No. S180468

SUPREME COURT COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE ENFORCEMENT AGAINST THE POINT ALTERNATIVE CARE OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT,

Petitioner,

vs.

THE POINT ALTERNATIVE CARE, INC.

Respondent

RESPONDENT'S OPENING BRIEF ON THE MERITS

Re: Decision of the Court of Appeal, Fourth Appellate District, Division Four, filed February 11, 2010 (Court of Appeal No. G042893)
Orange County Case No. 30-2009-00298187

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I.

ISSUE PRESENTED

Pursuant to the Court's order dated March 10, 2010, the issue presented in this Opening Brief on the merits will be limited to the issue of whether an order compelling compliance with a legislative subpoena issued under California Government Code §37104 *et seq.* appealable as a final judgment.[1]

II.

INTRODUCTION

The Respondent, THE POINT ALTERNATIVE, INC., A CALIFORNIA NON-PROFIT CORPORATION (hereinafter "The Point") is a California non-profit organization duly organized under the laws of the State of California. The Point was created by its members pursuant to the guidelines set forth by the California Attorney General as a collective for the cultivation and distribution of marijuana for medical purposes.

The Respondent has challenged the Superior Court's orders directing them to comply with subpoenas issued by City pursuant to Government

[1] Government Code §37104 provides as follows:
The legislative body may issue subpenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it.

Code section 37104 et seq.

By way of this Opinion Brief, the Respondent asserts that an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment.

III.

FACTUAL AND PROCEDURAL BACKGROUND

On or about June 29, 2009, the Petitioner caused to be issued a subpoena for the production of Business Records pursuant to California Government Code § 37104. Said subpoena contained a total of 44 production requests. The aforementioned subpoena was served upon the Petitioner on or about July 2, 2009 with a production date of July 27, 2009. The Petitioner was granted an extension until August 10, 2009 to respond. On or about August 10, 2009, the Petitioner provided its responses to the requested documents. These responses included both the appropriate objections, as well as numerous documents which evidenced the Respondent's compliance with the California Attorney General Guidelines relating to the cultivation and distribution of marijuana for medical purposes.

On August 31, 2009, pursuant to California Government Code §§'s 37106 and 37107, the Petitioner filed a Petition seeking an Order to Show Cause Re Contempt for Non-Compliance of a legislative subpoena. In

support of the Order to Show Cause, the Petitioner submitted the "Mayor's Report," which outlined the basis for the issuance of the subpoena and Petition seeking enforcement of the subpoena.

One of the documents which the Respondent objected to, and which was subject to extensive briefing and argument at the trial court level, was the disclosure of private personal information of third parties. The Petitioner alleged that these records were sought to determine that the Respondent was in compliance with the Attorney General Guidelines. The Respondent argued that these were private and privileged records of third party individuals. Further, the Petitioner argued that these private documents had no bearing on the issue at hand.

After contested proceedings during which Respondent opposed the Petitioner's efforts to secure their personal and business information, the court issued its order filed November 2, 2009 ordering that that the Respondent fully comply with the subpoena, including the production of the private information of the third parties.

On November 13, 2009, the Respondent timely filed its Notice of Appeal to the Trial court's order. Further, on December 3, 2009, the trial Court at the request of the Respondent, stayed enforcement of its order during the pendency of the appeal. In issuing the stay, the trial court ruled that its November 2nd order was appealable as a final order in a special

proceeding.

On January 29, 2010, the Court of Appeal for the Fourth District on its own motion, found that the appeal in this case is not from an appealable order and deemed that the Notice of Appeal filed by the Respondent on November 13, 2009, to be a petition for extraordinary writ and further ordered that the Respondent had fifteen days from the date of the order to file a petition for extraordinary writ.

On February 10, 2010, the Respondent filed its Motion to Vacate Order and Reinstate Appeal with the Court of Appeal. On February 11, 2010, the Court of Appeal denied the Respondent's motion, but allowed an extension up to and including March 12, 2010, for the Respondent to file its extraordinary writ.

After seeking its Petition for Review, on March 10, 2010, the California Supreme Court granted review of this matter.

IV.

LEGISLATIVE SUBPOENAS AND ADMINISTRATIVE SUBPOENAS ARE ANALOGOUS

As an introductory matter, the Respondent asserts that legislative Subpoenas (Government Code Section 37104 et seq. are analogous to Administrative Subpoenas (Government Code Section 11180 et. seq.) in that both provide for the issuance of subpoenas by both administrative and

legislative agencies. Further, both statutes call for a process whereby the effected agencies may Petition the Court for compliance with the subpoenas. Finally, both statutes set forth the remedies available (i.e. contempt proceedings) for failure to comply with valid subpoena.

After extensive research, the Respondent has determined that there exists very limited case law related to legislative subpoenas. It appears that this is not a very highly litigated area. However, there is significant case law as it applies to the analogous administrative subpoenas. Therefore, many of the cases cited in this Opening Brief on the Merits refer to administrative subpoenas. However, the Respondent maintains that the issues and rulings found in the line of cases relating to administrative cases (i.e. finality and appealability) are nearly identical to the issues raised in this matter, and should therefore be applied to this proceeding.

V.

CURRENT DECISIONS CONCERNING THE APPEALABILITY OF ADMINISTRATIVE AND LEGISLATIVE SUBPOENAS LACK UNIFORMITY

The Courts of Appeal and the Superior Courts in this state must choose among conflicting authority on the appealability of Superior Court orders enforcing administrative and analogous legislative subpoenas.

Some courts have held such orders are non-appealable and may only be reviewed by writ. See, *Bishop v. Merging Capital, Inc.,* 49 Cal.App.4th

1803, 1806-09, 57 Cal.Rptr.2d 556 (1996). Other courts, however, have found that the "better view" is that such orders are appealable as final judgments in special proceedings. *Millan v. Restaurant Enterprises Group, Inc.*, 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198 (4th Dist. 1993).

The Fourth District has previously stated and found that the "better view" is that such orders are appealable as final judgments in special proceedings. *Millan v. Restaurant Enterprises Group, Inc.*, 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198 (4th Dist. 1993).

> Moreover, the better view is that "orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings. . . Numerous cases, including cases from our Supreme Court, have decided appeals taken from similar orders on the merits without discussion of the appealability issue. Inasmuch as the Supreme Court is among those courts which have assumed the appealability of such orders, we conclude such an order is appealable . . . The issue on this appeal, whether the subpoena meets constitutional standards for enforcement, is a matter of law and is reviewed *de novo*. Millan, supra [internal citations omitted].

The Sixth District Court of Appeal has expressly found that an order to compel compliance with a legislative subpoena pursuant to Government Code §37104 is appealable as a final judgment. *City of Santa Cruz v. Patel*, 155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824 (6th Dist. 2007).

Millan is cited extensively in the *Patel* opinion in support for its ruling and a contrary line of cases from the Second District Court of Appeal was discussed and rejected in favor of the "better view" of the Fourth District Court of Appeal.

VI.

NATURE OF ACTION

This case presents an important question of law that will arise frequently in California's lower courts.

Current decisions lack uniformity as exhibited by the inconsistent opinions issued by the First, Second, Third, Fourth and Sixth District Courts of Appeal regarding appealability of the underlying Superior Court order compelling compliance with a legislative subpoena. Despite the ruling in *Millan,* the Court of Appeal in this instant case has found that the appeal is not from an appealable order.

Because of the Court of Appeal's ruling, the Respondent has been denied their right to appeal the Trial Court's order of November 2, 2009. This right to appeal is critical, because of the potential disclosure of private information that could affect the way these third party individuals are treated. As recognized in *Patel*, an appeal is more likely to result in the issuance of a full opinion, which is not the case with a writ. Accordingly, the issue presented in this Opening Brief raises a clear ambiguity in the law as it relates to the appealability of legislative subpoenas.

VII.

APPEALABILITY

A. Introduction

Government Code section 37104 authorizes the legislative body of a city to issue subpoenas "requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." Further, in instances where a witness refuses to comply with the subpoena, the provisions of Government Code Section 37106, provide that "[t]he judge shall issue an attachment directed to the sheriff of the county where the witness was required to appear, commanding him to attach the person, and forthwith bring him before the judge." "On return of the attachment and production of the witness, the judge has jurisdiction." (Gov Code, § 37108.).

Further, the refusal to comply with a subpoena could subject the witness to contempt proceedings. In that event, the witness has the same rights he or she would have in a civil trial "to purge himself [or herself] of the contempt." (Gov. Code, § 37109.).

The City of Dana Point issued the subpoena subject to this proceeding and obtained enforcement orders pursuant to the aforementioned statutes. The Appellant has maintained that the order issued by the Superior Court in this matter is appealable.

B. Analysis

There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control. (*Trede v.*

Superior Court (1943) 21 Cal.2d 630, 634.). Further, the California Code of Civil Procedure section 904.1 lists the types of rulings that are appealable in this state. A "judgment," other than an interlocutory judgment, is appealable. (Code Civ. Proc., § 904, subd. (a)(1).) Other specified orders are also appealable.

An order compelling compliance with subpoenas issued under Government Code Section 37104 et seq. is not listed as one of them. Further, the statutes dealing with legislative subpoenas do not prohibit appeal. Moreover, the Respondent is not aware of any case specifically considering the appealability of such orders. *City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 748 (*Vacaville*) was an appeal from such an order, but *Vacaville* did not consider appealability, apparently assuming the order was appealable. The cases differ on the question of whether an analogous order compelling compliance with an administrative subpoena (Gov. Code, § 11180 et seq.) is appealable.

In *Millan* the Court primarily relied upon the fact that many cases, including cases from the Supreme Court, had considered appeals from such orders without addressing the appealability issue. (*Ibid.*, citing *Younger v. Jensen* (1980) 26 Cal.3d 397; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669; *Fielder v. Berkeley Properties Co.* (1972) 23 Cal.App.3d 30. See also *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 18.) Of course, a case is not authority for an issue which has not considered. (*People v. Toro* (1989) 47 Cal.3d 966, 978, fn. 7.)

Millan also cited as a basis for its holding *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1140. (*Millan, supra*, 14 Cal.App.4th at p. 485.) *Wood* provides no independent analysis but simply relies upon the

observation in *Franchise Tax Board v. Barnhart* (1980) 105 Cal.App.3d 274, 277, that "[a]n order made under the authority of [Government Code] sections 11186-11188 . . . can be viewed as a final judgment in a special proceeding, appealable unless the statute creating the special proceeding prohibits such appeal."

A line of cases from the Second District Court of Appeal holds that compliance orders made under Government Code sections 11186 through 11188 are not appealable. (*Barnes v. Molino* (1980) 103 Cal.App.3d 46, 51 [order is not a final determination of parties' rights and does not fit description of appealable orders listed in Code Civ. Proc., § 904.1]; *People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 535 [following *Barnes*]; *Bishop v. Merging Capital, Inc.* (1996) 49 Cal.App.4th 1803, 1808-1809 (*Bishop*) [accord].) *Bishop* was of the view that, when a witness is ordered to comply with an administrative subpoena issued under Government Code section 11180 et seq., the witness is not aggrieved until he or she has disobeyed the order and been found in contempt. Prior to that, any ruling the appellate court could make would be purely advisory. "That is to say, if we were to rule in favor of the [respondent], we would simply be advising the appellants that, if the [respondent] pursues contempt proceedings, and the trial court finds [appellants] in contempt, we will uphold that ruling on appeal. Similarly, our decision in favor of appellants would amount to no more than our advice to the [respondent] that contempt proceedings will ultimately prove fruitless." (*Bishop*, *supra*, 49 Cal.App.4th at p. 1808.) The appellate court did not consider the order to be a judgment because, under its analysis, the order was not final.

Further support for the appealability of a legislative subpoena is set forth in the more recent decision by the Third District in the case of *State ex rel. Dept. of Pesticide Regulation v. Pet Food Express Ltd.* (2008) 165 Cal.App.4th 841 [81 Cal.Rptr.3d 486]. In *State ex rel. Dept. of Pesticide Regulation*, the court noted, "Confusion exists regarding appealability of orders enforcing administrative subpoenas." (*Id.*, at p. 849; compare e.g., *Millan v. Rest. Enters. Group, Inc.* (1993) 14 Cal.App 4th 477, [18 Cal.Rptr.2d 198], with *Bishop v. Merging Capital, Inc.* (1996) 49 Cal.App.4th 1803, 1809 [57 Cal.Rptr.2d 556] (*Bishop*) [concluding that orders compelling compliance with administrative subpoenas are not appealable].)

In following *Millan* and implicitly rejecting *Bishop*, the court in *State ex rel. Dept. of Pesticide Regulation* concluded that an order compelling compliance with an administrative subpoena is appealable as a final judgment: "[A] judgment is the 'final determination of the rights of the parties in an action or proceeding.' The statutory scheme provides for an original proceeding in the superior court, which results in an order directing the respondent to comply with the administrative subpoena.

C. A Final Judgment in Special Proceeding is Deemed Appealable

Courts have held that the general appeal provisions of the Code of Civil Procedure governed all special proceedings, even those intended to be summary in nature, unless the Legislature had specifically prohibited appeal in the statute creating the particular special proceeding. It is still clear today that unless the statute creating the special proceeding prohibits appeal, there is an appeal from a final judgment entered in a special proceeding. *People v.*

Bank of San Luis Obispo (1907) 152 Cal. 261, *In re De La O* (1963) 59 Cal. 2d. 128, 156, 28 Cal. Rptr. 489. It is also clear that *Millan*, supra, considers litigation arising from a challenged administrative subpoena to be a special proceeding.

The Respondent therefore maintains that the November 2nd order in this proceeding, was a final order arising from a special proceeding dealing with a legislative subpoena where appealability is not prohibited.

D. The Trial Court's November 2nd Order was a Final Determination of the Parties' Rights

The Respondent asserts that the "better view" is that the November 2nd Order is appealable as final judgment. A judgment is the "final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) The statutory scheme at hand provides for an original proceeding in the superior court, initiated by the mayor's report to the judge, which resulted in an order directing the respondent to comply with a city's subpoena. Indeed, the compliance order is tantamount to a superior court judgment in mandamus, which, with limited statutory exceptions, is appealable. (*Id.*, § 904.1, subd. (a); *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 702.)

The fact that a witness may or may not be subject to a contempt order does not mean that the order compelling compliance is not final. The normal rule is that "injunctions and final judgments which form the basis for contempt sanctions are appealable. . . . The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. This fact does not render such an

order 'nonfinal,' and thus nonappealable." (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.*, *supra*, 43 Cal.3d at p. 704.) Indeed, the contempt judgment is not appealable. (Code Civ. Proc., § 904.1, subd. (a)(1).) It must be reviewed, if at all, by writ. (*Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 522.)

Here, the superior court's order determined all of the parties' rights and liabilities at issue in the proceedings; the only determination left was the question of future compliance, which is present in every judgment. (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1985) 192 Cal.App.3d 1530, 1537.).

Whether the matter is properly characterized as an "action" (Code Civ. Proc., § 22) or a "special proceeding" (*id.*, § 23), it is a final determination of the rights of the parties. It is final because it leaves nothing for further determination between the parties except the fact of compliance or noncompliance with its terms. (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.*, *supra*, 43 Cal.3d at p. 703.).

E. Discussion

The Respondent insists that the key issue dealt with by the line of cases cited in this Opening Brief on the Merits relating to the issue of appealability, and which must be decided here, is whether the trial court's order is final leaving no further action necessary to achieve the purpose of litigation. "[W]here no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the

decree is interlocutory." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal. 4th 688, 107 Cal. Rptr. 2d 149.

The order in this matter was a result of the Order to Show Cause filed by the Petitioner seeking compliance with the legislative subpoena. Further, the Court's November 2nd Order granted the exact relief sought by the Petitioner (i.e. compliance with the subpoena). Once the November 2nd order was made by the Court, the matter was completed. Thus, the rights of the parties placed at issue by the Petitioner's petition were completely adjudicated. Whether the Respondent complies with the order or not, is completely separate and apart as to whether the November 2nd Order was final. Clearly, the Order had to be final, because it left nothing left for the Court to decide. The Respondent argues that compliance or non-compliance with the order is a separate issue.

Accordingly, the Respondent maintains that the Trial Court's Order enforcing the legislative subpoena is tantamount to a superior court judgment in mandamus which, with limited exceptions, is appealable under Code of Civil Procedure § 904.1. Whether the matter is properly characterized as an 'action' or a 'special proceeding', it is a final determination of the parties' rights, because it leaves nothing for further judicial determination between the parties except the fact of compliance or noncompliance with its terms.

Although the Respondent may be subject to a future contempt order does not mean the Court order is not final, because the same possibility exists with injunctions and final judgments which form the basis for contempt citations.

The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. This fact does not render such an order 'nonfinal.' Indeed, the contempt judgment is not appealable but must be reviewed, if at all, by writ, and therefore review of the underlying order can reliably be had only if that order is appealable. [Citation.]" (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 851.).

The *State ex rel. Dept. of Pesticide Regulation* court rejected the argument that an order compelling compliance with an administrative subpoena is akin to a nonappealable discovery order: "We . . . reject the Department's . . . argument that we should analogize to discovery orders in civil litigation, which are not considered final, appealable orders. Such discovery orders, however, are made in connection with pending lawsuits which have yet to be resolved. A discovery order does not determine all of the parties' rights and liabilities at issue in the litigation. The Department argues the same applies here, because even with the documents, the Department cannot impose administrative penalties unless an administrative hearing is held if such a hearing is requested. However, it is possible an administrative hearing may not be requested and, even if it is requested, it will not necessarily end up in court. [Fn. omitted.] In contrast to this case, pending civil litigation in which a discovery order occurs already involves

the court and will continue to do so." (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.).

The holding in *State ex rel. Dept. of Pesticide Regulation, supra,* has also been cited and followed in the more recent case of *The People ex rel. Preston DuFauchard v. U.S. Financial Management,* (2009) 169 Cal.App.4th 1502, which sets forth:

> "We agree with the court's analysis in *State ex rel. Dept. of Pesticide Regulation.* In this case, the trial court's order compelling compliance with the Commissioner's administrative subpoena constituted a final determination of the parties' rights, notwithstanding the possibility that further proceedings might be required to gain U.S. Financial Management's compliance with that order. (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.) As such, the order constitutes an appealable final judgment pursuant to Code of Civil Procedure § 904.1, subdivision (a)(1). (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 849.)."

The Respondent concludes that the order herein must be deemed final judgment and is, therefore, appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1).

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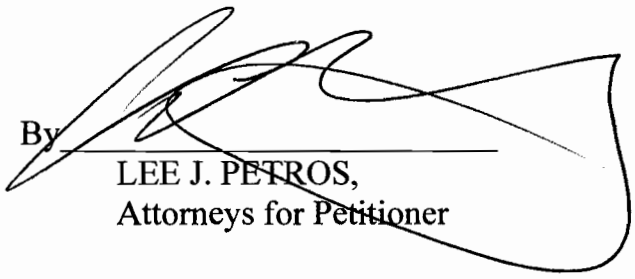
VIII.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this Court determine that an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq*. is appealable as a final judgment in a special proceeding.

DATED: April 7, 2010

Respectfully submitted,



By _____
LEE J. PETROS,
Attorneys for Petitioner

IX.

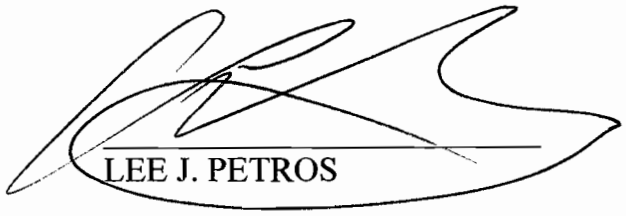
CERTIFICATE OF COMPLAINCE

California Rules of Court, Rule 8.204

The foregoing brief is proportionately spaced, using 13-point Time New Roman Regular. The Word count of 4103 is based on information provided by Microsoft Word processing program and therefore does not exceed the limits provided by Rule 8.204, California Rules of Court.

I certify that the foregoing is true and correct.

Executed this 7th day of April, 2010, at Santa Ana, California.



LEE J. PETROS

PROOF OF SERVICE

I, RAJASHREE DAYANAND, am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 1851 East First Street, Ste. 857, Santa Ana, CA 92705.

On April 8, 2010, I served the foregoing RESPONDENT'S OPENING BRIEF by placing a true copy thereof enclosed in a sealed envelope, as follows:

Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Clerk of the Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Rutan & Tucker
A. Patrick Munoz
Noam I. Duzman
Jennifer J. Farrell
611 Anton Blvd.,
14th Floor
Costa Mesa, CA 92626

I caused such envelopes to be deposited in the mail at Santa Ana, California or placed for collection and mailing on the date and at the place shown above following our ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of

deposit for mailing affidavit. The envelopes were mailed with postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of April, 2010, at Santa Ana, California.

RAJASHREE DAYANAND