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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, APPELLATE DIVISION

CHRISTINA HARRIS, et al.

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest.

Case No. GIC876101

RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO RESPONDENT'S EVIDENTIARY OBJECTIONS RE: ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF PROHIBITION/MANDATE

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Comes now the Respondent, the Superior Court of California, County of San Diego, by and through its retained counsel, Randal L. Glaser of Fuller Glaser Jenkins, and respectfully submits the following Reply to Petitioner's Opposition to Respondent's Evidentiary Objections Re: Order to Show Cause on Petition for Writ of Prohibition/Mandate, and alleges the following:

I. ARGUMENT

1. Respondent's Return Need Not Be Verified.

In her opposition to respondent's evidentiary objections, petitioner contends that respondent's return is not verified and, as a result, all legal contentions in the petition are deemed

admitted. (Petitioner's Reply to Respondent's Evidentiary Objections, p. 5, ln. 10.) Petitioner fails to recognize that public entities, such as the respondent court, need not verify complaints or answers pursuant to Code of Civil Procedure section 446. (*Los Angeles County Dept. of Children & Family Services v. Superior Court (Paul Anthony C.)* (1998) 62 Cal.App.4th 1, 9; *Murrieta Valley Unified School Dist. v. County of Riverside* (1991) 228 Cal.App.3d 1212, 1221-1223; see also *Hall v. Superior Court (People)* (2005) 133 Cal.App.4th 908, 914, fn. 9.) Hence, petitioner's argument in this regard is without merit.

2. Nature of Respondent's Return and Clarification.

Petitioner further alleges in his opposition to respondent's objections that the respondent court failed to deny the existence of a "blanket policy" and, as a result, "no factual issue is joined for resolution by the reviewing court." (Petitioner's Reply to Respondent's Evidentiary Objections, p. 5, lns. 14-15.)

To be clear, respondent's return argues that petitioner has failed to allege facts sufficient to allege a cause of action—i.e., that there exists an improper "blanket policy" in the North County branch of the respondent court. Accordingly, respondent's return demurs to the petition, which is proper under Code of Civil Procedure section 1089. At oral argument, should the Court overrule respondent's arguments in demurrer to the petition, respondent intends to request an opportunity to answer—also proper under Section 1089.

In this regard, it is worth noting that in no place does petitioner really ever identify the specific nature of the alleged blanket policy. In one instance, petitioner refers to "a blanket policy of requiring misdemeanor defendants to personally appear at trial" (petition, p. 2, lns. 19-20, emphasis in original); in another, a "non published local 'personal appearance at trial' rule" (petition, p. 4, lns. 6-7); in still another, a "local rule requiring personal appearance at trial" (petition, p. 7, lns. 1-2); and finally, a "personal appearance at trial policy in Judge Mills (*sic*) court" (petition, p. 7, lns. 4-5). But in defining this alleged policy, petitioner adopts the hearsay statement of Judge Kirkman, who states that this so-called "blanket" policy does not apply in all—or even most—instances. (Petition, p. 4, lns. 15-21; Petitioner's Memorandum of Points and Authorities, p. 5, lns. 4-8.) So, on the one hand, petitioner contends that there is a blanket policy that, one assumes, applies in all instances (hence the

1 term "blanket"); while on the other, petitioner contends that this blanket policy *does not* apply in all
2 instances. It is difficult to understand, therefore, how the respondent court could ever hope to admit
3 or deny these specific allegations in the petition, when it is clear that petitioner herself cannot
4 reasonably identify the policy.

5 In any event, the legal significance of petitioner's equivocation about the existence of a
6 blanket policy, and her conflicting verified allegations on the subject, arises from petitioner's
7 attempted end-run around the doctrine of judicial immunity in order to claim costs and attorneys'
8 fees from the respondent court. Of critical importance, the respondent court is not appearing before
9 this Court in order to defend the legal propriety of any alleged blanket policy requiring the personal
10 appearance of all misdemeanor defendants. That decision is left to the legal determination of the
11 Appellate Division, with briefing on the merits provided on that subject by petitioner and by the
12 People.

13 Respondent is instead appearing before this Court specifically because petitioner is seeking
14 an award of costs and fees against respondent court, allegedly deriving from the order made by a
15 judge in petitioner's case. (See, Calif. Rule of Ct., rule 10.202 [trial court claims and litigation
16 management].) As an exercise of individual judicial discretion, the judge's order in petitioner's case
17 is protected by judicial immunity from any assessment of costs as against that judge, and by logical
18 extension, the respondent court as the administrative arm of the trial court, is also protected from any
19 assessment of fees and costs arising from decisions made by the judicial officer in this exercise of
20 judicial discretion.

21 As summarized in *Winikow v. Superior Court* (2000) 82 Cal.App.4th 719:

22 > It is inappropriate to award costs against the trial judge or the Superior
23 > Court, as to do so would chill the judicial process which judicial
24 > immunity was established to protect. As long as a court acts within the
> jurisdiction given to it absolute judicial immunity applies regardless of
25 > whether the court was correct or incorrect in its action, and regardless
> of allegations of motive or intent. See *Frost v. Geernaert* (1988) 200
26 > Cal.App.3d 1104, 1107-1108; *Mireles v. Waco* (1991) 502 U.S. 9 [112
> S. Ct. 286, 116 L.Ed.2nd 9. [¶] While these cases do not deal directly
27 > with costs, our Supreme Court has made it clear that judicial immunity
> applies to any effort to impose monetary consequences upon the
28 > exercise of judicial discretion.

(*Winikow v. Superior Court, supra*, 82 Cal.App.4th 719, 725, citing *Oppenheimer v. Ashburn* (1959) 173 Cal.App. 2nd 624, 634, emphasis added.)

As stated in turn in *Oppenheimer, supra*, "the decisions of this state uniformly and consistently grant immunity to judges in the exercise of their judicial functions. The bedrock of this principle lies in the essential requirement for an independent judiciary in the structure of our government." (*Id.*, at p. 629; see also, *Bradley v. Fisher* (1871) 13 U.S. (Wall) 335, 351; *Turpen v. Booth* (1880) 56 Cal. 65.) After commenting that "[i]ndependence of judgment cannot truly survive the impediment of reward and punishment" (*id.*, at 633), the court reversed the lower court's award of costs. (*Oppenheimer v. Ashburn, supra*, 173 Cal.App.2d at p. 635.)

Readily distinguishable is *Olney v. Municipal Court* (4th Dist., Div. 1, 1982) 133 Cal.App.3d 455 [Opinion by Work, J., with Wiener, Acting P.J., and Reed, J., assigned by the Chairperson of the Judicial Council, concurring], wherein the Municipal Court of El Cajon Judicial District appeared and appealed to defend its blanket policy of requiring misdemeanor defendants to appear at every readiness and sentencing hearing. (*Id.*, at p. 457.) In that case, the court stated it was the uniform policy of the court to require the presence of defendants at sentencing (*Ibid.*) The court specifically found that a blanket, mechanical policy existed. (*Id.*, at p. 462.)

Similarly distinguishable is *Rhyne v. Municipal Court* (4th Dist., Div. 1, 1980) 113 Cal.App.3d 807 [Opinion by Staniforth, J., with Brown (Gerald), P.J., and Work, J., concurring], wherein the Municipal Court itself appealed an order of the trial court granting a writ of mandate commanding the Municipal Court "to furnish a counseling attorney or attorneys to any persons charged with crimes which could result in confinement, prior to and during their appearance in your court." (*Id.*, at p. 812.)

Finally, it is noteworthy that petitioner has failed to substantively address respondent's arguments against attorneys' fees under Code of Civil Procedure section 1021.5. Because she reasonably cannot, petitioner does not dispute respondent's claim that her interests are not *at least* co-equal with the class she has proposed.

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1 3. **DDA Tag's Statement Remains Inadmissible Hearsay.**

2 In its separately-filed objections, the respondent court objected to this Court's consideration
3 of DDA Tag's statement regarding his understanding of Judge Mills' practices. Specifically,
4 respondent argued that the statement was hearsay and lacked foundation. Petitioner asserts that the
5 respondent court has waived any objections to DDA Tag's statement because there was no objection
6 to the statement at the hearing below. (Petitioner's Reply to Respondent's Evidentiary Objections,
7 p. 6, lns. 1-4.) This argument is specious.

8 One of the reasons there was no objection in the trial court is because there was no testimony
9 in the trial court, either by means of a sworn witness or affidavit files under penalty of perjury.
10 Hence, a hearsay objection to DDA Tag's statement would have been nonsensical in the trial court
11 inasmuch as argument is not evidence. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th
12 171, 178, fn. 4; *People v. Breaux* (1991) 1 Cal.4th 281, 313.)

13 It is also the case that the respondent court was not represented in the trial court.
14 Consequently, it would have been impossible for the respondent court to object to the statement,
15 even if it had been inclined to do so.

16 Moreover, the instant petition is the first instance that petitioner has asserted the claim that
17 the North County branch of the respondent court maintains a "blanket policy" that in any way
18 adversely affects misdemeanants. Accordingly, this original proceeding is, in fact, the first
19 opportunity the respondent court has had to object to petitioner's attempt to use DDA Tag's
20 statement, which remains hearsay.

21 Petitioner asserts that the statement was an admission by a party opponent, and is therefore
22 admissible even if it is hearsay. (Petitioner's Reply to Respondent's Evidentiary Objections, p. 6,
23 lns. 1-4.) This argument is also without merit.

24 Evidence Code section 1220 provides that "a statement is not made inadmissible by the
25 hearsay rule when offered *against the declarant* in an action to which he is a party in either his
26 individual or representative capacity, regardless of whether the statement was made in his individual
27 or representative capacity." (*Id.*, emphasis added.) As noted in *People v. Castille* (2003) 108
28 Cal.App.4th 469, Evidence Code section 1220 is subject to at least two "important limitations":

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"[f]irst, the statement must be offered by a party opposing the party declarant. Second, the statement is only admissible against the party who actually made it." (*Id.*, at p. 479.)

The respondent court did not make the statement attributed to DDA Tag, DDA Tag was in no way representing the respondent court at the time he made the statement, and the respondent court has in no way adopted the statement. As such, DDA Tag's statement is not admissible as against the respondent court. (Evid. Code, § 1220; *People v. Castille, supra,* 108 Cal.App.4th at p. 479; *Nishi v. Inoguchi, et al.* (1931) 116 Cal.App. 398, 401 [admissions against one defendant are not admissible to establish liability of other defendant, being hearsay].) Hence, petitioner's argument that DDA Tag's statement should be considered by this Court with respect the claims she makes against the respondent court should be rejected.

Finally, there is a very real question as to whether the statement by DDA Tag is even an "admission" at all. In the context of hearsay, an admission must be made by a party to the action or its authorized representative. (Evid. Code, § 1220, 1222.) Unless an agent's authority is conceded, the hearsay is competent evidence of a party admission only upon proof of the agent's authority to speak for the party on the matter. (Evid. Code, § 1222(b); *Fox v. City & County of San Francisco* (1975) 47 Cal.App.3d 164, 177.) Certainly, with respect to the underlying criminal action, "the People" are in fact a party to the action; however, DDA Tag is not. And while DDA Tag is most certainly the People's advocate, it is unlikely that he has been authorized to hold forth on official positions of the District Attorney's Office for the County of San Diego, and therefore the People, particularly with respect to any practices that sitting judges of the Superior Court may or may not maintain. As such, it is difficult to see how for evidentiary purposes the statement makes it over even the preliminary hurdle of being a declaration by a party to the action.[1]

In any event, as it concerns the respondent court, DDA Tag's statement is hearsay that is not admissible under any exception. Accordingly, it should be excluded.

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[1] Not wishing to belabor the point, unless an agent's authority is conceded, the hearsay is competent evidence of a party admission only upon proof of the agent's authority to speak for the party on the matter. (Evid. Code, § 1222(b); *Fox v. City & County of San Francisco, supra,* 47 Cal.App.3d 164, 177.) Petitioner has not even attempted to establish, as is her burden, that DDA Tag is an authorized representative for the San Diego County District Attorney's Office with respect to its position on Judge Mills' policies.

1 **4. DDA Tag's Statement Lacks Foundation.**

2 Petitioner does not directly address the respondent court's objection to DDA Tag's statement
3 that it lacks foundation and is therefore inadmissible. Petitioner does, however, assert that because
4 DDA Tag is an attorney, he is subject to the ethical requirements incumbent upon all members of the
5 bar in California and, therefore, should be believed.

6 The respondent court does not here suggest that DDA Tag is anything other than a competent
7 and ethical lawyer who dutifully advocates for the People, as he is bound to do; this is not the point
8 of respondent's argument. The respondent court simply asserts that the petitioner, to the extent she
9 wishes to have this court consider the non-expert opinion of DDA Tag, must first lay an evidentiary
10 foundation for that purpose. She has failed to do so. The objection should therefore be sustained.

11 **5. Judge Kirkman's Statement is Hearsay and Lacks Foundation.**

12 Petitioner does not directly respond to the respondent court's objection to Judge Kirkman's
13 statement as hearsay or that it lacks foundation, other than to say that Judge Kirkman has an ethical
14 obligation under the California Code of Judicial Ethics to uphold the integrity and independence of
15 the judiciary and avoid impropriety or the appearance thereof in all of his duties as a judge.

16 Petitioner further contends that Judge Kirkman has a right to comment on matters before
17 him.

18 Certainly, no one—least of all the respondent court—asserts that Judge Kirkman performed
19 his official duties in this matter in anything other than a professional and ethical manner, or that he
20 may not comment on matters before him. For the purposes of the instant petition, however, Judge
21 Kirkman's statement is inadmissible hearsay, for which no exception has been asserted by petitioner.
22 And irrespective of the Code of Judicial Ethics, petitioner has still failed to lay a foundation for the
23 admissibility of Judge Kirkman's statement insofar as she has not identified whether the Judge's
24 statement was based on his own perception, from hearsay statements, or from other sources.

25 Accordingly, Judge Kirkman's statement remains hearsay without an appropriately applied
26 exception, and it lacks foundation. The respondent court requests, therefore, that the Court sustain
27 the objection.

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1 **II. CONCLUSION**

2 Based upon the argument and authorities presented herein, respondent respectfully requests
3 that this Court sustain petitioner's objections and make all other orders it deems appropriate under
4 the circumstances.

5 Respectfully submitted,

6 Dated: January 16, 2007 **FULLER GLASER JENKINS**

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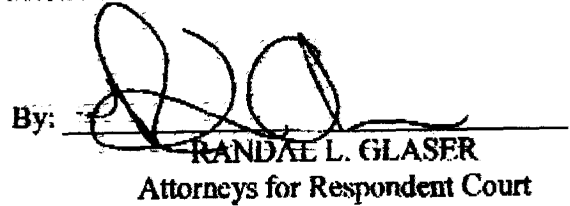

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9 RANDAL L. GLASER
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