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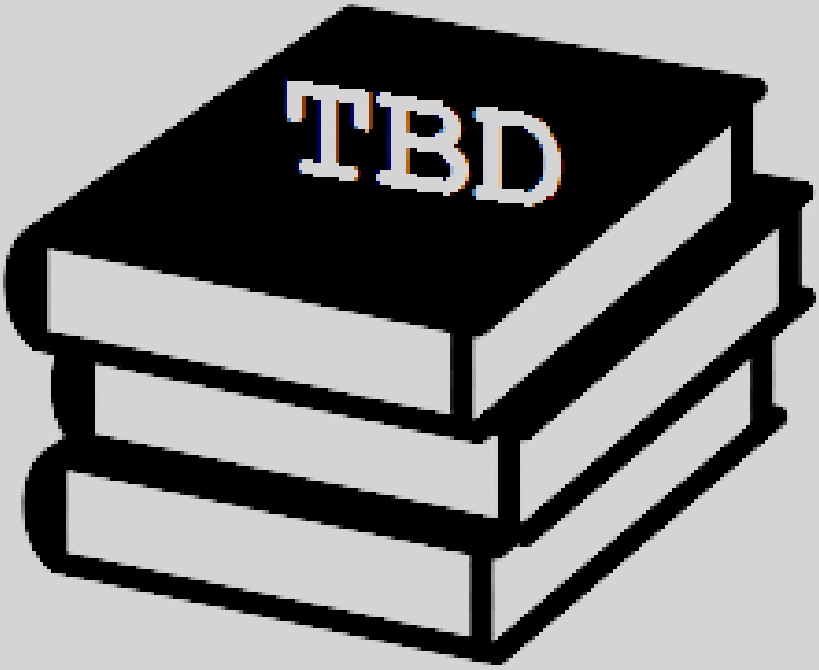

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELIAS MAKERE,	)	
Petitioner,	)	
	)	Case No. 18-0373
vs.	)	2017-01432
	)	
ALLSTATE CORPORATION,	)	
Respondent	)	

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S RENEWED MOTION TO QUASH SUBPOENA TO GREG GUIDOS

Petitioner, ELIAS MAKERE ("Petitioner"), on this 18th day of January 2019, responds to "*Respondent's Renewed Motion to Quash Subpoena to Greg Guidos*" (hereinafter, "That Motion") (filed on 1/9/19). He states the following:

Key Points:

A.)	Invalidity	That Motion relies on the "Apex Doctrine". Florida courts reject the Apex Doctrine.
B.)	Inaccurate	That Motion is contradicted by the very facts it proffers
C.)	Precedence	The DOAH has previously denied similar motions to quash

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Filed January 18, 2019 4:57 PM Division of Administrative Hearings

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Background: The Petitioner identified a witness, then served him a subpoena to appear at trial
Problem: The Respondent filed a motion to quash the subpoena on the grounds that the witness is an executive
Request: The Court orders the Respondent to file the trial transcript on-or-before December 21, 2018

Rule 1.410(c) | Fla. R. Civ. P. | (emphasis added)

"but the court, on motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive,…On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought or the form requested is not reasonably accessible because of undue costs or burden….the court may nonetheless order discovery… considering the limitations set out in rule 1.280(d)(2)"

§120.569(2)(k) | Florida Statutes | (emphasis added)

"(k) 1. Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material."

Honorable CJ Shahood and JJ Taylor | Invalidity of Apex Doctrine in Florida | Florida's 4th DCA | (emphasis added)

"[C]ourts should not hesitate to deny protection if it appears that the apex official has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions are at issue"

Official Recognition

- COG 212 - Motion for Official Recognition (Emails) - Filed on (11/27/18)
- COG 213 - Motion for Official Recognition (4D05-1389) - Filed on (1/18/19)
- COG 214 - Motion for Official Recognition (10-2629) - Filed on (1/18/19)
- COG 215 - Motion for Official Recognition (06-002115) - Filed on (1/18/19)

Legal Citations

- Rule 1.410(c) - Fla. R. Civ. P.
- 28-106.204(1) - FAC

Precedence

- DOAH Case No. 06-2115 - Order (10/26/06)
  The DOAH has rejected similar motions that relied on the "Apex Doctrine"

RESPONSE

I. Introduction

1. That Motion fails for two fundamental reasons. There is neither a legal basis nor a factual basis to support it. Instead, it relies on inapplicable law for which it attempts to insert inaccurate information.

II. Unsupported Legal Basis

1. The Respondent never cited any legal authority for That Motion. The 18-page pleading is devoid of any mention of Florida Statutes, Florida Administrative Codes, or even Florida rules of procedure.
2. Instead, That Motion relied on the "Apex Doctrine" (albeit implicitly). As the following quotes show (emphasis added):

> *"In order to justify subpoenaing a CEO or agency head to testify, a party is required to establish that [he] is uniquely able to provide relevant testimony and/or information and that the party exhausted other tools in discovery."*
>
> - That Motion, ¶4

Compare that with the written opinion in Citigroup v Holtsberg, 4D05-1389, Florida Fourth District Court of Appeals (emphasis added):

> *"Defendants apparently rely on the "apex doctrine" itself to supply the irreparable harm factor. Expressly adopted in some jurisdictions, this doctrine protects the top officers of a corporation from being deposed without a showing that they have unique or special knowledge of the events and that the party seeking the deposition is unable to obtain the information using less intrusive means"*
>
> - Honorable CJ Shahood and JJ Taylor | 4D05-1389 | 12/21/05 | Florida's 4DCA

3. The problem is that Florida has never adopted the "Apex Doctrine" (emphasis added):

> *"First, no reported Florida appellate court opinion has expressly adopted the doctrine; a district court of appeal cannot adopt a doctrine which arguably conflicts with discovery rules."*
>
> - Honorable CJ Shahood and JJ Taylor | 4D05-1389 | 12/21/05 | Florida's 4DCA

Indeed, the Apex Doctrine does conflict with Rule 1.280 Fla. R. Civ. P., Rule 1.410(c) Fla. R. Civ. P. and §120.569(2)(k). None of which provide any deference for a corporate executive. None of which prescribe the need to exhaust other discovery methods beforehand.

4. Moreover, the DOAH has dispelled this same notion before. In AHCA v Oakridge, DOAH Case No. 06-2115, the Court dispatched a motion for a protective order which relied on the "Apex Doctrine". The opponent to the motion wrote the following (emphasis added):

> *"[The Apex Doctrine] is diametrically opposed to Florida's discovery process which allows a party to discover any matter not privileged which is relevant to the subject matter of the pending action."*
>
> - Melanie Ann Hines, Esq (279250) | 10/24/06 | DOAH Case No. 06-2115

In the interest of judicial economy, the Petitioner incorporates that response into his response (see **Exhibit B**). As such, this Court should deny That Motion for the same reason.

5. Furthermore, That Motion referenced an inapplicable DOAH case (13-4292). The presiding judge there implicitly used the Apex Doctrine. However, implicit use of the Apex Doctrine is forbidden, as the written opinion in Serrano v Cintas, 10-2629, US 6th Circuit Court of Appeals (emphasis added):

> *"A few district courts in the Sixth Circuit have recently applied the apex doctrine claiming that while "the term 'apex deposition' has not been used by the Court of Appeals for the Sixth Circuit . . . this Circuit [has] used the same analysis without using the specific term." … We disagree."*
>
> - Honorable Judges Moore, Gibbons, and Alarcon | 10-2629 | 11/9/12 | US 6th Circuit Court of Appeals

The quoted case is particularly probative because it was also an employment discrimination case.

6. That Motion also referenced several inapplicable cases involving government agencies. However, as Florida's 4th District Court of Appeals explains, corporations cannot use the "Apex Doctrine" (emphasis added):

> *"To the extent the first district may have adopted the doctrine in Department of Agriculture and Horne, those cases are distinguishable as arising in a governmental context, where there are policy arguments, such as not discouraging people from accepting positions as public servants, that are not applicable in the corporate context."*
>
> - Honorable CJ Shahood and JJ Taylor | 4D05-1389 | 12/21/05 | Florida's 4DCA

Since the instant case involves a corporate defendant and an individual, the Court should deny That Motion.

7. Florida make it clear that a motion to quash must abide by established laws, codes, and rules (ie, not the "Apex Doctrine"). The Respondent, however, failed to follow Florida's legal framework. Therefore, this Court should deny That Motion.

III. Inaccurate Facts

8. That Motion was based on a number of inaccurate statements. Most notably, it claimed that the Petitioner did not attempt to retrieve information from the Witness in other ways. This is false.
    a. On May 8, 2018, the Petitioner sent a Request for Production pertaining to the Witness
    b. On May 10, 2018, the Petitioner sent a Request for Admissions pertaining to the Witness.

In short, the Respondent attempted to insert inaccurate facts into a flawed legal mechanism. This is fata to its request. Thus, the Court should deny That Motion.

Logical, Fair Solution

As the record shows, the Witness is uniquely positioned to answer questions that are pertinent to the Petitioner's case:

The Witness was the Petitioner's manager (twice removed):

Petitioner reported to Ms. Lisa Henry who reported to Mr. Richard Schaefer who reported to Greg Guidos.

The Petitioner has met the Witness. He has shaken the Witness' hand.

The Witness terminated the Petitioner (see **Exhibit A**).

The Petitioner alleges that the Witness directed the employment discrimination. Or – at the very least – incentivized it

:

CONCLUSION

WHEREFORE, the Petitioner respectfully asks this court to deny the Respondent's Renewed Motion to Quash the Subpoena to Greg Guidos.

Dated this 18th Day of January 2019.

Respectfully submitted,

ELIAS MAKERE
s/ Elias Makere, Pro Se
3709 San Pablo Rd. S # 701
Jacksonville, FL 32224
Tel: (904) 294-0026
E-mail: justice.actuarial@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th Day of January 2019, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal which will send a notice of electronic filing to the following:

Liebler, Gonzalez & Portuondo
44 West Flagler Street
Courthouse Tower 25th Floor
Miami, FL 33130
(*respondent's lawyer*)

on behalf of:
Allstate Corporation
2775 Sanders Road F5
Northbrook, IL 60062
(*respondent*)

Tammy S. Barton, Agency Clerk
Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(*agency*)

/s/ Elias Makere

[1/] The Witness is indeed an executive for the Respondent. Both parties agree (see Petition for Relief, see 'That Motion').

EXHIBIT A

The Witness' Involvement in Alleged Employment Discrimination

From: Respondent | To: Agency (FCHR) | Date: 9/8/17

Source: Respondent's Answer to Petitioner's Charge of Discrimination
2nd Page Excerpt

Events Leading to Termination

When the Respondent hired Mr. Makere in 2013, to be an Actuary Associate, he became a member of the Allstate Financial Actuarial Career Program (ACP). The Respondent designed the program in order provide actuaries and management with support in ensuring critical actuarial talent is attracted, developed, and retained. Actuaries are critical to the Respondent's business because they handle the measurement and management of risk and uncertainty. The program included qualified actuaries as well as, high potential graduates like Mr. Makere, who were pursuing actuarial certification. Employees could obtain actuarial certification through either the Society of Actuaries (SOA) or Casualty Actuary Society (CAS).). The Respondent supported employees pursing actuarial certification by paying for exam fees, preparation courses, and travel expenses for traveling to exam sites. The Respondent also provided paid study time as part of the program (Exhibit 2—Allstate Financial Actuarial Career Program).

Mr. Makere received the ACP Guidelines at the time of hire, which stated that a member must pass one exam in the past qualifying session in order to remain in his position and in the ACP. In January 2016, Mr. Makere's manager, Senior Actuary Manager Lisa Henry, reminded Mr. Makere that he needed to pass an exam in May 2016 in order to stay in the ACP. She reminded him that upon loss of eligibility, an employee could post for another position with the Respondent, but ongoing employment with the Respondent was not guaranteed.

In July 2016, Ms. Henry learned that Mr. Makere did not pass the exam that he took in May 2016. She then e-mailed Human Resources looking for support to transition Mr. Makere out of the ACP.

The matter was assigned to Centralized Employee Relations Team (CERT) Consultant Kelly Bermudez. She consulted with Human Resources Lead Consultant Marina Graff and Human Resource Staff Manager Ellis Manucy who supported Allstate Benefits and Allstate Financial. Ms. Graff and Mr. Manucy advised Ms. Bermudez that typically an employee who lost eligibility for the ACP remained on the payroll for month in order to have time to find a non-actuarial position with the Respondent. If the employee was unable to procure a new position, his employment was terminated at the end of the month. Ms. Bermudez wrote up the request for termination and CERT Associate Manager Steve McIntosh and Allstate Benefits President Greg Guidos signed the request. On August 13, 2016, Ms. Henry notified Mr. Makere that if he was no longer eligible for the ACP and if he did not obtain a non-actuarial position within the next month, the Respondent would terminate his employment. Mr. Makere was unable to secure a new position and his employment was terminated effective September 13, 2016.

EXHIBIT B

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

OAKRIDGE AMBULATORY SURGERY LLC, d/b/a OAKRIDGE AMBULATORY SURGERY, LLC,

Respondent.

_____/

DOAH # 06-2115

AHCA Case # 2006004265

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR PROTECTIVE ORDER

Respondent, Oakridge Ambulatory Surgery LLC, ("Oakridge"), by and through undersigned counsel, submits this response in opposition to Petitioner's Motion for Protective Order, and states:

1. Petitioner, the Agency for Health Care Administration ("AHCA") asserts that its former Secretary, Alan Levine, is immune from giving sworn testimony in discovery proceedings in this action based on the "Apex Doctrine."[1]

2. Petitioner asserts that the Respondent's discovery requests are "overbroad, not relevant to this case, not calculated to lead to discoverable evidence, duplicative of a prior public records request, and designed to harass and embarrass the proposed deponent." Motion at ¶ 14.

3. Respondent submits that Petitioner is wrong on all counts.

[1] The Agency's authority to represent its former Secretary is not clear.

SUMMARY OF ARGUMENT

This enforcement action was personally directed by AHCA Secretary Alan Levine. The level of his involvement was not routine for an agency head, nor was it in keeping with his own track record. Alan Levine made critical decisions in this case from the issuance of a Moratorium, to the issuance of a press release, to the lifting of the Moratorium, and, finally, to the nature and extent of the penalty to be sought. Copies of Alan Levine's internal email communications make this very clear. Yet, at some point in 2006, as this case unfolded, Alan Levine allegedly recused himself from personal involvement in any matter involving health care facilities in Broward County as he was seeking lucrative employment as the President and CEO of the North Broward Hospital District. Oakridge is located in Broward County. Inexplicably, AHCA has been unable to pinpoint with any specificity when this alleged recusal occurred, how it was enacted, and whether it was violated in this case. AHCA has ignored Respondent's discovery requests for documentation concerning this recusal. Under Alan Levine's personal direction, the Agency acted arbitrarily, capriciously, and excessively. Oakridge is entitled to discover the motivations for this selective enforcement action, and the reasons are known by Alan Levine.

STATEMENT OF THE CASE AND FACTS

Petitioner correctly states that this case is about "allegations of sexual misconduct at an ambulatory surgical center and the facility's policies and procedures in regard to that conduct and the facility's response when those allegations were brought to their attention." Motion, ¶ 8. These allegations are in dispute and will be vigorously contested at the scheduled hearing. Respondent expects to show that the allegations were not properly investigated by AHCA, that

the investigation was motivated by an administration determined to effect a particular result even where the facts did not warrant it, and that the agency has abused its discretion at every point in this matter, from imposing a Moratorium when there were less restrictive means available to seeking fines grossly disproportionate to prior, similar actions.

The following factual assertions, which are important to a determination of this issue, will be adduced at the hearing scheduled for the week of November 14, 2006.

Oakridge is an award winning ambulatory surgery center, located in Broward County, with extremely high patient satisfaction ratings. In a thorough regulatory compliance review conducted by AHCA for the period prior to the alleged events, AHCA found no irregularities or deficiencies in patient safety protocols or any other matter related to the provision of medical care to patients. This review was conducted in August of 2005. Since as far back as 1998, Oakridge has not been investigated by AHCA based on any formal or informal complaint about patient medical care or safety. The alleged actions which form the basis for the agency action herein were never reported to AHCA by the alleged victims, their families or representatives, or by law enforcement.

On or about February 4, 2005, an allegation of misconduct by an Oakridge employee toward a patient was made known to the administration of Oakridge. The allegation was investigated by Oakridge personnel in charge of risk management. When the incident was reported to law enforcement, Oakridge fully and completely cooperated in the criminal investigation. Oakridge suspended the employee during the investigation. Oakridge was thereafter advised that no criminal charges would be filed against the employee. The employee was allowed to return to work and counseled against any inappropriate conduct.

The above allegation was reported by Oakridge to AHCA at the time the complaint was made and thereafter during the August 2005 review. AHCA made no follow-up inquiry of Oakridge until April 2006, as set forth below.

AHCA alleges that a second allegation of misconduct toward a patient by this same employee was reported to Oakridge in May of 2005. Oakridge denies that such a complaint was received by the administration.

In August of 2005, the employee was terminated from employment by Oakridge, but for reasons unrelated to the allegations.

Eight months after his termination from Oakridge, the former employee was arrested on April 24, 2006, on allegations of sexual battery on two former patients of Oakridge. The arrest was reported on television and, as a result, AHCA opened an investigation. The investigation opening was assigned two different priority codes by AHCA (Exhibit A), and the reasons for this are unclear. One code denoted immediate jeopardy to the public; the other did not.

What is clear is that then Secretary Alan Levine was immediately and personally notified of the case opening, and became personally involved in the direction of this case from its inception. (Exhibit B).

After the media coverage of the arrest, AHCA appeared unannounced at Oakridge on April 26, 2006, and conducted interviews and reviewed documents at the Oakridge facility regarding the alleged incidents. The surveyor was there for a day and she interviewed approximately half a dozen people.

On May 1, 2006, three days after the site visit, and without any notice to Oakridge, AHCA imposed an Order of Immediate Moratorium on Admissions against the Oakridge facility. (Exhibit C). AHCA claimed the Immediate Moratorium was necessary because the

two events, alleged to have occurred at Oakridge at least a year prior thereto, constituted an immediate harm to the public. The Moratorium was issued even though the employee in question had been terminated from Oakridge more than eight months prior thereto. The Moratorium shut the surgical facility down, resulting in the cancellation of necessary surgical procedures for an indefinite period of time, causing physicians and patients to move to other facilities, and resulting in huge economic losses and irreparable damage to the reputation of Oakridge. Oakridge was given no opportunity to be heard by either the Agency or an impartial trier of fact before the Moratorium was issued and applied.

The evidence shows that Alan Levine gave his personal approval for the issuance of the Moratorium. (Exhibit D). The evidence also shows that, at least in the memory of the AHCA manager routinely involved in these types of cases, Alan Levine was not personally involved in any other decision to issue an immediate Moratorium during his tenure. (Deposition of Polly Weaver, Exhibit E).

On May 1, 2006, then Secretary Alan Levine issued an inflammatory news release in which he characterized Oakridge as "unconscionable" in failing to protect its patients which "likely resulted in harm to some women . . .." (Exhibit F). Despite the fact that the known allegation of misconduct was over a year old, Levine thought it necessary to alarm the public. Despite the fact that the employee in question had been gone from the facility for almost eight months, Levine thought it necessary to shut the entire surgical facility down. The press release did not state that the charges are only allegations and that Oakridge would have its day in court.

Following the imposition of the Immediate Moratorium, and on May 2, 2006, AHCA's Broward field office mailed Oakridge the first notices containing a listing of the specific

practices ("tags") AHCA deemed to be deficient. Oakridge did not *receive* the notices until May 5, 2006.

On May 4, 2006, Oakridge requested that AHCA lift the Immediate Moratorium based on representations that it would immediately implement twelve corrective measures designed to address any outstanding concerns regarding the ability of Oakridge to monitor the conduct of current employees.

On May 5, 2006, AHCA's Broward field office mailed Oakridge an "amendment" to its May 2, 2006, notification, adding an additional allegation of deficiency, based on the same investigation. Oakridge did not *receive* the "amendment" until May 8, 2006. In the course of this investigation, at least four different versions of an investigative report were issued by the same surveyor.

On May 10, 2006, Oakridge responded to both of AHCA's notices, again urging AHCA to lift the Immediate Moratorium as unwarranted.

On May 11, 2006, Counsel for Oakridge met with AHCA counsel and Agency head representatives in the AHCA offices in Tallahassee. Then Secretary Alan Levine allegedly recused himself from the meeting to avoid the appearance of conflict. He was, according to certain internal email traffic, as interpreted by previous deponents, avoiding taking any personal action with respect to any competitor of the North Broward Hospital District inasmuch as he was seeking the position of President and CEO of that entity. (Exhibits G, H). Apparently, Levine did not wish to appear to be currying favor with the Board. Oakridge is a competitor of the NBHD facilities.

Certain agency officials were briefed by Oakridge regarding the relevant events, the original proposal submitted by Oakridge's counsel on May 4, 2006, the response to AHCA's

letters which contained Oakridge's corrective action plan, as well as a comprehensive compliance program prepared by Oakridge's counsel which addressed all conceivable concerns AHCA might reasonably have regarding the supervision and monitoring of the behavior of Oakridge's employees. Oakridge informed AHCA officials that all employees had received mandatory training regarding the new compliance program earlier that week.

At this meeting, Oakridge counsel stressed to the AHCA officials that, because each and every correction and enhancement required by AHCA had been implemented, and because the patients, employees, doctors, and owners of Oakridge were being harmed by the continued Moratorium imposed by AHCA, time was of the essence for review of the compliance program and for reinstatement of Oakridge's authority to admit patients.

AHCA officials stated that they would review Oakridge's compliance program immediately, although no specific timetable was given by the officials.

During the investigation, AHCA notified the Center for Medicare & Medicaid Services of the U.S. Department of Health & Human Services ("CMS") about the enforcement action. There was considerable discussion between representatives of these respective agencies wherein the federal agency made it very clear that it did not view the situation to be one of "immediate jeopardy." (Exhibit I). After considerable lobbying by AHCA, CMS notified Oakridge Ambulatory Surgery that it would be suspended from the Medicare program as a provider, effective May 19, 2006, unless Oakridge could prove by May 15, 2006, that it had cured the deficiencies asserted by AHCA. (Exhibit J).

Thereafter, Oakridge provided CMS with all of the information regarding its compliance program that it had submitted to AHCA. As a result, on May 17, 2006, CMS sent the following communication to Oakridge: "[w]e are pleased to inform you that Oakridge Ambulatory

Surgery's *credible* allegation of compliance for its Medicare deficiencies has been found acceptable." (Exhibit K).

While the federal authorities promptly reviewed this matter and determined there was no credible basis to find Oakridge deficient according to Medicare standards, AHCA failed to honor its commitment to promptly review Oakridge's compliance efforts.

Because of AHCA's failure to act on the request to lift the Moratorium in a reasonably expeditious fashion, Oakridge filed a Petition for Review in the First District Court of Appeal on May 18th, 2006. The Petition alleged that AHCA departed from the essential requirements of Florida law in that it failed to take only that action which is necessary to protect the public interest as required by § 120.60(6)(b), Fla. Stat. Oakridge asserted that an emergency Moratorium was not warranted for conduct by a former employee alleged to have occurred over eight months earlier. Oakridge argued that the Order of Immediate Moratorium was not based upon facts justifying a finding of immediate danger to the public health, safety or welfare as required by Florida law.

In the late afternoon of May 18th, AHCA lifted the Moratorium, *three weeks after its imposition.* (Exhibit L). The evidence shows that Alan Levine was involved in the decision to lift the Moratorium. (Exhibits M, N). AHCA did not issue a press release about the removal of the Moratorium, and the original press release remains in place on AHCA's website today.

Oakridge filed a Notice of Voluntary Dismissal of the Petition as the claims regarding the Moratorium were moot.

On May 22, 2006, AHCA filed an Administrative Complaint ("Complaint"), pursuant to § 120.569, Fla. Stat., and Ch. 28-106, Fla. Admin. Code., seeking administrative fines in the

amount of $274,000.00. The Complaint contains the same allegations as the Moratorium Order, *including allegations that an emergency still exists.*

On June 1, 2006, Oakridge filed its Petition for Hearing Involving Disputed Issues of Material Fact, denying the factual allegations relied upon by AHCA in its Complaint and as set forth in the Order of Immediate Moratorium on Admissions.

Pursuant to § 120.569(2)(d), Fla. Stat., AHCA may only refer a petition that is in "substantial compliance" with the requirements concerning the timing and nature of the allegations to be made as set forth in subsection (c) of that same statute. Under the statute, AHCA has 15 days in which to review the Petition for Hearing and to refer the matter to the Division of Administrative Hearings for assignment of the matter to an administrative law judge.

During the review period, Oakridge called AHCA seeking expedited transmittal. AHCA advised petitioner's counsel that the Agency's clerk was "out of the office" and the Petition could not and would not be reviewed until he returned. AHCA further advised that no other agency official was designated to perform this review function.

On June 15, 2006, the Petition was forwarded to the Division of Administrative Hearings. A hearing is scheduled for the week of November 14, 2006.

Additional facts to be adduced at the hearing: In June, 2006, Alan Levine was appointed President and CEO of the North Broward Hospital District. (Exhibit O). On May 3, 2006, two days after the Moratorium was issued, the owners of a competitor and neighboring facility, Tenant Health Care Corp., announced its intentions to expand its outpatient services. (Exhibit P).

Both sides have taken discovery depositions. They have not all been transcribed as of the date of these pleadings, but those which have been transcribed bear directly on the matters in dispute. The portions that are most relevant, and attached hereto, contain proof that Alan Levine

has personal knowledge of the claims or defenses, and that he possesses knowledge and information that cannot be obtained by any means other than taking his deposition.

ARGUMENT

THE FORMER SECRETARY OF AHCA IS NOT IMMUNE FROM GIVING SWORN TESTIMONY IN DISCOVERY PROCEEDINGS IN A PETITION FOR REVIEW OF AGENCY ACTION IN WHICH HE PERSONALLY PARTICIPATED AND WHERE HIS KNOWLEDGE IS RELEVANT TO THE CLAIMS AND DEFENSES AND HIS TESTIMONY COULD LEAD TO ADMISSIBLE EVIDENCE ON THE CREDIBILITY OF THE AGENCY'S PROOF, BIAS, AND ABUSE OF DISCRETION

Petitioner argues that former AHCA Secretary Alan Levine is immune from giving sworn testimony in discovery in this action based on the "Apex Doctrine." Petitioner's assertion is wrong for several reasons: (1) the Apex Doctrine has not been adopted by Florida courts; (2) the Apex Doctrine conflicts with Florida's discovery rules; and (3) even if applied to this case, the Apex Doctrine requires Petitioner to attach an affidavit of Alan Levine swearing that he has no relevant knowledge in this matter, and Petitioner has failed to do so. Petitioner's arguments fly in the face of the evidence produced in discovery to date and ignore the fundamental precepts of the discovery process.

First and foremost, Petitioner fails to alert this Court to the opinion of the Fourth District Court of Appeal in *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265 (Fla. 4th DCA 2005), wherein the Court held that "no reported Florida appellate opinion has expressly adopted the [Apex] doctrine." *Citigroup* at 1269. The Court further stated that such a decision would have to be made by the Florida Supreme Court because it would conflict with Florida's broad discovery procedures which are within the province of the high court. *Citigroup*, at 1269. The Apex Doctrine requires a showing by the party seeking discovery that the witness has "unique or

superior knowledge."[2] Such a requirement is diametrically opposed to Florida's discovery process which allows a party to discover any matter not privileged which is relevant to the subject matter of the pending action or appears reasonably calculated to lead to the discovery of admissible evidence. Rule 1.280, Fla. R. Civ. Pro. The Florida Supreme Court has not altered these rules; no Supreme Court opinion exists which adopts the Apex Doctrine. Moreover, the Apex line of cases from other jurisdictions, cited in the decisions quoted by Petitioner, reveal a requirement that the person seeking to avoid giving testimony swear they have no unique knowledge. Thus, even if the doctrine applies, AHCA has not met its requirements. Alan Levine has supplied no such affidavit, and in fact the evidence shows he could not.

The First District Court of Appeal generally holds that a party may not take the deposition of an agency head unless it shows the testimony to be elicited is "necessary, relevant, and unavailable from other sources." *State, Department of Health and Rehabilitative Services v. Brooke,* 573 So.2d 363, 371 (Fla. 1st DCA 1991). The Supreme Court has not opined on this "rule." In any event, and if this Court finds Mr. Levine, as a *former* agency head is entitled to that consideration, Respondent Oakridge can meet that test.

Indeed, there are no Florida Supreme Court decisions granting immunity to former public agency heads from being deposed. The only decision on point, a recent First District Court opinion in *Horne v. School Board of Miami-Dade County,* 901 So. 2d 238 (Fla. 1st DCA 2005), stressed that this was a question of first impression in Florida. Citing public policy reasons, the Court held that the immunity rule is equally applicable to former agency heads, but it did not declare the rule to be absolute. A party who meets the scope of discovery test may take the deposition. Respondent can meet the test here.

---

[2] *Department of Agriculture and Consumer Services v. Broward County,* 810 So.2d 1056 (Fla. 1st DCA 2002), heavily relied upon by Petitioner (Motion, ¶ 6), was criticized in *Citigroup, supra,* for applying the unique knowledge test.

Unlike former Education Secretary Jim Horne, who attached an affidavit that he had no personal knowledge of the agency action, Mr. Levine has not filed such a sworn statement. In fact, he cannot. AHCA admits as much in its Motion, by arguing that his "memories as to meetings, telephone calls or negotiations could not possibly have any relevance to the counts in the Administrative Complaint." Motion, ¶3a. However, as the attached emails indicate, it was Mr. Levine who personally gave the authorization to serve the Moratorium, approved the legal theory used to support it, and issued a public statement about the agency action. (Exhibit D). His memories of these events have everything to do with this case. As the evidence will show, the AHCA surveyor who conducted the investigation was taking direction from Tallahassee (Exhibit Q), and that pressure led to a sloppy investigation and misrepresentations of facts which persist to this day. Those "facts" are set forth in the Moratorium Order which forms the basis for the instant Petition. Indeed, the Petition is simply a regurgitation of the misrepresentations contained in the Moratorium Order.

In the *Horne* case, *supra*, the former agency head supplied an affidavit that any information known by him was also known by his former staff members In the instant case, top level AHCA officials, including Levine's Deputy Secretary, made it very clear that Alan Levine has information about this case that they do not. On three occasions, these witnesses advised counsel for Oakridge that questions being put to them would have to be directed to Alan Levine.

> [Counsel for Oakridge, referring to an email by Alan Levine]
> Q: Why would Alan Levine have any doubt as to whether the facts were as they had been presented to him?
>
> [Polly Weaver, Chief of Operations, AHCA]
> A: I don't know. You would have to ask Alan Levine.
>
> Q: Okay. And why would he have any knowledge of who the owner of Oakridge is?
> A: That I don't know.

Q: Okay. I have to ask him that too, right?
A. Yes.

(Deposition of Polly Weaver, - Exhibit R).

And from the transcript of the Deputy Secretary's deposition:

Q: And so in that email are you referring to the Secretary, Alan Levine?
A: Yes.

Q: So in fact it appears from that email that the Secretary has weighed in on the issue of the lifting of the moratorium; is that correct?
A: To the extent that they needed a plan of correction and corrections to be made before it could be lifted, I would say yes.

Q: And do you know how the Secretary's decision and his direction was communicated to anyone representing Oakridge?
A: No, not myself. I thought they had meetings with him or that Mr. Lamb [counsel for Oakridge] had met with him or with the Chief of Staff.

Q: Okay. But that email doesn't say the Chief of Staff. It says the Secretary, correct?
A: Right.
Q: And so you're not aware of how and when or where that communication between the Secretary and Oakridge had taken place, correct?
A: I don't recall at this point, no.

Q: So the only way for us to know that would be to ask the Secretary, correct?
A: Unless Mr. Lamb [counsel for Oakridge] can tell you.

(Deposition of Deputy Secretary Elizabeth Dudek, Exhibit S).

In *Horne, supra,* the party seeking the deposition had deposed only three agency employees before seeking the deposition of the former agency head. The court found this fact to be persuasive in denying access to the former agency head. In the instant case, Respondent has deposed numerous AHCA employees including the Deputy Secretary. The above two upper

management AHCA employees have indicated that Alan Levine has knowledge about this case which they do not. If the opportunity to discover this information from other sources is key, then the fact that the witnesses directed counsel to ask Alan Levine for answers proves that Respondent Oakridge has exhausted all other avenues of obtaining his knowledge.

Moreover, AHCA asserts that Respondent is seeking information which it has already requested in a public records request dated September 28, 2006. Motion, ¶ 13. AHCA misleads this Court. Indeed, Respondent filed the aforementioned public records demand, but to date, almost a month later, AHCA has not provided any of the requested documents cited in the Motion. (Exhibit T). Thus, Respondent has been frustrated in its attempts to discover the information it needs to buttress its assertions. AHCA holds all the information and it is not revealing it. Respondent's only recourse is to depose Alan Levine.

The knowledge which Mr. Levine possesses bears directly on the course this investigation took. He knows why he personally directed it, he knows the circumstances and the timing of both the investigation and the reports, and he knows why the agency has taken draconian action in this matter. The selective nature of this action is in question. The credibility of the investigation is at issue. AHCA previews this point when it asserts that there were "negotiations and exchanges between health facility regulatory surveyor managers [and] the Secretary of AHCA." Motion, ¶ 3a. The phrase "negotiation" implies compromise. Compromise is exactly what is at issue here. Compromise of agency credibility.

There are numerous factual disputes over the allegations contained in the "investigative reports."[3] One such example is over whether Respondent notified AHCA after learning of one of the alleged incidents. Respondent intends to offer proof that such contact was made. Respondent will also show that in its investigation AHCA chose not to look for any evidence of

[3] Respondent intends to reveal the misrepresentations and discrepancies in their fullness at the hearing.

an "adverse incident" report by Respondent. In fact, the person to whom the matter was reported no longer works at AHCA and in her deposition, she testified that she has been prevented from searching her emails to determine if she made any notes of the communication.[4] Without access to her records, she is unable to confirm that the report occurred. Respondent has demanded these records via public records demand, but, of course, AHCA has not responded.

As previously stated, Alan Levine allegedly recused himself from participating in a meeting with representatives of Oakridge on the ground that he wanted to avoid the appearance of impropriety because he was applying for a position as the head of the North Broward Hospital District ("NBHD"). The NBHD is composed of a number of Broward health care facilities all of which are in direct competition with non-member facilities. Oakridge is not a member of the NBHD. By taking swift and harsh action against Oakridge, even if unwarranted, Alan Levine was conceivably able to achieve at least three goals[5]: (1) to impress the NBHD Board and thereby personally benefit; (2) to give an unfair advantage to any other Oakridge competitor; and (3) to show the Florida Legislature that his agency was not "asleep at the switch." In fact, Alan Levine was so concerned about the impression on the Legislature that he notified his chief of staff to schedule meetings with the Broward delegation to advise them of his actions in this matter. (Exhibit U). He was able to have meetings with legislators, but he could not meet with Oakridge representatives. The Legislature, of course, appropriates the budget for AHCA, and perhaps the local delegation has some influence on the NBHD Board hiring decisions. In any event, the facts are that Alan Levine was appointed to the position of President and CEO of the NBHD on June 28, 2006, and that he was being considered for the appointment during the course of his agency's action against a Broward health care facility. And as has been shown,

[4] This deposition was taken last week and has not yet been transcribed.
[5] These are admittedly suppositions. Oakridge, and this Court are entitled to know the truth.

Oakridge's closest neighboring facility, and competitor, Tenant Health Care Corp., announced during the Moratorium that it would be focusing its strategic efforts to enhance outpatient services in its facilities.

In *Citigroup,* the Court quoted a scholarly article with approval when its author wrote: "[C]ourts should not hesitate to deny protection if it appears that the apex official has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions are at issue." *Citigroup* at 1270, quoting Moskowitz, *Deposing 'Apex' Officials in Florida: Shooting Straight for the Top,* 72 FLORIDA BAR JOURNAL 10 (Dec. 1998). The motivations of AHCA witnesses at all levels, and thus their credibility, is in question just by virtue of their involvement in this case. The motivations of the Agency to act precipitously, unreasonably, and excessively are called into question by the facts themselves. There is no doubt that Alan Levine was calling the shots. The unanswered question is, "why?". The mystery is deepened by his alleged recusal, but this is contradicted by evidence of his highly personal involvement in this case. The trouble here is that no one from AHCA who has been deposed is able to define with specificity when Mr. Levine recused himself, and whether he violated that recusal by becoming involved in this case. (Exhibit V, W), and such dates as have been discussed are internally inconsistent: Levine couldn't meet with Oakridge representatives about lifting the Moratorium, but he was involved in the decision to lift the Moratorium. AHCA has not provided Oakridge the information it seeks about the recusal. Mr. Levine is the only source of this information and Oakridge is entitled to learn more about it.

Respondent Oakrid ge seeks to prove that there was ample motivation for a hurried investigation, ample motivation for a harsh result, ample motivation for public attention, to the point of alarm, and ample motivation to try to ruin the standing of Oakridge in the community.

Respondent submits that the proof is in the hands of the documents AHCA is withholding and in the memory of Alan Levine. Do these matters affect the review of this case under principles of agency authority? Absolutely. Do these matters affect the veracity of the AHCA testimony to be offered? Absolutely. Do these matters affect this Court's assessment of the Agency request for punishment should Oakridge be found in violation of the applicable regulations? Absolutely. Are these matters then discoverable? Absolutely.

AHCA has maintained this enforcement action in an arbitrary and capricious manner: from pulling the trigger to shut Oakridge down to dragging its feet to lift the Moratorium; from Levine's refusal to meet with Oakridge representatives to AHCA's pushing the federal government to take precipitous action, which it did not do; from deliberately misrepresenting facts in the reports and pleadings to withholding documents to prove the falsity of the charges; and, in the end, seeking fines that are grossly disproportionate to the fines sought by AHCA against other entities. As just one example, Tenant Health Care Corp. which owns the aforementioned competing facility next door to Oakridge, was found in violation of multiple health care regulations in its Palm Beach Gardens facility, which violations resulted in defective surgeries, massive post-operative infections, and multiple human deaths in 2003. AHCA fined the Tenent facility a mere $95,000.00. Individuals closely associated with Oakridge have publicly complained about AHCA's woefully inadequate enforcement response against Tenent in this instance and in others, and Oakridge believes, Alan Levine is aware of this. Yet, by comparison, and inexplicably, AHCA seeks fines against Oakridge in the amount of $274,000.00! For reasons which are not yet fully known, but which Oakridge seeks to determine, AHCA has taken an excessive position on the stale and disputed allegations here,

while giving more favorable treatment to at least one of its competitors in whose facility multiple patients have died as a result of the violations.

Once again, Oakridge has attempted to discover from AHCA the universe of fines and penalties assessed against similarly situated facilities, only to have the door remain stubbornly shut. Respondent's public records demands and discovery requests on this issue have been to no avail.[6] In this regard, Secretary Levine is the only person who can shed light on the actions of his agency during his tenure.

Thus, Respondent has established that Alan Levine possesses personal knowledge that is relevant to the claims and defenses in this action and that his testimony could lead to admissible evidence on the credibility of the agency's proof, bias, and abuse of discretion. The burden shifts to Petitioner to prove how Alan Levine will be embarrassed by this inquiry and by the manner in which the discovery process is alleged to be overly burdensome. Petitioner offers nothing more than "outrage." Motion, ¶11.

The discovery requests pre-dating April 2006 are for the purpose of determining when Alan Levine began to seek the NBHD position, which is the reason given for his absence in meetings with Oakridge representatives regarding the Moratorium. Alan Levine's personal telephone records were requested under the assumption he no longer has access to his business phone records, and the telephone records are sought to determine if he called any member of the NBHD Board or any competitor of Oakridge during the pendency of this case. And as has been seen, AHCA refuses to comply with Respondent's discovery requests and public records demand seeking access to these and other documents.

[6] Oakridge scheduled a deposition of an Agency Representative for the purpose of obtaining records of fines and penalties in other, similar cases. Oakridge cancelled the deposition on the representation of AHCA counsel that the documents would be produced. The documents AHCA produced are not in compliance with the Notice. Oakridge is rescheduling the deposition.

AHCA cannot meet the burden placed upon a party seeking to prevent discovery. Florida has liberal discovery rules and AHCA has demonstrated no reason to deny Oakridge access to the evidence to support its claims. The Motion should be denied.

CONCLUSION

Alan Levine may feel that his days of public service are over and that he should no longer be subjected to scrutiny for the actions he took as Secretary of AHCA. But the law allows such inquiry when it could lead to evidence relevant to a claim or defense. In this case, the reasons for Alan Levine's personal involvement in this case, the timing of it, and the excessiveness of it, are all relevant to the credibility and validity of the agency action and allegations against Oakridge. This is not speculation. Oakridge is not hoping to discover "something" that will "somehow" be relevant in "someway" to this case. Motion, ¶ 11. Oakridge is not asking to rummage through Alan Levine's filing cabinets "to see if they contain anything useful." Motion, ¶12, citing *Menke v. Broward County School Board,* 916 So.2d 8 (Fla. 4th DCA 2005). Oakridge has already discovered the questions to be asked; Oakridge is entitled to the answers. Whatever the answers, whatever the motivations, Alan Levine should have no difficulty articulating them. The events occurred only a few months ago. The facts are not complicated. The deposition won't take very long. This Court should deny AHCA's Motion for Protective Order seeking to deny Oakridge access to the sworn testimony of its former agency head.

Respectfully Submitted,

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Tallahassee, Florida 32301
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Facsimile: (850)561-3013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original has been filed by hand delivery to the Division of Administrative Hearings and a true and correct copy of the foregoing has been furnished via overnight delivery on October 24, 2006 to all counsel of record.

Melanie Ann Hines, Esq.

Counsel of Record

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Assistant General Counsel
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Tampa, FL 33602

Joseph Cartolano, Esquire
46 N.E. 6th St.
Maimi, FL 33132

EXHIBIT INDEX

Exhibit A – Two AHCA Case Opening Forms

Exhibit B – Emails of Alan Levine

Exhibit C – Oakridge Moratorium

Exhibit D – Emails of Alan Levine

Exhibit E – Deposition of Polly Weaver, pp. 15-16

Exhibit F – AHCA Press Release

Exhibit G – Email of Liz Dudek

Exhibit H – Deposition of Elizabeth Dudek, pp. 10-12

Exhibit I – emails between AHCA and the Federal Centers for Medicare and Medicaid Services

Exhibit J - May 4, 2006 letter from Federal Centers for Medicare and Medicaid Services

Exhibit K – May 17, 2006 letter from Federal Centers for Medicare and Medicaid Services

Exhibit L – May 18, 2006 letter from AHCA to Oakridge

Exhibit M – Email of Liz Dudek

Exhibit N – Deposition of Elizabeth Dudek, p. 91

Exhibit O – South Florida Business Journal, June 28, 2006

Exhibit P – Business Wire report, May 3, 2006

Exhibit Q – Deposition of Kim Dillon, (July 25, 2006), p. 49

Exhibit R – Deposition of Polly Weaver, pp 53-54

Exhibit S – Deposition of Elizabeth Dudek, pp 91-92

Exhibit T – October 18, 2006 Letter to AHCA

Exhibit U – Email of Alan Levine

Exhibit V – Deposition of Polly Weaver, p 18

Exhibit W – Deposition of Elizabeth Dudek, p 35

10/12/2006

Respondent Area Office: 1

ALLEGATIONS CCR#2006003748

Recording ProCode: 14

Priority: 1

OAKRIDGE AMBULATORY SURGERY, LLC
1000 N.E. 56TH STREET
FORT LAUDERDALE, FL 33334
(954) 958-0617

AMBULATORY SURGICAL CENTER
Date Received: 04/25/2006
Closed Date: 05/24/2006
Complaint Status: Complaint Closed
Inspection Disposition: Completed

Resp Client Code: 14
File # 14960371
License # 1081
Medicaid #
Medicare # 101309

COMPLAINANT

AHCA INTERNAL

COMPLAINT SUMMARY

A former (let go a few months ago) employee, holding himself out as a licensed MD, has been arrested for sexual assault on 2 female patients while under anesthesia; one occurrence was in 02/05 and the 2nd was in 05/05. (Taken from FOX news report).

ALLEGATIONS SUMMARY

Type Cde	Type Desc	Dspsn Desc	Comment
28	Patient Abuse/Neglect	Confirmed	Facility failure to provide care and services in an environment free from sexual abuse.

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State only

Date: 4/25/2006

RESP AO: 10

ALLEGATIONS CCR#2006003748

Recording ProCode: 14

[redacted]

Respondent ProCode: 14
AMBULATORY SURGICAL CENTER

Insp Disposition: None

Date Recvd: 04/25/2006

Date Closed: 04/25/2006

OAKRIDGE AMBULATORY SURGERY, LLC
1000 N.E. 56TH STREET
FORT LAUDERDALE, Florida 33334
(954) 958-0617

FRAES #14960371

License #1081

COMPLAINT SUMMARY

A former (let go a few months ago) employee, holding himself out as a licensed MD, has been arrested for sexual assault on 2 female patients while under anesthesia; one occurrence was in 02/05 and the 2nd was in 05/05. (Taken from FOX news report).

COMPLAINANT

TITLE:
NAME: AHCA INTERNAL,
ADDRESS:
CITY/ST: ,

PHONE:
ADDR2:
ADDR3:
EMAIL:

Allgtn Typ Cde	Allgtn Typ Desc	Allgtn Disposition Desc	Allgtn Cmnt
28	Patient Abuse/Neglect		Facility failure to provide care and services in an environment free from sexual abuse.

H. Tapo
R. Tapo

Employee resign/term 1/06 - 3/31/06
ID # who worked on / record
School of Thought.
Inc reports for 1/06 - 3/31/06

Kim

Report: E:\FRAES_ia\COMPLAINTS_REAL TIME REPORTS\AreaOffice_Live\RECAP_ALLEG.rpt
Catalog: E:\FRAES_ia\COMPLAINTS\complaint_list.cat

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A2

against the facility?

Brandi L. Brown
Deputy Chief of Staff
Agency for Health Care Administration
850/922-5766

-----Original Message-----
From: Levine, Alan
To: Weaver, Polly; Knapp, Rebecca; Madden, Steven
CC: Alford, Barbara
Sent: Thu Apr 27 15:15:03 2006
Subject: RE: Heads Up: Oakridge Ambulatory Surgery Center--Ft. Lauderdale

Thanks polly.
This is bad stuff.
They should be ashamed.
Not knowing their basic responsibility is inexcusable.
The fact they didn't even discipline the employee (much less report it to law enforcement) says more to me than anything else.
They should not be in the business of caring for people.
Please keep me informed.
Frankly, I would not be opposed to revocation.
They broke the law. Please let me know our options before we do anything.

From: Weaver, Polly
Sent: Thursday, April 27, 2006 2:48 PM
To: Levine, Alan; Knapp, Rebecca; Madden, Steven
Cc: Alford, Barbara
Subject: RE: Heads Up: Oakridge Ambulatory Surgery Center--Ft. Lauderdale

We definitely intend to sanction and are looking at other DOH referrals due to the lack of activity on behalf of facility management.

From: Levine, Alan
Sent: Thursday, April 27, 2006 2:46 PM
To: Knapp, Rebecca; Madden, Steven
Cc: Alford, Barbara; Weaver, Polly
Subject: RE: Heads Up: Oakridge Ambulatory

EXHIBIT
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Surgery Center--Ft. Lauderdale

This is serious.
We should be looking at maximum fines for non-compliance in reporting, and even sanctions beyond that.

From: Knapp, Rebecca
Sent: Wednesday, April 26, 2006 4:50 PM
To: Levine, Alan; Madden, Steven
Cc: Alford, Barbara; Weaver, Polly
Subject: Heads Up: Oakridge Ambulatory Surgery Center--Ft. Lauderdale

FOX news station did a news segment on this Ambulatory Surger Center last night. (This complaint was not reported to us.) A former (fired in August 2005) employee has been arrested for sexual assault on 2 female patients under anesthesia; one occurrence was in 02/05 and the 2nd was in 05/05.

Our surveyor has confirmed 3 incidents of sexual assault on patients at this ASC. The ASC's CEO, risk manager and nursing staff were aware of the assaults and never reported them to the police or AHCA and did not discipline the employee. Nurses are mandatory reporters. This is past non-compliance; however, problems continue.

It appears we have immediate jeopardy, and the surveyor has advised the administrator. Risk manager, nurses, techs are still not aware of Policy & Procedure, or of what action to take if someone reports sexual abuse of a patient by an employee. They were not aware they needed to call the police, call APS, or what to do with the employee. The facility is closed for tonight, but the ivestigation will be ongoing tomorrow to gather more facts. Diane Reiland, Field Office Manager, is on top of this. As of today, they were stationing at least 2 nurses in the recovery rooms. We will keep you posted.

B.

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY
FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs. AHCA No: 2006003871

OAKRIDGE AMBULATORY SURGERY, LLC, d/b/a
OAKRIDGE AMBULATORY SURGERY, LLC,

Respondent.
_____/

ORDER OF IMMEDIATE MORATORIUM ON ADMISSIONS

THIS CAUSE having come before the Secretary of the Agency for Health Care Administration (hereinafter "Agency") and after careful review of the record and after being otherwise fully advised, the Secretary finds and concludes as follows:

FINDINGS OF FACT

1. The Agency is the state agency charged with the responsibility of regulating and licensing ambulatory surgical centers pursuant to Chapter 395, Florida Statutes (2005), and Chapter 59A-5, Florida Administrative Code.

2. Respondent, Oakridge Ambulatory Surgery, LLC, d/b/a Oakridge Ambulatory Surgery, LLC (hereinafter "Respondent"), is licensed by the Agency to operate an ambulatory surgery center located at 1000 N.E. 56th Street, Fort Lauderdale, Florida 33334, having been issued license number 1081. The Agency has determined that conditions at Oakridge Ambulatory Surgery are grounds for the imposition of an

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immediate moratorium on admissions to Respondent's facility pursuant to Section 395.1065(5), Florida Statutes (2005).

3. The current census is 12 cases. The admission of new patients into this facility would pose an immediate and serious threat to the public health or safety of patients. Upon delivery of the Immediate Order of Moratorium, no new cases can be admitted. Admitting new patients while the facility is failing to meet standards of care required by the Florida Administrative Code and Florida Statutes would place new patients in immediate danger. Therefore, an order of immediate moratorium is the only method by which to avoid further harm to patients.

4. The only way to prevent Respondent from admitting new patients is by issuing this Order of Immediate Moratorium prohibiting Respondent from admitting new patients.

5. Pursuant to Section 395.0197(1)(a) and (b), Florida Statutes (2005), every licensed facility (i.e., hospital) shall, as part of its administrative functions establish an internal risk management program that includes (a) the investigation and analysis of the frequency and causes of specific types of adverse incidents to patients, and (b) the development of appropriate measures to minimize the risk of adverse incidents to patients. Pursuant to Section 395.0197(9), Florida Statutes (2005), the risk manager is specifically required to investigate every allegation of sexual misconduct.

6. Pursuant to Rule 59A-10.002(14), Florida Administrative Code (2005), "risk management" is defined to mean the identification, investigation, analysis, and evaluation of risks and the selection of the most advantageous method of correcting, reducing, or eliminating identifiable risks.

7. The facility does not have an operational internal risk management program to investigate and analyze adverse incidents and take appropriate measures to prevent future occurrences and thereby assure the health and safety of patients.

8. Based on information received on or around April 24, 2006, the Agency visited the facility, conducted interviews with staff and reviewed facility documents on or around April 25, 2006.

9. On February 4, 2005 a female patient complained to nursing personnel that a male staff member (Staff #1) touched her breast and placed his finger into the subject's sexual organ. Nursing personnel reported this incident to the Administrator / Risk Manager who documented an incident report specifying staff #1 touched the subject's breasts and placed his hand down the subject's pants, and touched her "belly button" which was other than what the patient had reported.

10. Nursing personnel reported to the Administrator / Risk Manager in May 2005, that they observed the same male staff member inappropriately touching the pubic area of a female patient who had been sedated and was in the Recovery Room. The patient was in the recovery room after conscious sedation, asleep on a bed in the recovery room with a curtain closed. There was a slight opening where the RN observed the male staff member. The RN who observed this, asked another nurse working in the recovery room to witness what he/she saw. Both nurses observed the male staff member touching the patient's pubic area. There was no incident report generated or investigated regarding this incident. The police were not informed of this incident. The staff was generally afraid to make any complaints to the facility. Those

who did were reprimanded. The facility did not investigate and document any and all complaints, which may affect a patient's safety and welfare.

11. Four registered Nurses and one Surgical Technician stated that this same male staff member isolated female patients in the bathroom, and assisted them to change into their clothes. After the allegation in February, a charge nurse instructed staff #1 to stop that practice. Staff #1 stopped it for a few weeks and then continued to isolate female patients in the restroom. The staff further stated that a Plastic Surgeon had made complaints about staff #1 staring at the breasts of female patients. An RN stated that the Plastic Surgeon had written a letter about the allegations. The staff #1's employee file did contain a letter about the employee's competence, but did not mention the sexual abuse allegation. Other staff members corroborated that the Plastic Surgeon had made the allegations. These incidents were not investigated or documented on incident reports. All of the nurses' complaints prior to the Physician's complaints were not investigated.

12. An RN stated that they perform standing preps on female patients prior to surgery. The patient stands up naked with arms above the head and legs spread open. They swab Betadine all over the body, including the breasts and between the legs. Several nurses noticed staff #1 would stop doing work and would turn and face the back of the patient, and watch the procedure. The patient would be unaware because they would be faced the other way. The nursing staff requested staff #1 to leave the room. This happened on more than one occasion. The RN told the Risk manager designee about this before September 2004.

13. Staff #1 was terminated on August 15, 2005. However, there were at least four incidents dating back to before September 2004 involving inappropriate behavior by staff #1 before any action was taken by the facility to remove this staff member. Three of those incidents, the inappropriate staring at patients, the isolating female patients and assisting them in undressing, and the touching of a patient's pubic area in May 2005, were never investigated by the risk manager or anyone else at the facility.

14. On or around April 25, 2006, the Risk Manager for this facility was interviewed. The risk manager did not feel, even up to the current time, that there was any problem with the risk management function. The risk manager was not knowledgeable of the facility's policies and procedures or of state risk management requirements.

15. One of the most important components of a risk management function is that staff complaints and concerns are fully investigated and reported. Here staff did not feel their observations of inappropriate behavior were treated seriously and even worse, staff was reprimanded for coming forward with these complaints. This fostered an atmosphere in which observed incidents would not be reported and therefore the protection of the patients was compromised.

16. The risk management issues of not investigating incidents, fostering an environment in which incidents are not reported, and being unaware of the facility's own policies and procedures and state requirements regarding the reporting of adverse incidents continues to exist presently and therefore present a current threat to the health and safety of patients.

17. Section 395.0197 Florida Statutes (2005) requires every ambulatory surgical center to establish an internal risk management program. The functions of that program include the investigation and analysis of adverse incidents to patients and the development of appropriate measures to minimize the risk of adverse incidents to patients by preventing future adverse incidents.

18. The legislature clearly delineated the purpose of a risk management program in Section 395.10971 Florida Statutes (2005). The "control and prevention of medical accidents and injuries is a **significant public health and safety concern** (emphasis added). An essential method of controlling medical injuries is a comprehensive program of risk management as required by s. 395.0197. The key to such a program is a competent and qualified health care risk manager".

19. Without a functioning internal risk management program where serious incidents are investigated and preventive measures (such as assuring staff are not alone with patients, referring offending staff for police investigations and timely terminating staff that are repeatedly involved in inappropriate behavior) are instituted, the health and safety of patients cannot be assured. Without a functioning internal risk management program patterns of problems cannot be discerned, trends cannot be determined, and causes of repeat incidents cannot be eliminated. Every current and future patient at this facility is therefore at risk due to the lack of a functioning internal risk management program which should be able to prevent adverse incidents before they occur.

20. Because of the egregious nature of the acts committed by this facility, Petitioner requests the issuance of an Order of Immediate Moratorium to assure the

health and safety of the public. The Agency will take further enforcement measures as warranted.

CONCLUSIONS OF LAW

1. The Agency has jurisdiction over the Respondent pursuant to Chapter 395, Florida Statutes, and Chapter 59A-5, Florida Administrative Code.

2. Based on the foregoing Findings of Fact, the Secretary concludes that conditions in the facility present a threat to the health or safety of the patients warranting an immediate moratorium on admissions to Respondent's facility pursuant to Section 395.1065(5), Florida Statutes (2005).

3. The Agency shall promptly proceed with any other administrative action to be brought against Respondent based upon the facts set out herein and shall provide notice to Respondent of the right to a hearing under Section 120.57, Florida Statutes, at the time such action is taken.

IT IS THEREFORE ORDERED THAT:

1. Respondent is hereby **UNDER AN IMMEDIATE MORATORIUM ON ADMISSIONS** and shall not admit any patients until the moratorium is lifted by the Agency.

2. Respondent shall post this notice of moratorium in a location visible to the public until the moratorium is lifted by the Agency.

3. Respondent shall provide the Agency a written plan of correction and notify the Agency in writing when all violations are corrected so the Agency may inspect the Respondent's facility to determine whether the moratorium may be lifted.

4. The Agency shall monitor the conditions at Respondent's facility on a

regular basis and notify the Respondent when the moratorium is lifted.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 1st day of May, 2006.

Alan Levine, Secretary
Agency for Health Care Administration

NOTICE OF RIGHT TO JUDICIAL REVIEW

THIS EMERGENCY ORDER OF IMMEDIATE MORATORIUM IS A NON-FINAL ORDER SUBJECT TO FACIAL REVIEW FOR LEGAL SUFFICIENCY. See, e.g. Broyles v. State, 776 So. 2d 340 (Fla. 1st DCA 2001). SUCH REVIEW IS COMMENCED BY FILING A PETITION FOR REVIEW IN ACCORDANCE WITH FLORIDA RULES OF APPELLATE PROCEDURE 9.100(b) and (c). See Fla. R. App. P. 9.190(b)(2). TO BE TIMELY, SUCH A PETITION FOR REVIEW MUST BE FILED WITHIN THIRTY DAYS OF RENDITION OF THIS EMERGENCY ORDER OF IMMEDIATE MORATORIUM.

Weaver, Polly

From: Weaver, Polly
Sent: Monday, May 01, 2006 11:19 AM
To: Calamas, Christa
Subject: RE: Oakridge Draft 2

thanks

-----Original Message-----
From: Calamas, Christa
Sent: Monday, May 01, 2006 11:15 AM
To: Weaver, Polly
Subject: FW: Oakridge Draft 2

FYI.

-----Original Message-----
From: Madden, Steven
Sent: Monday, May 01, 2006 11:15 AM
To: Levine, Alan; Brown, Brandi; Calamas, Christa
Subject: Re: Oakridge Draft 2

Yes with your approval.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Levine, Alan
To: Brown, Brandi; Calamas, Christa; Madden, Steven
Sent: Mon May 01 11:12:41 2006

EXHIBIT
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Subject: RE: Oakridge Draft 2

Great...then let's serve it up.
Is becky signing and local office delivering???

it's going to take me a moment to find it -- but something like I want the highest penalty levied against these people, they have breached the public trust, phrases like that?

MR. RODNEY: Objection. The document speaks for itself.

BY MS. HINES:

Q Do you remember anything like that?

A I remember the exchange of e-mails. I'm just not sure off the top of my head the exact wording that was used.

Q Do you know why it is that Mr. Levine became personally involved in this action?

A No, other than, again, there would be nothing -- it would be incorrect to say, I'm sorry, that there's not been involvement by the agency secretary in other cases as well. But I have no other explanation other than that.

Q Well, tell me how many times in your history here with the agency -- by the way, how long have you been the chief of field operations?

A Since 1995.

Q Okay. So for the past 11 years, how long -- excuse me -- how many times have you known the secretary of the Agency for Health Care Administration to become personally involved in the issuance of an immediate enforcement against a facility?

A I can't give you an exact number. I can tell you

though that a case that has maybe reached media attention that's otherwise been what I would phrase a high profile case, it would not be unusual to involve the secretary or keep the secretary informed of the status.

Q Well, keeping the secretary informed is one thing. And if that's what you're referring to, then that's different than what I asked you, which is how often in your memory in the past 11 years has the secretary become personally involved in making decisions about enforcement actions?

A Again, I really can't give you a number. I know there have been discussions with the secretary about particular cases.

Q Can you give us any examples of such cases?

A Yes. One that comes to mind actually dates back to earlier in my tenure in this position was with Mr. Doug Cook and discussions involving some nursing homes in that case that we were having some enforcement issues with.

Q And he became personally involved in the decision-making process?

A Yes.

Q Any other time that Mr. Levine has done that, gotten personally involved in the decision-making process?

A I can't think of any offhand that I'm aware of.

Q So why then was he personally involved in this

JEB BUSH, GOVERNOR

ALAN LEVINE, SECRETARY

FOR IMMEDIATE RELEASE
May 1, 2006

Contact: Toby Philpot
(850) 922-5871

Statement by: **SECRETARY ALAN LEVINE**
Regarding the Moratorium placed on Oakridge Ambulatory Surgery

"Today, the Agency for Health Care Administration took steps to halt the operations of the Oakridge Ambulatory Surgery in Ft. Lauderdale, and it is the intent of the Agency to pursue additional action up to and including revocation of the license of the facility.

"Upon review of the survey findings by Agency personnel, it is clear the leadership of the facility created and fostered an environment where employees were afraid to step forward when they saw the potential sexual abuse of patients. That is unconscionable and will not under any circumstances be tolerated.

"The Florida Legislature's intent in mandating the investigation of and reporting of sexual abuse and other adverse incidents is to ensure patients are protected and to prevent unnecessary risk to patients. In the case of this surgery center, not only did they fail to protect the patients, their failure to do so likely resulted in harm to some women who, in good faith, sought their services.

"All hospitals and health care facilities should be on notice. Failure to investigate and report adverse incidents is very serious, and the state of Florida will not tolerate it."

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Dudek, Liz

From: Dudek, Liz
Sent: Monday, June 26, 2006 3:02 PM
To: Knapp, Rebecca
Subject: Meeting on Oakridge

You and I will not be involved. The facility is in Broward, and as Alan's delegate for the purpose, I am the final arbitrator; and you, as my delegate, are also excluded as you may be me/Alan when a Final Order would need to be signed. Polly is handling it.

Elizabeth Dudek, Deputy Secretary
Division of Health Quality Assurance
Agency for Health Care Administration
850-414-9796
dudekl@ahca.myflorida.com

EXHIBIT 6

stands in for Alan Levine -- let's use his name since that is the person who was in charge of AHCA at the time of these alleged incidents. There are conversations -- let's call them that -- e-mail conversations in this batch of documents that actually refer to that issue, the issue of you being Alan's -- that would be Alan Levine -- Alan's delegate, and let me ask you to take a look at this e-mail here dated June 26th of 2006. It appears to be from you to Rebecca Knapp, and we will mark it as an exhibit for purposes of this deposition, Exhibit No. 1.

(Whereupon, Exhibit No. 1 was marked for identification.)

BY MS. HINES:

Q And so that you know, Nelson, there are no indications on this e-mail of any attorney-client communications.

I'm going to ask you to read that and explain what it is you're talking about there, if you know, or if you recall.

A At the time of this, we had several -- let me think. I believe around this time I was given delegation purposes from the Secretary, from Mr. Levine, for issues involving Broward County, specifically actually Certificate of Need issues because there was I believe at the time a rumor or an indication that he might be considered for

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employment in Broward County by an entity in Broward County, and to avoid any possible concerns, basically I was given authority to look at Broward County. That's all that I can recollect. I don't remember something else related to this.

Q The entity that Mr. Levine was seeking employment from, was that the North Broward Hospital District where he now works.

A He now works at the North Broward Hospital District. Again, I don't know the exact dates and the relationship on this date, if he actually had sought employment at that point or if there were rumors that he was being considered. So I don't -- I couldn't say if he at that point had actually sought employment there.

Q But, in any event, do I understand that it's your recollection that, at the time of this e-mail, that you were acting in his stead because -- in order to avoid some appearance of impropriety?

A Right, with issues involving facilities in Broward County. I think there was something similar with Medicaid with the Medicaid Deputy Secretary.

Q Do you recall as you sit here today when that substitution would have been implemented for purposes that we're speaking about here?

A Right. I don't recall an exact date, no.

Q Was it in writing?

A Yes.

MS. HINES: Nelson, at this time I would request, pursuant to our discovery demand, that we have a copy of that, please, and if not, if you don't consider it responsive to our discovery demand, certainly it's responsive to our public records demand for a copy of that substitution from Alan Levine -- that might not be the right term, but the designation, I guess it would be called, from Alan Levine to Ms. Dudek in order to avoid an appearance of impropriety.

MR. RODNEY: Okay.

BY MS. HINES:

Q Thank you.

The date of that e-mail is what again?

A June 26th of 2006.

Q On that same day there is an e-mail in this packet which I would like to mark as Exhibit No. 2, which indicates that it is a communication between you and Grant Dearborn. So, before I mark it, is Grant Dearborn part of your legal team?

A Yes.

MS. HINES: Okay. Nelson, I can go ahead and mark this as an exhibit and you can request that it be sealed for purposes of dealing with it by the Administrative Law Judge pursuant to your --

FW: Oakridge now a COP only

Dudek, Liz

From: Dudek, Liz
Sent: Thursday, May 04, 2006 8:51 AM
To: Weaver, Polly
Subject: RE: Oakridge now a COP only

What is going on??? wow

Elizabeth Dudek, Deputy Secretary
Division of Health Quality Assurance
Agency for Health Care Administration
850-414-9796
dudekl@ahca.myflorida.com

From: Weaver, Polly
Sent: Thursday, May 04, 2006 8:49 AM
To: Dudek, Liz
Subject: FW: Oakridge now a COP only

Holy geez!!!

From: Weaver, Polly
Sent: Thursday, May 04, 2006 8:49 AM
To: 'Booker, Janetta B. (CMS/SC)'; Sandmann, Doris C. (CMS/SC)
Subject: RE: Oakridge now a COP only

Well, herein lies the problem. No one has articulated what your concerns are. We tried to set up a conference call yesterday, but no one was available. Is there some time this morning where I can have the appropriate staff on to discuss?

From: Booker, Janetta B. (CMS/SC) [mailto:Janetta.Booker@cms.hhs.gov]
Sent: Thursday, May 04, 2006 8:34 AM
To: Weaver, Polly; Sandmann, Doris C. (CMS/SC)
Subject: RE: Oakridge now a COP only

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Polly,
If you insist on proceeding with this as an IJ, please forward me the corrections you plan to make this morning if possible so that I can get this case out. As you are aware, it is your call and unless there is other evidence we don't see this as an ongoing Jeopardy as the 2567 is written. Let me know how you want to proceed with Kindred as well. If you want it to stay at IJ then let me know & I will send it out today as well. Also, please verify that the

rest of the documents to complete these kits have been or are in the process of being submitted. Thanks for allowing your staff to discuss these cases with us.

Thank You,

Janetta Booker
Health Insurance Specialist
Division of Survey & Certification
Phone: (404) 562-7343
Fax: (404) 562-7480

From: Weaver, Polly [mailto:weaverp@ahca.myflorida.com]
Sent: Wednesday, May 03, 2006 10:40 AM
To: Booker, Janetta B. (CMS/SC); Sandmann, Doris C. (CMS/SC)
Subject: FW: Oakridge now a COP only

Janetta, I was out sick yesterday. I don't agree with the determination to downgrade the IJ to a COP. The current IJ is based on the fact that the facility had no plan or knowledge of what to do in the event of future problems, particularly and including sexual abuse/misconduct. If you don't already know, this is a very high profile case here in the media. .

The field office has prepared the deficiency statement as you requested, but this is misguided and should remain at the jeopardy level. If you want to see the tag beefed up, that is fine, but the IJ should stand; and we can add Q002 for the state noncompliance. While we can insist that the IJ stand, I would prefer to proceed with your agreement.

Polly

From: Relland, Diane
Sent: Tuesday, May 02, 2006 3:28 PM
To: Alford, Barbara
Cc: Weaver, Polly
Subject: Oakridge now a COP only

Just to clarify:

area office to issue the deficiencies at the COP level; cover letter to state the correction time frame to be 45 days;

upon receipt of POC, to be reviewed for acceptability and revisit scheduled
if correction of at least the COP issues is demonstrated, then the facility is put on a regular correction track and consideration of lifting the moratorium

reference to state requirements to be moved to Q001, resulting in two COP's out
moratorium to hold up based on the state tags for Licensure and RM

FW: Oakridge now a COP only

Let me know if there is more to be done at this time.

Diane Reiland, Field Office Manager

Area 9, West Palm Beach

Department of Health & Human Services
Centers for Medicare & Medicaid Services
61 Forsyth St., Suite 4T20
Atlanta, Georgia 30303-8909

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

May 4, 2006

Ms. Diana Albert, Administrator
Oakridge Ambulatory Surgery
1000 NE 56th Street
Fort Lauderdale, Florida 33334

RE: Medicare Provider Number 10C0001309

Dear Ms. Albert:

An ambulatory surgery center (ASC) must meet all of the pertinent provisions of Section 1861 (e) of Title XVIII of the Social Security Act and be in compliance with each of the Conditions of Participation for ambulatory surgery centers in order to participate in the Medicare/Medicaid programs.

A survey was conducted at Oakridge Ambulatory Surgery on April 26, 2006, by the Florida State Survey Agency. They informed us that your agency is out of compliance with the following Medicare Conditions of Participation (COP):

42 CFR 416.40 Compliance with Licensure Law
42 CFR 416.41 Governing Body Management

We believe the deficiencies pose an immediate and serious threat to the health and safety of your patients. When an ASC is found to be out of compliance with one or more Conditions of Participation, and an immediate or serious threat to patient health and safety is found to exist, a determination must be made by CMS that the facility no longer meets the requirements for participation as a provider of services in the Medicare program. Such a determination has been made in the case of your ASC. Accordingly, the Medicare provider agreement between Oakridge Ambulatory Surgery and the Secretary of the Department of Health and Human Services is being terminated. This termination will be effective May 19, 2006.

The Medicare program will not make payment for ambulatory surgery services to patients who are admitted after May 19, 2006.

We will publish a public notice in a local newspaper on May 10, 2006. Termination can only be averted by correction of these deficiencies. Should we not hear from you we will assume that the

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situation has not been corrected. If you have corrected these deficiencies, please submit you credible allegation of compliance to us on or before May 15, 2006. If an acceptable allegation of compliance is received from you, a follow up visit will be conducted prior to, May 19, 2006..

If you believe that this termination decision is incorrect, you may request a hearing before an Administrative Law Judge (ALJ) at the Departmental Appeals Board, Department of Health and Human Services. Procedures governing this process are set out in section 42 CFR 498.40, et seq. To be effective, a written request for a hearing must be filed not later than 60 days after the date you receive this letter. Such a request may be made to the following address:

Sandra M. Pace
Associate Regional Administrator
Centers for Medicare & Medicaid Services
61 Forsyth Street, SW, Suite 4T20
Atlanta, Georgia 30303-8909

We will forward your request to the Departmental Appeals Board. The request for a hearing should state why CMS's decision is considered incorrect, and should be accompanied by any evidence and arguments you may wish to bring to the attention of the Department of Health and Human Services. Evidence and arguments may be presented at the hearing, and you may be represented by legal counsel.

If there are any questions, please contact Janetta Booker at (404) 562-7343.

Sincerely,

Sandra M. Pace
Associate Regional Administrator
Division of Survey & Certification

Enclosure
CMS 2567

Department of Health & Human Services
Centers for Medicare & Medicaid Services
61 Forsyth St., Suite. 4T20
Atlanta, Georgia 30303-8909

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

May 17, 2006

Mr. Eugene Marini, Administrator
Oakridge Ambulatory Surgery
1000 NE 56th Street
Fort Lauderdale, Florida 33334

Re: Medicare Provider Number 10C0001309

Dear Mr. Marini:

We are pleased to inform you that Oakridge Ambulatory Surgery's credible allegation of compliance for its Medicare deficiencies has been found acceptable.

We are requesting that the Florida State Survey Agency conduct a follow-up visit to determine if the deficiencies have been corrected. **In this regard we are requesting that you provide the Florida State Survey Agency with a copy of your credible allegation of compliance at the following address:**

Ms. Elizabeth Dudek, Deputy Secretary
Managed Care and Health Quality
Agency for Health Care Administration
2727 Mahan Drive
Tallahassee, Florida 32308

Attention: Polly Weaver

Fax: (850) 487-6240

Since the Florida State Survey Agency will need to make their follow-up visit before the effective date of the termination of your Medicare agreement the document should be sent by the fastest means possible.

If you have any questions concerning this, please contact Janetta Booker at (404) 562-7343.

Sincerely,

Janetta Booker

Sandra M. Pace
Associate Regional Administrator
Division of Survey & Certification

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AHCA
FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION

JEB BUSH, GOVERNOR ALAN LEVINE, SECRETARY

May 18, 2006

Mr. Eugene Marini, Administrator
Oakridge Ambulatory Surgery, LLC
1000 Northeast 56th Street
Fort Lauderdale, Florida 33334

RE: Oakridge Ambulatory Surgery, LLC

Dear Mr. Marini:

The Agency for Health Care Administration, Delray Beach Field Office, has inspected Oakridge Ambulatory Surgery, LLC and has determined the condition that resulted in the placement of a moratorium against the facility on May 1, 2006, has been corrected. Field Office staff reported to this office that the necessary corrections have been made to protect the health and welfare of the patients. In view of this, we are hereby fully lifting the moratorium on admissions effective May 18, 2006.

If you have any questions concerning this matter, please contact Laura MacLafferty in the Hospital and Outpatient Services Unit at (850) 487-2717 or Ms. Diane Reiland, Field Office Manager in the Delray Beach Field Office at (561) 496-5904.

Sincerely,

Elizabeth Dudek, Deputy Secretary
Division of Health Quality Assurance

cc: Diane Reiland, Delray Beach Field Office
Christa Calamas , AHCA General Counsel
Grant Dearborn, AHCA General Counsel's Office

EXHIBIT
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Berry, June

From: Reiland, Diane
Sent: Wednesday, May 10, 2006 8:23 AM
To: Berry, June
Subject: FW: Oakridge

June, need to fax to Liz Dudek a copy of the Oakridge report; her fax number is s/c 277-6240 or 850 487-6240

From: Reiland, Diane
Sent: Wednesday, May 10, 2006 8:20 AM
To: Dudek, Liz
Subject: RE: Oakridge

Will get it up ;to you in a few minutes

From: Dudek, Liz
Sent: Wednesday, May 10, 2006 8:16 AM
To: Reiland, Diane
Subject: RE: Oakridge

Thanks Diane. I would love a copy of the report; I have a copy of Mr. Lamb's letter. They have asked to meet with me and we are trying to schedule. They are hoping to do so tomorrow but I haven't had a confirmation from our legal staff yet. I have, as has the Secretary and Legal, advised that what needs to happen is they need to complete a POC and put the corrections into place, contact you and show us that they have made the corrections via a follow up; any other discussion is unnecessary at this time.

Elizabeth Dudek, Deputy Secretary
Division of Health Quality Assurance
Agency for Health Care Administration
850-414-9796
dudekl@ahca.myflorida.com

From: Reiland, Diane
Sent: Wednesday, May 10, 2006 8:13 AM
To: Dudek, Liz
Subject: Oakridge

Yes, the deficiency report has been issued;

I have not had direct contact from facility staff; I was copied on a letter sent to Nelson Rodney by their attorney Bruce Lamb; letter explains their corrective action and request that we return as soon as possible; I can fax a copy of the letter if you like. Also can fax the deficiency report.

Diane Reiland, Field Office Manager
Area 9, West Palm Beach

EXHIBIT M tabbies

on.

A Right. That would have been what we would have told Mr. Lamb needed to happen.

Q And when you say we --

A I mean, that I and then the Secretary and someone in Legal.

Q And so in that email are you referring to the Secretary, Alan Levine?

A Yes.

Q So in fact it appears from that email that the Secretary has weighed in on the issue of the lifting of the moratorium; is that correct?

A To the extent that they needed a plan of correction and corrections to be made before it could be lifted, I would say yes.

Q And do you know how the Secretary's decision and his direction was communicated to anyone representing Oakridge?

A No, not myself. I thought they had meetings with him or that Mr. Lamb had met with him or with the Chief of Staff.

Q Okay. But that email doesn't say the Chief of Staff. It says the Secretary, correct?

A Right.

Q And so you're not aware of how and when or where

South Florida Business Journal - June 28, 2006
http://southflorida.bizjournals.com/southflorida/stories/2006/06/26/daily32.html

THE SOUTH FLORIDA BUSINESS JOURNAL

North Broward Hospital District picks AHCA's Levine

South Florida Business Journal - June 28, 2006 by Brian Bandell

The **North Broward Hospital** District (NBHD)'s board of commissioners has selected the secretary/chief executive officer of Florida's **Agency for Healthcare Administration** (AHCA) as its next president/CEO.

The board made its decision unanimously after interviewing four candidates on Wednesday.

Alan Levine is to replace Wil Trower, who is to step down, July 15, after 11 years heading the publicly funded district that runs four hospitals.

The board also named Trower president emeritus with responsibility to serve as liaison between the district's board and its foundation, local nonprofits and local charities.

While with AHCA, Levine ran the state agency responsible for Medicaid and Healthy Kids and oversaw the Medicaid reform project to start in Broward County, July 1, with NBHD partnering to offer a reform health plan.

AHCA also oversees approval of new hospital services and new hospital construction.

The agency has twice reject calls for NBHD's proposal to build a campus on **Nova Southeasten University**'s Davie campus - although the board has vowed to appeal that decision.

Before Gov. Jeb Bush appointed him to head AHCA, Levine was CEO of **Doctors' Memorial Hospital** in Perry and CEO of **South Bay Hospital** in Sun City Center.

GHCZZ201 05/13/2006 12:28 Page 1

Symbol(s) THC & Date
Use Page Up, Page Down, ↑, ↓, or press ↵

05/03 8:01A (DJ) PRESS RELEASE: Tenet Forms Outpatient Strategic Development Group; Stephen Corbeil to Lead National Effort; Christopher B
Story 3716 (THC, I/HEA, I/XDJGI, I/XFFX, I/XNYA, I/XSP5, N/DJIN, N/DJN...)
DALLAS--(BUSINESS WIRE)--May 3, 2006--

Tenet Healthcare Corporation (NYSE:THC) announced today that it has formed a national strategic development group to focus on its freestanding and hospital-based outpatient services and facilities.

The effort will be led by Stephen E. Corbeil, a veteran Tenet hospital executive who most recently has served as senior vice president of Tenet's 18-hospital Central Northeast-Southern States region. The company also announced that Christopher M. Bird has been named vice president of outpatient services. Bird joins Tenet from his position as Western division vice president of DaVita Inc. (NYSE:DVA), a major provider of dialysis services nationwide.

The new outpatient group will harness Tenet's in-house expertise in business development and finance, clinical quality, technology and managed care to focus on strategic opportunities in the fast-growing outpatient care business. Outpatient services are already a significant line of business for Tenet, accounting for 29 percent of its net operating revenue in 2005. The company currently operates more than 40 imaging and diagnostic centers, more than 20 ambulatory surgery centers and a number of other outpatient facilities, both freestanding and on its general hospital campuses.

"Outpatient services are expected to grow significantly in the next several years, and our creation of this national outpatient development group is an essential element of Tenet's go-forward competitive strategy," said Reynold Jennings, Tenet's chief operating officer. "Steve Corbeil and Chris Bird will focus Tenet's efforts on developing the best opportunities in all of our markets."

Corbeil said, "Technology and managed care are driving a shift from inpatient to outpatient care. We anticipate that more than five million patients will use a Tenet facility in 2006 for outpatient services, including emergency room visits. We need to look no further than the advent of 64-slice scanners for cardiac diagnostics and 'virtual colonoscopies' to see the dramatic changes occurring in our business. In addition, the rise in consumer-driven health care will undoubtedly increase the demand for convenient, cost-effective outpatient care in a 'retail' setting."

"More than five years ago, Tenet was among the first to introduce consumer-friendly outpatient imaging and surgery centers with the construction of TenetCare facilities on a number of our hospital campuses. We intend to remain a leader in the future by developing and implementing innovative outpatient ideas and adopting new technology. A key element of our strategy will be, wherever possible, to partner and joint venture with physicians and other third parties in order to speed the development and construction of many needed projects in our communities," Corbeil said.

Corbeil said the company has more than 20 outpatient projects currently in development, most of them focused on the campuses of Tenet's acute care hospitals. He said the strategic group's goal is to ensure that every Tenet hospital and market is actively pursuing multiple outpatient growth opportunities.

Corbeil, 46, joined National Medical Enterprises, one of Tenet's predecessor

EXHIBIT P

companies, in 1984. He served in various administrative roles in New Orleans, St. Louis and Dallas before being named chief executive officer of Harton Regional Medical Center in Tullahoma, Tenn., in 1989. He served in various other executive positions with Tenet until 1996, when he was named chief executive officer of Medical City Dallas Hospital, North Texas Hospital for Children and Green Oaks Hospital in Texas, all of which are owned and operated by HCA-Hospital Corp. of America.

Corbeil rejoined Tenet in 1999. He holds a bachelor's degree from the University of Michigan and a master's degree from the University of Iowa. In addition to his new role, he will continue to supervise Tenet's hospitals in Missouri, Tennessee and Pennsylvania.

From 1988 to 2000, Bird, 41, was a health care consultant with a number of large consulting firms, including Deloitte & Touche. He joined DaVita as vice president of its Western division in December 2001. In that position, he was responsible for overseeing 50 dialysis centers with 2,000 employees in Southern California, Arizona and Utah.

Bird holds a bachelor's degree in business administration from Colorado State University, a master of public health degree from Columbia University and a master of business administration degree from Harvard University.

Tenet Healthcare Corporation, through its subsidiaries, owns and operates acute care hospitals and related health care services. Tenet's hospitals aim to provide the best possible care to every patient who comes through their doors, with a clear focus on quality and service. Tenet can be found on the World Wide Web at www.tenethealth.com.

Some of the statements in this release may constitute forward-looking statements. Such statements are based on our current expectations and could be affected by numerous factors and are subject to various risks and uncertainties discussed in our filings with the Securities and Exchange Commission, including our annual report on Form 10-K for the year ended Dec. 31, 2005, our quarterly reports on Form 10-Q and periodic reports on Form 8-K. Do not rely on any forward-looking statement, as we cannot predict or control many of the factors that ultimately may affect our ability to achieve the results estimated. We make no promise to update any forward-looking statement, whether as a result of changes in underlying factors, new information, future events or otherwise.

CONTACT: Media:
Steven Campanini, 469-893-6321
or
Investors:
Thomas Rice, 469-893-2522

SOURCE: Tenet Healthcare Corporation

(END) Dow Jones Newswires
05-03-06 0801ET
Additional Codes (N/DJWB, N/CAC, N/CNW, N/DJPN, N/DJWI, N/HIY, N/PER, N/PRL, N/TPCT, M/HCR, M/NND, M/TPX, P/TAP, R/CA, R/NME, R/PRM, R/US, R/USW)

could dial in, and I know my cell phone died at one point and I had to use another cell phone.

Q Whose cell phone did you use?

A I used my - my work cell phone --

Q So you have two cell phones?

A I have a personal one also. And I'd say at least 45 minutes to an hour, if not more. And then I was also on the phone with Arlene and Lorna at - before I left, you know, up until about the time I left, around 6:30.

Q Did you get any direction from Tallahassee as to what should be done or how you should conduct your investigation?

A Of course.

Q I'm talking about on the 26th.

A Yes.

Q And what direction did you get from them and from whom?

A Well, they - they were saying that it was immediate jeopardy and I went in to tell the facility they were in immediate jeopardy.

Q And what does immediate jeopardy mean?

A It means that the facility - it could mean -- Well, it means that the facility is - has a problem that needs to be corrected, like, immediately, because there is

Q So she pretty much knew right then, according to this e-mail, what she was going to add into the report, right?

A And, again, as I said when we talked about that, pertinent to that specific exhibit, I don't know that she personally was going to make the change to the report or who was going to do that, but she understood what the question was.

Q Who is Garnett Chisenhall?

A That's our appellate counsel.

(Deposition Exhibit Number D was marked for identification.)

BY MS. HINES:

Q Let me ask you to look at Exhibit D, which it appears to be part of a string of e-mails also. But I want you to focus on the one from Alan Levine dated April 28th of 2006 at 11:09 a.m. to you with a copy to a number of other people wherein he makes the statement, quote, "If the facts really are as they have been presented to me, then I am very disturbed and feel the owner has squandered the trust of this state."

Would you take a look at that e-mail?

A Yes.

Q Why would Alan Levine have any doubt as to whether the facts were as they had been presented to him?

A I don't know. You would have to ask Mr. Levine.

Q Okay. And why would he have any knowledge of who the owner of Oakridge is, do you know?

A That I don't know.

Q Okay. I have to ask him that too, right?

A Yes.

Q All right. In a series of e-mails that include communication with your counsel -- so for the record, I will ask that this particular document be sealed when the transcript is prepared so that the agency can assert its privilege with respect to this document -- but for purposes of this deposition, let me ask you to look at what I'm going to mark as Exhibit E.

(Deposition Exhibit Number E was marked for identification.)

BY MS. HINES:

Q And I'll ask you to look at that portion of the e-mail that does not include communication with your counsel, but in fact is an e-mail from Alan Levine on April 27th of 2006 at 2:46 p.m. directed to Rebecca Knapp and Steve Madden and you, cc'd to you and Barbara Alford.

By the way, who is Barbara Alford and what is her role in all of this?

A Barbara Alford -- her title is field office manager. And she's in charge of our Tallahassee office.

on.

A Right. That would have been what we would have told Mr. Lamb needed to happen.

Q And when you say we --

A I mean, that I and then the Secretary and someone in Legal.

Q And so in that email are you referring to the Secretary, Alan Levine?

A Yes.

Q So in fact it appears from that email that the Secretary has weighed in on the issue of the lifting of the moratorium; is that correct?

A To the extent that they needed a plan of correction and corrections to be made before it could be lifted, I would say yes.

Q And do you know how the Secretary's decision and his direction was communicated to anyone representing Oakridge?

A No, not myself. I thought they had meetings with him or that Mr. Lamb had met with him or with the Chief of Staff.

Q Okay. But that email doesn't say the Chief of Staff. It says the Secretary, correct?

A Right.

Q And so you're not aware of how and when or where

that communication between the Secretary and Oakridge had taken place, correct?

A I don't recall at this point, no.

Q So the only way for us to know that would be to ask the Secretary, correct?

A Unless Mr. Lamb can tell you.

Q Okay. But it doesn't say there that there was direct communication by the Secretary to Mr. Lamb, does it?

A No, but I know that Mr. Lamb was the person who was communicating with us.

Q With *us* being who?

A With the Agency, he was the legal representative. I know Bruce Lamb, I believe, was communicating as I believe was -- and I think you might even have an email there -- Bernice Cox who was in that same office.

Q Okay. So it could have been --

A I assume it was Mr. Lamb because he is an attorney.

Q Okay. But you don't have any way of knowing that --

A No.

Q -- from that email --

A No.

Q -- or your own personal knowledge?

A No.

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BERGER SINGERMAN
attorneys at law
Boca Raton Fort Lauderdale Miami Tallahassee

Melanie Ann Hines
850.561.3010
mhines@bergersingerman.com

October 18, 2006

VIA FACSIMILE AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Will Armstrong
Public Records Coordinator
Agency for Health Care Administration
2727 Mahan Drive
Ft. Knox #3, Mail Stop #2
Tallahassee, FL 32308-5403

Re: Public Records Demand Relating to the Actions of AHCA with Respect to the Oakridge Ambulatory Surgery, LLC, 1000 NE 56th St., Ft. Lauderdale, FL 33334

Dear Mr. Armstrong:

It has been over 49 days since we originally demanded access to records via the enclosed public records demand, and over 13 days since our follow-up demand. To date, we have not received a single document nor a phone call in response to our last demand advising when the documents may be reviewed. We specifically asked to review them as they are located, not in a bulk response. If we do not hear from you within 24 hours, we will pursue legal remedies.

Sincerely,

BERGER SINGERMAN

Melanie Ann Hines
Of Counsel

MAH:apw

Enclosure

cc: William Roberts, Acting General Counsel
Nelson Rodney, Assistant General Counsel

EXHIBIT 7

12477-1

-----Original Message-----
From: Weaver, Polly
Sent: Friday, April 28, 2006 11:12 AM
To: Levine, Alan
Cc: Madden, Steven; Calamas, Christa; Rodney, Nelson; 'dr_francois@doh.state.fl.us'
Subject: RE:

Will do and will keep you posted.

Polly

-----Original Message-----
From: Levine, Alan
Sent: Friday, April 28, 2006 11:09 AM
To: Weaver, Polly
Cc: Madden, Steven; Calamas, Christa; Rodney, Nelson; 'dr_francois@doh.state.fl.us'
Subject: Re:

My preference is for the most punitive action we can take. The law was broken. Someone was hurt intentionally. The facility leadership knew it and, in effect, deliberately covered it up, thus breaking the law again. The message needs to be sent that we are going to hold the owners of these facilities accountable for the actions, or inactions, of their leadership. This was not a

mistake or oversight. It was harmful and willful neglect.

If the facts support revocation, and our lawyers are confident we can defend it successfully, then that's what I believe is appropriate. In addition, I think we should be very public about it.

If the facts really are as they have been presented to me, then I am very disturbed and feel the owner has squandered the trust of the state.

Brandi, pls coordinate with HQA and legal. I will want to putout a statement. Steve, at the right time, pls let's coordinate some calls to notify the appropriate members of the legislature (local delegation) of our action once our team is prepared to file.

Polly, I am with secretary francois right now. I will give him a heads up. Pls make sure we make the appropriate referrals to the doh.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Weaver, Polly
To: Levine, Alan
CC: Madden, Steven; Calamas, Christa; Rodney, Nelson
Sent: Fri Apr 28 10:50:13 2006
Subject:

We had a conference call this morning to discuss this case and consider appropriate sanctions. In addition to referring the risk managers to the risk management licensure program as well as Department of Health on the practitioner side, we believe the best route is the following:

1. Fine $1,000 per day for the period of time from which the facility knew of the first incident until the employee was terminated which is 2/4/05 until 8/15/05; and 2. Consider the revocation or suspension of the license as well as impose an immediate moratorium on admissions. We discussed the pros and cons of initiating

for any reason?

A No.

Q To issue any kind of memorandum to his personnel file or to get involved in a negative way in his job performance --

A Not that I can recall.

Q -- or evaluations?

A I'm sorry. Not that I can recall, no.

Q So back to Mr. Levine's involvement in this matter. Are you aware of a point in time when Mr. Levine made it known to certain people within the agency that because he was seeking employment as the head of the north Broward Hospital District, that he would be recusing himself from involvement in any actions related to any health care facilities over which the agency had jurisdiction in order to avoid an appearance of impropriety?

A Yes.

Q And when was that?

A That I cannot tell you. I don't recall when.

Q Was it before or after he became personally involved in making decisions in this case?

A I believe it was after the case had proceeded to a certain point.

Q But you don't know as you sit here today?

A No.

Ms. Calamas, who's our current secretary, involved more than any other secretaries in actions if they're aware that we're involved in them, and I think it depends on what they see is happening, what the progress seems to be. I can't characterize that he has done more or less with others, but he's been involved with quite a few, and as has the current secretary.

Q And the date of that e-mail that Alan Levine's name is on, and I think it's on page two, what is the date?

A April 28th --

Q And as you --

A -- of 2006. I'm sorry.

Q And as you sit here today, can you tell us whether that was -- during the time period, whether that e-mail was sent to Mr. Levine during the time period in which he had imposed upon himself a responsibility to stay out of matters that might give rise to an appearance of impropriety because he was seeking employment with a facility or with some entity in Broward County?

A I don't know or recollect what that period was that Alan would have done the delegation, and I don't know when he began to seek any type of position anywhere.

MS. HINES: Again, Nelson, for purposes of our discovery request, we would request documentation regarding that action.

EXHIBIT tabbies W

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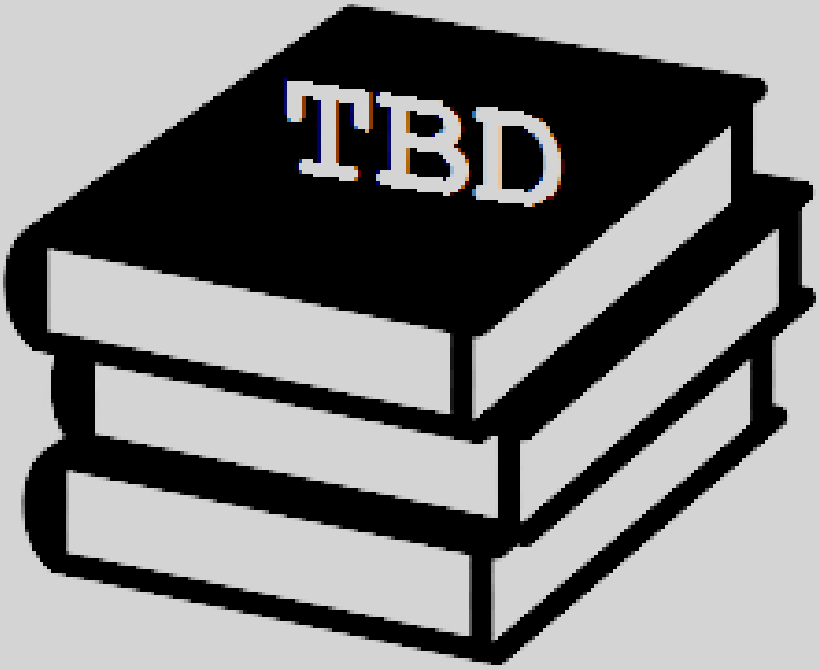

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