any way before the jury.

2 **15. Motion to Exclude Reference to Plaintiff "Placing Himself on Leave."**

3 Plaintiff's motion *in limine* for an order precluding Defendant, its counsel, and any expert
4 witnesses shall from referring to, interrogating about, commenting on, arguing or relying upon or in any
5 other manner attempting to introduce into evidence in any way, any allegations, documents, or written or
6 oral testimony or any reference or inference to the fact that Plaintiff's placed himself on leave. [Fed. R.
7 Evid., Rule 403].

8 The Court finds that Defendant failed to notify its core physicians of their CFRA/FMLA rights,
9 Defendant, so is precluded from introducing any evidence implying that Dr. Jadwin failed to follow its
10 FMLA/CFRA application procedures. [2 C.C.R. § 7297.4(5)].

11 Further, this court directs defense counsel to caution, warn, and instruct witnesses not to make
12 any reference to such evidence, and to follow this same order.
13

14 **16. Motion to Exclude Dr. McAfee's Testimony**

15 Plaintiff's motion to exclude the testimony of Defendant's expert Thomas McAfee, M.D. is
16 granted on the grounds that his testimony lacks adequate foundation, and his opinions are conclusory
17 and unduly prejudicial. Fed. R. Evid. 401, 404, 406, and 702.
18

19 **17. Motion to Exclude Mr. Sarkisian's Testimony**

20 Plaintiff's motion to exclude testimony of Defendant's expert Rick Sarkisian, Ph.D. on the
21 grounds that it is irrelevant. Fed. R. Evid., Rule 401-402. Here, neither party disputes that Dr. Jadwin
22 was physically capable of performing the job functions of a pathologist except for the two-three week
23 period in May of 2005 when he was recovering from nasal surgery and a broken foot and avulsed ankle
24 ligament.

25 Dated: 5/19/2009

26 /s/ OLIVER W. WANGER

27 Oliver Wanger
28 U.S. District Judge

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