Case No. S180560

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HOLISTIC HEALTH, INC.,
a California non-profit corporation,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF ORANGE
Respondent,

CITY OF DANA POINT,
Real Party in Interest.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G043883

Appeal from the Superior Court of the State of California,
County of Orange
Case No. 30-2009-00298196
Honorable Glenda Sanders, Judge

ANSWER TO PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Real Party in Interest City of Dana Point ("City") hereby submits this Answer to Petitioner and Appellant Holistic Health's ("Petitioner") Petition for Review ("Petition").

I. INTRODUCTION.

The order of the Court of Appeal for the Fourth District, Division Three ("Court of Appeal" or "Appellate Court") in this case does not present a proper circumstance for review by the Supreme Court. In its unpublished and non-precedential order, the Court of Appeal deemed Petitioner's notice of appeal to be a petition for extraordinary writ and ordered Petitioner to file its extraordinary writ within fifteen (15) days ("Order"). The Court's Order was based on well-established law, does not present an important issue of law, and does not create any conflict amongst published appellate court decisions. For all of these reasons, review of this matter should be denied.

II. BACKGROUND AND PROCEDURAL HISTORY.

The instant Petition stems from a trial court order enforcing a subpoena issued by the City's City Council ("Council" or "City Council") pursuant to Government Code section 37104 ("Section 37104").[1] The

[1] The Government Code authorizes cities to issue subpoenas in connection with matters within their jurisdiction that their city councils

subpoena sought various business and other records in connection with the Council's investigation into the operations of existing businesses known as "medical marijuana dispensaries" and stems from the City Council's intention to hold a public hearing upon completion of its investigation to contemplate whether to exercise its jurisdiction so as to amend its zoning code to permit this proposed land use.

When Petitioner refused to comply with the subpoena, the City filed the appropriate papers seeking the superior court's assistance in enforcing the subpoena. The trial court issued an order on November 2, 2009 directing Petitioner to produce all the documents requested in the City's subpoena. On the same day, the court also entered a protective order limiting the City's disclosure and use of any members' names contained within the documents produced by Petitioner. Instead of complying with the court's order, Petitioner filed an appeal.

On December 22, 2009, the Court of Appeal issued an order inviting both the City and another dispensary in a related but separate case, Dana Point Beach Collective (Court of Appeal Case No. G042889) to file letter briefs addressing whether the dispensary appealed from an appealable

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decide to investigate. (Gov. Code §§ 37104-37109.) Cities, however, do not have the authority to enforce a subpoena if the party to whom it is issued fails to comply; instead, the city must report the failure to the court and ask the court to enforce the subpoena. (Gov. Code § 37106.) The court is authorized to order that the subpoena be enforced and may use its powers of contempt to ensure enforcement occurs in the same manner it may enforce a subpoena in a civil trial. (Gov. Code § 37109.)

order. The City filed a letter brief, although inexplicably, and despite requesting and receiving several extensions of time, Dana Point Beach Collective, never filed such a brief.

On January 26, 2010, Petitioner filed a motion to consolidate the five related cases on appeal. The City opposed this motion because, amongst other reasons, each dispensary raised different objections to the subpoena at the trial court level.

On January 29, 2010, the Court of Appeal issued the Order that is the subject of the instant Petition. In its Order, the Court of Appeal deemed Petitioner's notice of appeal to be a petition for extraordinary writ and ordered Petitioner to file its extraordinary writ within fifteen (15) days.[2] On the same day, the Court also denied Petitioner's motion for consolidation. Petitioner subsequently filed a motion to reinstate the appeal which was denied, and ultimately filed this Petition for Review.

III. NONE OF THE STATUTORY GROUNDS FOR SUPREME COURT REVIEW EXIST IN THIS CASE.

Review of this case should be denied for the sole reason that the Order does not present an important issue of law and does not create any conflict amongst appellate court decisions. (See Cal. Rules of Court,

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[2] Instead of filing a writ on or before the court's February 16, 2010 deadline, Petitioner requested an extension of time, which was granted by the Appellate Court. Petitioner's writ is now due on or before March 12, 2010.

rule 8.500 (b) [stating that the primary reasons for granting review by the Supreme Court are "to secure uniformity of decision or to settle an important question of law"].) The Court's Order is not novel, and involves nothing more than the application of the relevant legal authority and public policy to determine the appealability of a specific order or judgment. Indeed because the Order is unpublished, it cannot even be cited as precedent (Cal. Rules of Court, rule 8.1115). Hence, it does not have any concrete impact on the future development of the law of the State, and certainly cannot be cited as a basis for lack of uniformity of the law.

A. The Court of Appeal's Order Was Based on Well-Established Law.

1. The Law is Clear That an Order or Judgment is Not Appealable Unless Expressly Authorized By Statute.

Subject to certain narrow constitutional limitations, there is no right to appeal. (*Lindsey v. Normet* (1972) 405 U.S. 56, 77; *Trede v. Superior Court* (1943) 21 Cal.2d 630, 634.) This Supreme Court has repeatedly held that the right to appeal is ***wholly statutory***. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 34-35 ["a judgment or order is not appealable unless expressly made so by statute"]; *Skaff v. Small Claims Court* (1968) 68 Cal.2d 76, 78 ["a party possesses no right of appeal except as provided by statute"]; *People v. Keener* (1961) 55 Cal.2d 714, 720, disapproved on

another point in *People v. Butler* (1966) 64 Cal.2d 842, 844 ["an order is not appealable unless declared to be so by the Constitution or by statute"]; *People v. Valenti* (1957) 49 Cal.2d 199, 204, disapproved on another point in *People v. Sidener* (1962) 58 Cal.2d 645, 647 ["the right of appeal is statutory and a judgment . . . is not appealable unless it is expressly made so by statute"]; *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 728 ["the Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable"]; *Trede v. Superior Court, supra,* 21 Cal.2d at p. 634 [there being no constitutional right of appeal, "the appellate procedure is entirely statutory and subject to complete legislative control"]; *Superior Wheeler C. Corp. v. Superior Court* (1928) 203 Cal. 384, 386 ["right of appeal is statutory and may be granted or withheld"].)

California Code of Civil Procedure section 904.1 ("Section 904.1"), subdivision (a), states that an appeal may be taken from the following:

> (1) From a judgment,[3] except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9) and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222.
>
> (2) From an order made after a judgment made appealable by paragraph (1).
>
> (3) From an order granting a motion to quash service of summons or granting a motion to stay the action on the

[3] Code of Civil Procedure section 577 defines judgment as ". . . the final determination of the rights of the parties in an action or proceeding."

ground of inconvenient forum, or from a written order of dismissal under Section 581d following an order granting a motion to dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(7) From an order appointing a receiver.

(8) From an interlocutory judgment, order or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(10) From an order made appealable by the provisions of the Probate Code or the Family Code.

(11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds Five Thousand Dollars ($5,000).

(12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds Five Thousand Dollars ($5,000).

(13) From an order granting or denying a special motion to strike under Section 425.16.

It is undisputed that an order made enforcing a subpoena issued pursuant to Section 37104 is ***not one of the orders expressly listed*** as appealable in Code of Civil Procedure section 904.1. It is much less clear,

however, whether such orders qualify as appealable "final judgments" pursuant to Section 904.1(a)(1).

Under the "one final judgment rule" (as codified in Code of Civil Procedure section 904.1(a)(1)), an appeal may be taken only from a final judgment that terminates the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697.) Under California law, there is ordinarily only one "final judgment" in an action. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.) The California Supreme Court has adopted a general test to determine whether a particular decree is interlocutory or final:

> [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. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 669-70.)

This Supreme Court has explained the "sound reasons" behind the one final judgment rule:

> "[P]iecemeal disposition and multiple appeals tend to be oppressive and costly. . . . Interlocutory appeals burden the courts and impede the judicial process in a number of ways: (1) They tend to clog the appellate courts with a multiplicity of appeals. . . . (2) Early resort to the appellate courts tends to produce uncertainty and delay in the trial court. . . . (3) Until a final judgment is rendered, the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken. . . . (4) Later

> actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless. (5) Having the benefit of a complete adjudication . . . will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, fn. 9.)

Appellate courts in this State have reached different conclusions as to whether analogous orders compelling compliance with administrative subpoenas issued pursuant to Government Code section 11180 *et seq.* qualify as final judgments. For instance, in *Bishop v. Merging Capital, Inc.*, the Court of Appeal for the Second District, Division Five addressed whether an order enforcing a subpoena issued by the California Department of Corporations pursuant to Government Code section 11180 *et seq.* was appealable. ((1996) 49 Cal.App.4th 1803, 1805.) The court ultimately concluded that such orders were ***not appealable*** because the witness is not actually aggrieved (and thus a judgment is not final) until the witness disobeys the court order and is found in contempt. (*Id.* at 1808-1809 ["In sum, if, and when, appellants' refusal to comply with the trial court's order results in an adverse consequence to them, they may seek the intervention of the appellate court, by appeal or by writ, as may be appropriate under the circumstances. Until that time, they have no cause to complain."]; see also *Barnes v. Molino* (2nd Dist. 1980) 103 Cal.App.3d 46, 51 ["An order made under section 11188 is not one of the orders listed as appealable in Code of

Civil Procedure section 904.1. It is not a judgment within the definition of Code of Civil Procedure section 577. . . The order does not fit the description of any of the other matters listed in . . . section 904.1."]; *People ex rel. Franchise Tax Board v. Superior Court* (2nd Dist. 1985) 164 Cal.App.3d 526, 535 [dismissing appeal of order to enforce compliance with subpoena because proper procedure required petitioners to file a writ of mandate].)

In contrast, in *Millan v. Restaurant Enterprises Group, Inc.,* the Court of Appeal held that an order enforcing a subpoena issued by the Division of Labor Standards Enforcement pursuant to Government Code section 11180 *et seq.* was appealable as a final judgment in a special proceeding. ((4th Dist. 1993) 14 Cal.App.4th 477, 484-485.) In so holding, the court relied primarily, if not solely, upon the fact that California courts had regularly considered appeals from such orders without addressing the appealability issue. (*Id.* at 485; see also *Franchise Tax Board v. Barnhart* (1st Dist. 1980) 105 Cal.App.3d 274, 277 ["An order made under the authority of sections 11186-11188 . . . can be viewed as a final judgment in special proceeding, appealable unless the statute creating the proceeding prohibits such appeal."]; see also *State ex rel. Dept. of Pesticide Regulation v. Pet Food Express Limited* (2008) 165 Cal.App.4th 841; *People ex rel. Preston DuFauchard v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502.)

To date, only one published case from the Sixth District Court of Appeal has addressed whether orders enforcing subpoenas issued pursuant to Section 37104 are appealable. (*City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234 ("*Patel*").) No other appellate district has directly addressed this issue in any published opinion.

In *Patel*, the Sixth District held that an order directing several hotel operators to comply with subpoenas issued by the city pursuant to Section 37104 was appealable as a final judgment. (*Id.* at 239.) In so holding, the Sixth District acknowledged the split of authority regarding the appealability of administrative subpoenas, and ultimately concluded that because the order left nothing for further determination between the parties except the fact of compliance or non-compliance with its terms, "the better view" of the two approaches is that orders requiring compliance with subpoenas issued pursuant to Section 37104 are appealable as final judgments. (*Id.* at 241-242.)

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2. Because the Appeal was Not Expressly Authorized By Statute, and for Various Public Policy Reasons, the Appellate Court Correctly Declined to Follow *Patel.*

It is well-established that decisions of this Supreme Court are binding and must be followed by trial courts and courts of appeal. (*Orange County Water District v. Riverside* (1959) 173 Cal.App.2d 137, 165 ["It is not for us to inquire what the law ought to be when the Supreme Court has emphatically informed us what the law is. Counsel's suggestion, therefore, cannot be addressed with propriety to any court subordinate to the Supreme Court."]; *Beckman v. Mayhew* (1975) 49 Cal.App.3d 529, 535 ["We are not permitted to violate stare decisis for the sake of straws in the wind. Our duty as an intermediate appellate court is to follow the decisional law laid down by the State Supreme Court."].)

It is equally established that a court of appeal in one district or division may (and in this case should) decline to follow another district's or division's decision, particularly when that decision conflicts with or is otherwise irreconcilable with Supreme Court precedent. (See *Gaalen v. Superior Court of Merced County* (1978) 80 Cal.App.3d 371, 376-379 [court refused to follow court of appeal decision even though it was factually indistinguishable from the case at hand because it was irreconcilable with Supreme Court precedent]; *Beckman, supra,* 49 Cal.App.3d at 535 [court refused to follow court of appeal decisions that

conflicted with prior Supreme Court decision]; *In re Marriage of Hayden* (1981) 124 Cal.App.3d 72, 77, fn. 1 [noting the "merit in not forcing the various districts within the Court of Appeal to blindly apply stare decisis to the holding first published."].)

The City agrees with the wise counsel set forth in *Marriage of Hayden*. The Court of Appeal did not and should not have blindly applied the concept of *stare decisis* to the instant case by following the *Patel* decision. This is particularly so in light of the fact that *Patel* overlooked many of the key legal and public policy principles implicated by its holding. For instance, although *Patel* correctly recited the applicable legal principles, the court incorrectly concluded that the appeal of an order enforcing a subpoena issued pursuant to Section 37104 is authorized by statute. (*Supra,* 155 Cal.App.4th at 240-243.) Such orders, however, are ***not*** expressly designated as appealable pursuant to Section 904.1 and, even as the *Patel* court itself recognized, are likely to be followed by subsequent contempt proceedings, and therefore cannot possibly constitute "final judgments." (See, e.g., *Barnes v. Molino* (1980) 103 Cal.App.3d 46, 51 ["An order made under section 11188 is not one of the orders listed as appealable in Code of Civil Procedure section 904.1. It is not a judgment within the definition of Code of Civil Procedure section 577. . . . The order does not fit the description of any of the other matters listed in . . . section 904.1."].) Because of these oversights, the court's decision in *Patel*

is irreconcilable with Supreme Court precedent establishing that ***a judgment or order is not appealable unless expressly made so by statute*** and therefore was not and should not have been followed by the Appellate Court. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 34-35 ["a judgment or order is not appealable unless expressly made so by statute"]; *Skaff v. Small Claims Court* (1968) 68 Cal.2d 76, 78 ["a party possesses no right of appeal except as provided by statute"]; *People v. Keener* (1961) 55 Cal.2d 714, 720, disapproved on another point in *People v. Butler* (1966) 64 Cal.2d 842, 844 ["an order is not appealable unless declared to be so by the Constitution or by statute"]; *People v. Valenti* (1957) 49 Cal.2d 199, 204, disapproved on another point in *People v. Sidener* (1962) 58 Cal.2d 645, 647 ["the right of appeal is statutory and a judgment . . . is not appealable unless it is expressly made so by statute"]; *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 728 ["the Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable"]; *Trede v. Superior Court, supra,* 21 Cal.2d at p. 634 [there being no constitutional right of appeal, "the appellate procedure is entirely statutory and subject to complete legislative control"]; *Superior Wheeler C. Corp. v. Superior Court* (1928) 203 Cal. 384, 386 ["right of appeal is statutory and may be granted or withheld"].)

In addition, the Court of Appeal likely recognized that *Patel* failed to

take into account the adverse public policy implications of its decision. For instance, the interests of judicial economy and efficiency are clearly hampered by permitting individuals to seek the intervention of the appellate court before they suffer harm (in the form of an unfavorable contempt proceeding). (See, e.g., *Bishop v. Merging Capitol, Inc., supra,* 49 Cal.App.4th at 1808-1809.) If, as *Patel* holds, individuals were permitted to appeal both the court order enforcing the subpoena and subsequently appeal or writ the decision of a related contempt proceeding, appellate courts would be clogged with costly, duplicative appeals. (See, e.g., *Morehart, supra,* 7 Cal.4th at 741, fn.9.)

Moreover, if a trial court's order enforcing compliance with city council subpoenas could be appealed, any investigation could be endlessly delayed by strategic litigation intended to delay and protract the investigatory functions of the legislative branch. The result would be that, in many cases, the subject of the investigation (whether a hotel operator or a medical marijuana dispensary) could effectively control the scope and pace of the legislative investigation by challenging each subpoena, and then appealing every related judgment or order. Neither law, nor equity, nor sound public policy (as determined by the Legislature in crafting Section 37104) supports such a result.

The instant case demonstrates the abuse that may occur if *Patel* is followed. It is illegal as a violation of the City's zoning to operate a

medical marijuana dispensary in Dana Point. Yet, the City chose to evaluate the issue before taking legal action against the existing operators, and has been attempting to address zoning issues related to dispensaries since issuing its subpoena in July. After several months of legal proceedings, an order that documents be produced was finally secured on November 2, 2009. Petitioner subsequently appealed, and on December 3, 2009, the trial court stayed its order pending the appeal. If Petitioner is allowed to proceed with its appeal, it is not unrealistic to think that as much as a year may pass before the Court of Appeal decides the issue, during which time Petitioner will presumably continue to illegally operate. Upon the conclusion of the instant appeal (perhaps a year or more from now), and assuming no more additional time-consuming appeals to the California Supreme Court, if the City prevails, a contempt order is likely to follow. Petitioner could then file a writ challenging that order and delay a final decision yet another year or more. All the while, absent some additional legal action by the City, Petitioner may continue to illegally operate a dispensary in the City.

B. The Court of Appeal's Unpublished Order has No Impact on the Development of the Law.

Petitioner contends that review is necessary to "secure uniformity of decision [and] settle an important question of law." (Petition, p. 7; Cal. Rules of Court, R. 8.500(b)(1).) Petitioner is wrong. While, as discussed

in detail above, there is some inconsistency in the case law, this Order did not create that inconsistency and it has done nothing to expand, contradict, or narrow the existing appellate opinions.

Moreover, because the Order is unpublished it cannot be cited or relied upon by any court or any party in any future proceeding. (Cal. Rules of Court, rule 8.1115, subd. (a) [Unpublished appellate opinions cannot, except under certain limited circumstances, be cited or relied upon by a court or other party in any other action]; *In re Sena* (2001) 94 Cal.App.4th 836, 838-839 ["The nonpublished orders are not binding precedents and the . . . Court should not have 'relied' upon them."].) Stated another way, this Order cannot, and will not, have any concrete impact on the future development of the law of the State, as such, review is simply not necessary.

IV. CONCLUSION.

Contrary to Petitioner's assertions, this is a completely unremarkable order that does not present a proper circumstance for review by the Supreme Court. The Order was based on well-established law, does not present an important issue of law, and does not create any conflict amongst appellate court decisions.

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For all of these reasons, review of this matter should be denied.

Dated: March 5, 2010

RUTAN & TUCKER, LLP
A. PATRICK MUNOZ
JENNIFER FARRELL

By: _____
Jennifer Farrell
Attorneys for Plaintiff and Respondent
CITY OF DANA POINT

CERTIFICATION OF WORD COUNT

Pursuant to and in compliance with Rules 8.204(c) and Rule 8.268(b)(3) of the California Rules of Court, I hereby certify under penalty of perjury under the laws of California that the word count of this brief, including footnotes but excluding the Table of Contents and Table of Authorities, is 3,928 words. This count was made using the word count feature of Microsoft Word 2007.

Dated: March 5, 2010

RUTAN & TUCKER, LLP
A. PATRICK MUNOZ
JENNIFER FARRELL

By: _____
Jennifer Farrell
Attorneys for Plaintiff and Respondent
CITY OF DANA POINT

PROOF OF SERVICE BY MAIL

Re: Case No.: S180560
Holistic Health, Inc. v. Superior Court of the State of California
and
City of Dana Point, Real Party in Interest

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party to the above-entitled action. I am employed in the County of Orange and my business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On March 5, 2010, I served the attached document described as an **ANSWER TO PETITION FOR REVIEW** on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Costa Mesa, California addressed as follows:

Supreme Court of California
Office of the Clerk
350 McAllister Street
San Francisco, CA 94102

(O + 13 copies)

(FAX & MAIL)

FAX (415) 865-7183
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I, Connie B. Reinglass, declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 2010, at Costa Mesa, California.

Connie B. Reinglass
(Type or print name)

Connie B. Reinglass
(Signature)