

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By RICKY R. SANCHEZ, Senior Deputy (SBN 107559)
MELISSA M. HOLMES, Senior Deputy (SBN 220961)
3 FERNANDO KISH, Senior Deputy (SBN 236961)
1600 Pacific Highway, Room 355
4 San Diego, California 92101-2469
Telephone: (619) 531- 4874
5 E-mail: ricky.sanchez@sdcounty.ca.gov

6 Attorneys for Defendant County of San Diego

7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
9

11 CHASSIDY NeSMITH, individually and as
Guardian ad Litem on behalf of SKYLER
12 KRISTOPHER SCOTT NeSMITH, and as
Successor in Interest to THE ESTATE OF
13 KRISTOPHER SCOTT NeSMITH,

14 Plaintiffs,

15 v.

16 COUNTY OF SAN DIEGO, SAN DIEGO
COUNTY SHERIFF'S DEPARTMENT;
17 WILLIAM D. GORE, SAN DIEGO
COUNTY SHERIFF; VISTA DETENTION
18 FACILITY; and DOES 1 – 100 inclusive,

19 Defendants.

No. 15cv0629-JLS (AGS)

NOTICE OF MOTION AND MOTION
TO COMPEL THIRD PARTY WITNESS
KELLY DAVIS TO APPEAR FOR
DEPOSITION AND PRODUCE THE
REQUESTED DOCUMENTS
COMPLIANCE WITH SUBPOENAS

Date: February 2, 2018

Time: 4:00 p.m.

Courtroom: Suite 5160

Hon. Andrew G. Schopler, U.S. Magistrate
Judge

NO ORAL ARGUMENT UNLESS
REQUESTED BY COURT

21 TO PLAINTIFFS AND KELLY DAVIS, AND THEIR ATTORNEYS OF
22 RECORD:

23 PLEASE TAKE NOTICE that on February 2, 2018, at 4:00 p.m., or as soon
24 thereafter as the matter may be heard, in Suite 5160 of the above Court, located at 221 W.
25 Broadway, San Diego, CA 92101, Defendant, the County of San Diego, will move the
26 Court for an order compelling third – party witness Kelly Davis to appear for deposition
27 and produce documents pursuant to subpoena.

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1 This motion will be based on this Notice, the accompanying Memorandum of Points and
2 Authorities, and Notice of Lodgment, as well as all pleadings and papers on file in this
3 action.

4 DATED: January 3, 2018

THOMAS E. MONTGOMERY, County Counsel

5 By: s/MELISSA M. HOLMES, Senior Deputy
6 Attorneys for Defendant County of San Diego
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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
10

11 CHASSIDY NeSMITH, individually and as) No. Case No. 15-cv-0629-JLS (AGS)
Guardian ad Litem on behalf of SKYLER)
12 KRISTOPHER SCOTT NeSMITH, and as) MEMORANDUM OF POINTS AND
Successor in Interest to THE ESTATE OF) AUTHORITIES IN SUPPORT OF
13 KRISTOPHER SCOTT NeSMITH,) MOTION TO COMPEL THIRD-
Plaintiffs,) PARTY WITNESS KELLY DAVIS TO
14 v.) APPEAR FOR DEPOSITION AND
15) PRODUCE DOCUMENTS IN
COUNTY OF SAN DIEGO, SAN DIEGO) COMPLIANCE WITH SUBPOENA
16 COUNTY SHERIFF'S DEPARTMENT;)
WILLIAM D. GORE, SAN DIEGO)
17 COUNTY SHERIFF; VISTA DETENTION)
18 FACILITY; and DOES 1 – 100 inclusive,)
Defendants.)
19)
20)
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Magistrate Judge
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21 **FACTUAL AND PROCEDURAL HISTORY**
22

23 On February 9, 2016, Chassidy NeSmith, individually and as *Guardian ad Litem*
24 on behalf of Skyler Kristopher Scott NeSmith (Plaintiffs) filed their Second Amended
25 Complaint against Defendant, County of San Diego (Defendant or County), alleging
26 claims for municipal civil rights (*Canton*) and wrongful death in connection with
27 Decedent, Kristopher NeSmith's March 1, 2014 suicide in a County jail. [Doc. No 19.]
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1 At the time of his suicide, Decedent was facing a potential life sentence for
2 domestic violence, mayhem, resisting arrest, and attempted murder. [Doc. No. 19 at
3 12:13-14, 12: 16-17.] Plaintiffs’ Second Amended Complaint alleges that the County
4 should have been on notice of “inadequate suicide prevention policies and training
5 programs” because there was a “pattern of similar constitutional violations.” [Doc. No.
6 19 at 22:22-24.] Plaintiffs allege that Decedent’s suicide was part of a larger “pattern,”
7 and in doing so incorporate and rely on the “research” of Kelly Davis (Davis) and her
8 articles for a local free paper throughout the Second Amended Complaint. [*See generally*
9 Doc. No 19 and at 23:7-27; 24:1-28; 25:1-2; 9-28; 26:1-4; 28:18-25; 29: 2-24; 30: 3-8;
10 12-27; 31: 9-13; 34: 22-28; 35: 1-28; 36:1-22; 37:1-23.] Plaintiffs describe Davis as a
11 “[l]ocal reporter who has dedicated her career to reporting and investigating deaths in the
12 San Diego County jail... .” [Doc. No. 19 at 22:25-26.] Davis’ articles are also attached
13 as Exhibits 3, 4, 5, 6, and 7 to the Second Amended Complaint. [Doc. No. 19 -1 at pp.
14 10, 18, 20, 23, & 27.] When ruling on the Motion to Dismiss the Second Amended
15 Complaint, the Court found that Davis’ articles along with other materials “could
16 plausibly haven given the County notice” to support a municipal civil rights claims.
17 [Doc. No. 25 Order on Motion to Compel 12:3 – 17.] Thus, it is necessary for the County
18 to conduct discovery regarding the basis and accuracy of Davis’ research and
19 publications relied on in the Second Amended Complaint.

20 Pursuant to Federal Rule of Civil Procedure 45, on November 15, 2017, Defendant
21 served Davis with both a subpoena for testimony at deposition and a subpoena for
22 testimony at deposition and demand for documents. [Exs. A & B attached to the Notice
23 of Lodgment (NOL) filed herewith.] The deposition was noticed for December 11,
24 2017. [Ex. A to NOL.]

25 On December 4, 2017, counsel for Davis called defense counsel to discuss the
26 scope of the subpoena. The same day, counsel for Davis served objections to the
27 subpoenas along with correspondence setting forth, in more detail, Davis’ objections to
28 the subpoenas based on California state law and the First Amendment. [Exs. C & D to

1 NOL.] Davis also objected alleging undue burden based on Davis' health. [*Id.*] In the
2 letter accompanying the objection, counsel for Davis stated that Davis would not honor
3 the subpoena absent a motion to compel. [Ex. C to NOL at p. 7.]

4 On December 6, 2017, defense counsel wrote Davis' counsel requesting to meet
5 and confer pursuant to Local Rule 26.1(a). [Ex. E to NOL.] On December 12, 2017,
6 counsel for Davis and defense counsel met and conferred in an attempt to avoid Court
7 intervention. They discussed the possibility of a stipulation that counsel for Davis would
8 present to Plaintiffs' counsel to potentially resolve the issue. [Ex. F & G to NOL.]

9 Defendant proposed the following stipulation:

10
11 1. The reporter Kelly Davis will be precluded from providing testimony (written or
12 oral) in the above captioned matter;

13 2. Any publications (including but not limited to newspaper and online articles,
14 op/eds, tweets, blog posts, interviews or statements) by Kelly Davis or co-written
15 by Kelly Davis, or other publications that reference or relate to Kelly Davis'
16 publications regarding suicide, mortality, or death rates in the County of San Diego
17 jails shall not be admitted as evidence or referred to for any purpose in this action;
18 and

19 3. Any research, notes, opinions, charts, or conclusions Kelly Davis made or has
20 regarding suicide, mortality or death rates in the County of San Diego jails (or
21 other publications or reports referencing Kelly Davis' research, notes, opinions,
22 charts, or conclusions) shall not be admitted as evidence or referred to for any
23 purpose in this action. [Ex. F.]

24 On December 19, 2017, Davis' counsel responded stating Plaintiffs were unwilling
25 to sign the stipulation and proposed order unless the following language was added to
26 Paragraph 2 of the proposed stipulation and order – “except for the limited purpose of
27 proving that the allegations made in the articles were in the public realm at the time of the
28 articles' publication and not for the purpose of proving the truth of the allegations.” [Exs.
H & I to NOL.]

The amendment to the stipulation proposed by Plaintiffs is untenable because it
would require the County to defend Davis' opinions and conclusions without examining

1 her. Davis' deposition is necessary because the County requires an opportunity to inquire
2 as to the basis and rationale of her conclusions if Plaintiffs are going to be referencing her
3 conclusions to support their claims. The proposed amendment defeats the purpose of the
4 stipulation by precluding examination of Davis but allowing for references to her articles
5 and opinions. Accordingly, the County respectfully requests that the Court issue an order
6 compelling Davis to testify at deposition and produce the requested documents. *See*
7 *Forsythe v. Brown*, 281 F.R.D. 577, 587 (D. Nev. 2012), report and recommendation
8 adopted, No. 3:10-CV-00716-RCJ, 2012 WL 1833393 (D. Nev. May 18, 2012).

9 **ANALYSIS AND ARGUMENT**

10 **I.**

11 **FEDERAL LAW AFFORDS PARTIES BROAD DISCOVERY RIGHTS**

12 The Supreme Court has held that “deposition-discovery rules are to be accorded a
13 broad and liberal treatment.” *Hickman v. Taylor*, 329 U.S 495, 507 (1947). All relevant
14 evidence is subject to discovery. *See USCS Fed. Rules Civ. Proc. R. 26(b)(1)*. This broad
15 right of discovery is based on the general principle that litigants have a right to ““every
16 man’s evidence,’ ...and that wide access to relevant facts serves the integrity and fairness
17 of the judicial process by promoting the search for the truth.” *Shoen v. Shoen*, 5 F.3d
18 1289, 1292 (1993) (citation omitted).

19
20 **II.**

21 **FEDERAL PRIVILEGE LAW, NOT STATE LAW APPLIES**

22 Davis contends that California law bars the deposition. Such is not the case.
23 Plaintiffs filed suit in federal court asserting three § 1983, federal question, claims against
24 the County.

25 California and federal law differ in how they apply evidentiary privileges to
26 journalists. California law recognizes an absolute privilege for journalists under the
27 *California Constitution, Article 1, §2, Speech and Press*, otherwise known as the

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1 Journalist Shield Law. *See Delaney v. Superior Court*, 50 Cal. 3d 785, 796-797, 798
2 (1990); *see also Cal. Civ. Proc. Code* § 1986.1; *Cal. Evid. Code* § 1070.

3 In federal question matters, there is only a *qualified* privilege for journalists.
4 Federal privilege law is governed by *Federal Rule of Evidence* 501. *FRE* 501 recognizes
5 federal common law as governing testimonial privileges, unless a federal statute, rules
6 promulgated by the Supreme Court, or the United States Constitution provides otherwise.
7 *See also Crowe v. Cty. of San Diego*, 242 F. Supp. 2d 740, 744-750 (S.D. Cal. 2003)
8 (explaining “a garden-variety § 1983 claim is a federal claim governed by federal law”
9 and therefore federal privilege law applies).

10 III.

11 **THE QUALIFIED PRIVILEGE FOR JOURNALISTS DOES NOT PRECLUDE** 12 **DAVIS’ DEPOSITION**

13 In *Branzburg v. Hayes*, 408 U.S. 665 the Supreme Court “dealt precisely with the
14 First Amendment free press provisions.” *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir.
15 1975). The court combined three separate criminal trials in which reporters refused to
16 disclose their sources to a grand jury and were subsequently charged with contempt. *See*
17 *id.* The Court recognized there are some first amendment protections of news sources.
18 *See id.* However, “the language of the case likewise indicate[d] that the privilege is a
19 limited or conditional one.” *Id.* The Ninth Circuit noted that *Branzburg* “appears to
20 teach broadly enough to be applied to other civil or criminal judicial proceedings as
21 well.” *Id.* After *Branzburg*, circuit courts, including the Ninth Circuit, began recognizing
22 a qualified privilege for journalist in both criminal and civil cases. *See e.g. Shoen v.*
23 *Shoen (Shoen I)*, 5 F.3d 1289 (9th Cir. 1993); *Mark v. Shoen (Shoen II)*, 48 F.3d 412 (9th
24 Cir. 1995). Ninth Circuit case law on the journalists’ privilege stems from two related
25 cases *Shoen I* and *Shoen II*.

26 In *Shoen I*, the Ninth Circuit acknowledged the existence of a qualified privilege
27 for journalists. *Shoen I*, 5 F.3d at 1292. “When facts acquired by a journalist in the
28 course of gathering the news become the target of discovery, a qualified privilege against

1 compelled disclosure comes into play.” *Id.* The court further explained that “once the
2 privilege is properly invoked, the burden shifts to the requesting party to demonstrate a
3 sufficiently compelling need for the journalist's materials to overcome the privilege.” *Id.*
4 at 1296. “At a minimum, this requires a showing that the information sought is not
5 obtainable from another source.” *Id.* The court further recognized that the qualified
6 privilege for journalists, applies to both confidential and non-confidential sources. *Id.* at
7 1295. However, the “absence of confidentiality may be considered in the balance of
8 competing interests as a factor that diminishes the journalist’s, and the public's, interest in
9 non-disclosure.” *Id.*

10 In *Shoen II*, the Ninth Circuit affirmed their decision recognizing a qualified
11 privilege for journalists. 48 F.3d at 416. The Court expanded on *Shoen I* by creating a
12 three part test to determine if the asserted privilege applied. The Court determined “that
13 where information sought is not confidential, a civil litigant is entitled to requested
14 discovery notwithstanding a valid assertion of the journalist’s privilege by a nonparty
15 only upon a showing that the requested material is: (1) unavailable despite exhaustion of
16 all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an
17 important issue in the case...there must be a showing of actual relevance; a showing of
18 potential relevance will not suffice.” *Id.* at 416.

19 The factors set forth in *Shoen II* are not satisfied here. There are no indications
20 that Davis’ opinions and articles rely on confidential sources. The information sought by
21 the subpoenas is not cumulative and it is only available from Davis. While the County
22 does have access to raw statistical data, such information is not reflective of her
23 interpretations and analysis of that data. It is also directly relevant to an important issue –
24 Plaintiffs’ Second Amended Complaint heavily relies on and cites to information set forth
25 in Davis’ series of articles for the San Diego City Beat (an “alternative” free publication)
26 titled “60 Dead Inmates.” Plaintiffs’ municipal civil rights claims against the County
27 hinge on Davis’ articles and research. Her deposition is necessary to defend the

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1 municipal civil rights claims and is likely to provide evidence relevant to the County's
2 defense.

3 Davis' analysis, motivations, and basis for her opinions are appropriate subjects for
4 discovery in light of Plaintiffs' claims. Davis' decision to use specific factors and
5 statistics when setting forth her opinions is not incorporated in those articles. Despite the
6 County's access to raw data, it requires information as to the judgements Davis employed
7 when using data sets and formulas to create her statistics. For example, Davis has
8 compared jail deaths in Orange and Los Angeles Counties to the County of San Diego.
9 [Doc. No. 19 at 26:28 and Doc No, 19-1 at 28.] Unlike the County of San Diego, Orange
10 and Los Angeles Counties employ both city and county jail facilities that could affect
11 comparisons. Davis also provides quotes from multiple purported specialists on jail
12 deaths that she spoke with but, due to the truncated nature of her articles, the totality of
13 the opinions she relied on (and more importantly possibly chose to omit) are not set forth
14 in her articles. [Doc. No. 19-1 at pp. 11 – 17 & 28 – 30.]

15 In order to successfully defend against Davis' conclusions and opinions that San
16 Diego had a higher number of suicides than similarly populated counties and that her
17 articles put the County on notice of a pattern of alleged constitutional violations, it is
18 essential that the County understand what variables Davis did or did not take into account
19 while writing her articles.

20 The information regarding Davis' opinions is highly relevant to Plaintiff's
21 municipal civil rights claim against the County. In order to prevail on their *Canton*
22 claims, Plaintiffs need to prove that (1) they were deprived of their constitutional rights
23 by the City acting under color of state law; (2) that the City has customs or policies which
24 amount to 'deliberate indifference' to a plaintiffs constitutional rights; and (3) that these
25 policies were the 'moving force behind the constitutional violations.' ” *See Estate of*
26 *Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001); *see also* Doc. No 25 (Order
27 on Motion to Dismiss).

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IV.

**DAVIS MAY HAVE IMPLIEDLY WAIVED HER PRIVILEGE BY DISCLOSING
NON-PUBLISHED INFORMATION TO PLAINTIFFS' COUNSEL**

The journalist's privilege like other testimonial privileges may be impliedly waived. *See Ayala v. Ayers*, 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009); *See also Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008).

In *Ayala*, the court determined that “[i]n the interests of fairness, a journalist/author should not be permitted to disclose information to advance the interests of one litigant and then invoke the journalist's privilege to prevent discovery of this same information by another litigant.” 668 F. Supp. 2d at 1250. *Ayala* involved an author who produced a manuscript to petitioner's counsel, but later refused to produce it to respondent's counsel. *See id.* at 1249-1250. In analyzing whether the author waived his privilege, the court cited to *Sims v. Blot*, a Second Circuit case which determined that “[i]n dealing with testimonial privileges... , we have held that a waiver may be implied in circumstances where it is called for in the interests of fairness.” 534 F.3d at 132. The court further explained that fairness considerations arise when litigants attempt to use a testimonial privilege as both a sword and a shield. *See id.* In other words, a journalist cannot use information to assist one litigant, but then claim a testimonial privilege in order to withhold information from another litigant.

Here, Davis is refusing to submit to a deposition subpoena and produce documents relating to her communications with Plaintiffs' counsel or any information related to her series of articles, “60 Dead Inmates.” However, Plaintiff's Second Amended Complaint implies that Ms. Davis disclosed research to Plaintiffs' counsel. These potential disclosures are encompassed in the Complaint's independent references to “Ms. Davis' research.” Paragraphs 74, 97 and 123 state, “[a]ccording to Kelly Davis' research – based on public records request for official death investigation reports and coroner's reports – there have been 18 suicides in San Diego County jails since 2013.” [Doc. No. 19 at 23:7-9, 29: 2-4, 35:1-3.] Paragraphs, 85, 107, 134 state “[a]ccording to Kelly Davis' research, there were four suicides in 2009, one in 2010, five in 2011, two in 2012, five in

1 2013, six in 2014, and six in 2015. So far this year (2016) there has been one suicide. In
2 short, there have been 18 suicides since 2013.” [Doc. No. 19 at 25:28, 26:1-3, 31:9-12,
3 37:19-22.] Lastly, Footnotes 1, 2, 3, also set forth, “[i]n comparison, according to Kelly
4 Davis’ research, Los Angeles County was able to get its suicides down from ten in 2013
5 to five in 2014 and one in 2015. Orange County has had no suicides for the last three
6 years.” [Doc. No. 19 at 26: Fn1, 31:Fn2. 37:Fn3.] These statistics are not in quotes and
7 do not directly mirror information in the attached exhibits. Parts of the cited statistics are
8 present in a few of Davis articles, but the direct quotes do not appear to stem from any
9 single article. If this information does directly come from a publicly available article it
10 was not attached as an exhibit to Second Amended Complaint.

11 VII.

12 USE OF DAVIS’ OPINIONS WITHOUT DISCOVERY IS PROBLEMATIC

13 Plaintiffs contend that:

14 “Davis ...has dedicated her career to reporting and investigating deaths in
15 the San Diego County Jails. She began her series of investigations into San
16 Diego jail suicides in 2007. Since this time she has published over a dozen
17 articles highlighting the outrageous pattern of deaths and suicides in San
18 Diego County Jails.” [Doc. No. 19 at 22:25-28, 23:1-6.]

19 Allowing Plaintiffs to rely on Davis’ research, conclusions and opinions without
20 permitting her deposition to be taken is akin to permitting a party to present expert
21 opinion without expert discovery. *Federal Rule Evidence* 501, “does not recognize any
22 general privilege for experts.” *See Kaufman v. Edelstein*, 539 F.2d 811, 820 (2d Cir.
23 1976) (“[T]here is no constitutional or statutory privilege against the compulsion of
24 expert testimony...”); *see also Wright v. Jeep Corp.*, 547 F. Supp. 871, 875 (E.D. Mich.
25 1982) (“Privileges are the exception to the general duty of every citizen to provide
26 evidence when necessary to further the system of justice.”); *see also Wilkinson v. FBI*,
27 111 F.R.D. 432, 441 (C.D. Cal. 1986) (“[A]lthough several opinions appear to be
28 sympathetic to such a privilege, there is no case which explicitly holds that such a
privilege exists.”)

CONCLUSION

The County acknowledges Davis' health issues. The County will endeavor to ensure that the deposition will not be an undue burden on her health.

Accordingly, for the reasons set forth above, the County respectfully requests the court grant the Motion to Compel Deposition and Production of Documents.

DATED: January 3, 2018

THOMAS E. MONTGOMERY, County Counsel

By: s/MELISSA M. HOLMES
Attorneys for Defendant County of San Diego
E-mail: melissa.holmes@sdcounty.ca.gov

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No. 15cv0629-JLS (AGS)

NOTICE OF LODGMENT IN SUPPORT
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Date: February 2, 2018
Time: 4:00 p.m.
Courtroom: Suite 5160
Hon. Andrew G. Schopler, U.S. Magistrate
Judge

NO ORAL ARGUMENT UNLESS
REQUESTED BY COURT

21 PLEASE TAKE NOTICE that Defendant County of San Diego hereby lodges the
22 following exhibits in support of their motion to compel:

23 Exhibit A – subpoenas and notices for Kelly Lynn Davis' deposition and request for
24 documents;

25 Exhibit B – proof of service by process server for subpoenas and notices to Davis;

26 Exhibit C – objection to subpoenas by Davis;

27 Exhibit D –December 4, 2017 letter from Counsel for Davis, Guylyn Cummins, to Senior
28 Deputy County Counsel Melissa Holmes;

1 Exhibit E –December 6, 2017 letter from Senior Deputy County Counsel Melissa Holmes
2 to Davis’ counsel, to Guylyn Cummins and Matthew Halgren;

3 Exhibit F – County of San Diego’s [Proposed] Order and Stipulation, /s/ redacted;

4 Exhibit G –December 14, 2017 email correspondence from Senior Deputy County
5 Counsel Melissa Holmes to Guylyn Cummins and Matthew Halgren;

6 Exhibit H –December 19, 2017 letter from Guylyn Cummins to Senior Deputy County
7 Counsel Melissa Holmes; and

8 Exhibit I – Plaintiffs’ [Proposed] Order and Stipulation enclosed with December 19, 2017
9 letter to Senior Deputy Melissa Holmes, /s/ redacted.

10 DATED: January 3, 2018

THOMAS E. MONTGOMERY, County Counsel

11 By: s/MELISSA M. HOLMES, Senior Deputy
12 Attorneys for Defendant County of San Diego

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EXHIBIT “A”

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the Southern District of California

CHASSIDY NESMITH, ET AL.
Plaintiff
v.
COUNTY OF SAN DIEGO, ET AL.
Defendant
Civil Action No. 15-cv-00629-JLS-AGS

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: KELLY LYNN DAVIS

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Place: Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101
Date and Time: 12/11/2017 10:00 am

The deposition will be recorded by this method: Stenographically and Video

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/09/2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) County of San Diego, who issues or requests this subpoena, are: Melissa M. Holmes, Esq., (SBN 220961), Office of County Counsel, 1600 Pacific Highway, Rm 355, San Diego, CA 92101; (619) 531-5279; melissa.holmes@sdcounty.ca.gov

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 15-cv-00629-JLS-AGS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____
_____ *Server's signature*

_____ *Printed name and title*

_____ *Server's address*

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person, or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person, and
- (B) inspection of premises at the premises to be inspected

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship, and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) *Contempt.*

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013)

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By RICKY R. SANCHEZ, Senior Deputy (SBN 107559)
MELISSA M. HOLMES, Senior Deputy (SBN 220961)
3 ROBERT A. ORTIZ, Senior Deputy (SBN 246849)
1600 Pacific Highway, Room 355
4 San Diego, California 92101-2469
Telephone: (619) 531- 4874
5 E-mail: ricky.sanchez@sdcounty.ca.gov

6 Attorneys for Defendant County of San Diego

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 CHASSIDY NeSMITH, individually and as
Guardian ad Litem on behalf of SKYLER
12 KRISTOPHER SCOTT NeSMITH, and as
Successor in Interest to THE ESTATE OF
13 KRISTOPHER SCOTT NeSMITH,

14 Plaintiffs,

15 v.

16 COUNTY OF SAN DIEGO, SAN DIEGO
COUNTY SHERIFF'S DEPARTMENT;
17 WILLIAM D. GORE, SAN DIEGO
COUNTY SHERIFF; VISTA DETENTION
18 FACILITY; and DOES 1 – 100 inclusive,

19 Defendants.
20

No. 15-cv-00629-JLS (AGS)

**NOTICE OF DEPOSITION OF
KELLY LYNN DAVIS**

Date: December 11, 2017

Time: 10:00 a.m.

Place: Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

21 PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure, Rule
22 30 and Rule 45, Defendant County of San Diego ("Defendant") will take the deposition
23 of Kelly Lynn Davis ("Deponent"), on Monday, December 11, 2017, at 10:00 a.m., at
24 Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101.

25 Deponent is not a party to this action. Said deposition will be taken before a
26 deposition officer who is authorized to administer an oath. If the deposition is not
27 completed on the date set out above, the taking of the deposition will be continued from
28 day to day thereafter, excluding Sundays and holidays, at the same place until completed.

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Notice is further given that if an interpreter is required to translate testimony, notice of the required language and dialect must be provided to Defendant at least five working days prior to the date of the scheduled deposition.

Pursuant to Federal Rules of Civil Procedure, Rule 30(b)(3)(A), Defendant reserves the right, and intends to videotape the deposition in addition to recording the testimony by stenographic method before a certified court reporter present at said time and place. Defendant also reserves the right to introduce and use the videotape at the time of trial.

DATED: November 9, 2017 THOMAS E. MONTGOMERY, County Counsel

By: /s/MELISSA M. HOLMES, Senior Deputy
Attorneys for Defendant County of San Diego

AO 88A (Rev 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of California

CHASSIDY NESMITH, ET AL.

Plaintiff

v.

COUNTY OF SAN DIEGO, ET AL.

Defendant

Civil Action No. 15-cv-00629-JLS-AGS

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: KELLY LYNN DAVIS

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101) and Date and Time (12/11/2017 10:00 am)

The deposition will be recorded by this method: Stenographically and Video

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: See attached Notice of Deposition of Kelly Lynn Davis and Request for Production of Documents

The following provisions of Fed. R. Civ. P. 45 are attached -- Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 11/09/2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) County of San Diego, who issues or requests this subpoena, are: Melissa M. Holmes, Esq., (SBN 220961), Office of County Counsel, 1600 Pacific Highway, Rm 355, San Diego, CA 92101; (619) 531-5279; melissa.holmes@sdcounty.ca.gov

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 15-cv-00629-JLS-AGS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer, or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command.

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that

- (i) fails to allow a reasonable time to comply,
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) *Contempt.*

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By RICKY R. SANCHEZ, Senior Deputy (SBN 107559)
MELISSA M. HOLMES, Senior Deputy (SBN 220961)
3 ROBERT A. ORTIZ, Senior Deputy (SBN 246849)
1600 Pacific Highway, Room 355
4 San Diego, California 92101-2469
Telephone: (619) 531- 4874
5 E-mail: ricky.sanchez@sdcountry.ca.gov

6 Attorneys for Defendant County of San Diego

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 CHASSIDY NeSMITH, individually and as
Guardian ad Litem on behalf of SKYLER
12 KRISTOPHER SCOTT NeSMITH, and as
Successor in Interest to THE ESTATE OF
13 KRISTOPHER SCOTT NeSMITH,

14 Plaintiffs,

15 v.

16 COUNTY OF SAN DIEGO, SAN DIEGO
COUNTY SHERIFF'S DEPARTMENT;
17 WILLIAM D. GORE, SAN DIEGO
COUNTY SHERIFF; VISTA DETENTION
18 FACILITY; and DOES 1 – 100 inclusive,

19 Defendants.
20

No. 15-cv-00629-JLS (AGS)

**NOTICE OF DEPOSITION OF
KELLY LYNN DAVIS AND
REQUEST FOR PRODUCTION OF
DOCUMENTS**

Date: December 11, 2017
Time: 10:00 a.m.
Place: Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

21 PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure, Rule
22 30 and Rule 45, Defendant County of San Diego ("Defendant") will take the deposition
23 of Kelly Lynn Davis ("Deponent"), on Monday, December 11, 2017, at 10:00 a.m., at
24 Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101.

25 ///

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1 Deponent is not a party to this action. Said deposition will be taken before a deposition
2 officer who is authorized to administer an oath. If the deposition is not completed on the
3 date set out above, the taking of the deposition will be continued from day to day
4 thereafter, excluding Sundays and holidays, at the same place until completed.

5 Notice is further given that if an interpreter is required to translate testimony,
6 notice of the required language and dialect must be provided to Defendant at least five
7 working days prior to the date of the scheduled deposition.

8 Pursuant to Federal Rules of Civil Procedure, Rule 30(b)(3)(A), Defendant
9 reserves the right, and intends to videotape the deposition in addition to recording the
10 testimony by stenographic method before a certified court reporter present at said time
11 and place. Defendant also reserves the right to introduce and use the videotape at the time
12 of trial.

13 You are further notified that you are required to produce the following documents,
14 records, or other material, at said deposition:

- 15 1. Any and all documents, notes, and recordings, including in electronic
16 format, that you relied on when reporting and/or publishing that the
17 San Diego County's incarceration mortality rate "leads in California's
18 largest jails".
- 19 2. Any and all documents, notes, and recordings, including in electronic
20 format, that you relied on when reporting and/or publishing that the
21 County of San Diego jails had/has a "high suicide . . . rate [].".
- 22 3. Any and all documents, notes, and recordings, including in electronic
23 format, that reflect communications from 2010 to present with anyone
24 from the law firm of Morris Law Firm, Apc, including but not limited
25 to Danielle R. Pena, Esq. and/or Christopher Morris, Esq. regarding
26 San Diego County jail mortality and suicide rates.

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4. Any and all documents, notes, and recordings, including in electronic format, that reflect communications from 2010 to present with anyone from the law firm of Morris Law Firm, Apc, including but not limited to Danielle R. Pena, Esq. and/or Christopher Morris, Esq. regarding the attempted self-harming events/suicide/ attempted suicide[s]/deaths of: Kristopher NeSmith; Jason Nishimoto; Jonathan Thomas; Benedicto Lopez; and Heron Moriarty, as well as communications with Richard Berumen.

DATED: November 9, 2017 THOMAS E. MONTGOMERY, County Counsel

By: /s/MELISSA M. HOLMES, Senior Deputy
Attorneys for Defendant County of San Diego

EXHIBIT “B”

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): SAN DIEGO COUNTY COUNSEL MELISSA M. HOLMES, 220961 1600 PACIFIC HIGHWAY, ROOM 355 SAN DIEGO, CA 92101		TELEPHONE NO.: (619) 531-4860	FOR COURT USE ONLY
ATTORNEY FOR (Name):		Ref. No. or File No. 15-90156	
Insert name of court, judicial district or branch court, if any: UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT 333 WEST BROADWAY, SUITE 420 SAN DIEGO, CA 92101			
PLAINTIFF: CHASSIDY NESMITH, ET AL.			
DEFENDANT: COUNTY OF SAN DIEGO, ET AL.			
PROOF OF SERVICE	DATE:	TIME:	DEPT/DIV: CASE NUMBER: 15-CV-00629-JLS-AGS

**UNITED STATES DISTRICT COURT
DECLARATION OF SERVICE**

I, THE UNDERSIGNED, DECLARE UNDER PENALTY OF PERJURY THAT I WAS ON THE DATE HEREIN REFERRED TO OVER THE AGE OF 18 YEARS AND NOT A PARTY TO THE WITHIN ENTITLED ACTION. I SERVED THE:

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION; NOTICE OF DEPOSITION; SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION; NOTICE OF DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS;

ON: KELLY LYNN DAVIS

PHYSICAL DESCRIPTION:

Age: 30'S-40'S Weight: 115-125 Hair: RED
 Sex: female Height: 5'3 Eyes: BLUE
 Skin: CAUCASIAN

Marks:

IN THE ABOVE MENTIONED ACTION BY DELIVERING TO AND LEAVING WITH THE ABOVE NAMED PERSON A COPY THEREOF, AT:

3548 FLORIDA STREET, UNIT #2
SAN DIEGO, CA 92104

ON: November 15, 2017
 AT: 01:37 pm

Witness Fees Tendered: .00

Manner of service in compliance with Federal Code of Civil Procedure.
 Fee for Service: **127.85**

County: **SAN DIEGO**
 Registration No.: **1863**
Advanced Attorney Services, Inc.
3500 Fifth Ave., Suite 202
San Diego, CA 92103
(619) 299-2012

I declare under penalty of perjury under the laws of the The State of California that the foregoing information contained in the return of service and statement of service fees is true and correct and that this declaration was executed on **November 16, 2017.**

Signature: _____
AKIBA T. MINIEFEE

**EXHIBIT B
PROOF OF SERVICE**

EXHIBIT “C”

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
 2 A Limited Liability Partnership
 2 Including Professional Corporations
 3 GUYLYN R. CUMMINS Cal. Bar No. 122445
 3 501 West Broadway, 19th Floor
 San Diego, California 92101-3598
 4 Telephone: 619.338.6500
 Facsimile: 619.234.3815
 5 Email: gcummins@sheppardmullin.com

6
 7 Attorneys for Non-Party Journalist
 KELLY LYNN DAVIS

8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 CHASSIDY NESMITH, ET AL.,
 12 Plaintiff,
 13 v.
 14 COUNTY OF SAN DIEGO, ET AL.,
 15 Defendant.

Case No. 15-cv-00629-JLS-AGS

**OBJECTIONS TO SUBPOENA TO
 TESTIFY AT A DEPOSITION IN A
 CIVIL ACTION AND REQUEST FOR
 PRODUCTION OF DOCUMENTS
 FROM NON-PARTY JOURNALIST
 KELLY LYNN DAVIS**

Date: December 11, 2017
 Time: 10:00 a.m.
 Place: Office of County Counsel
 1600 Pacific Highway, Room 355
 San Diego, CA 92101

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1 Journalist KELLY LYNN DAVIS (DAVIS) hereby objects to Petitioners'
2 subpoena for a deposition and production of records (the Subpoena), dated November 9,
3 2017, a true and correct copy of which is attached as exhibit 1, as follows:

4 1. Pursuant to Article I, Section 2 of the California Constitution, the First
5 Amendment to the United States Constitution, California Evidence Code Section 1070,
6 California Code of Civil Procedure 1085, Federal Rule of Evidence 501, and the common
7 law, DAVIS is not required to testify to or produce information obtained in the course of
8 newsgathering in this civil case, and the Subpoena is therefore improper and objected to in
9 its entirety, and including each category set forth therein specifically. *Delaney v. Superior*
10 *Court*, 50 Cal. App. 3d 785 (Cal. Ct. App. 1990); *New York Times Co. v. Superior Court*
11 51 Cal. 3d 453 (Cal. 1990) (California's news shield law is absolute against compelled
12 disclosures in a civil lawsuit); U.S. Const. amend 1; *Shoen v. Shoen*, 48 F.3d 412, 414-15
13 (9th Cir. 1995); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Farr v. Pitchess*, 522 F.2d
14 464, 467-68 (9th Cir. 1975) (discussing reporter shield law protections under the first
15 Amendment).

16 2. The Subpoena subjects DAVIS to undue burden in light of the Subpoena's
17 return date and DAVIS's severe health issues.

18 3. The Subpoena is vague and overbroad, and objected on these bases as well.

19 4. DAVIS reserves all other objections.
20

21 Dated: December 4, 2017

22 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

23
24 By

25 _____
26 GUYLYN R. CUMMINS
27 Attorney for KELLY LYNN DAVIS
28

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2 A Limited Liability Partnership
3 Including Professional Corporations
4 GUYLYN R. CUMMINS Cal. Bar No. 122445
5 501 West Broadway, 19th Floor
6 San Diego, California 92101-3598
7 Telephone: 619.338.6500
8 Facsimile: 619.234.3815

9 Attorneys for Non-Party Journalist
10 KELLY LYNN DAVIS

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 CHASSIDY NESMITH, ET AL.,

14 Plaintiff,

15 v.

16 COUNTY OF SAN DIEGO, ET AL.,

17 Defendant.

Case No. 15-cv-00629-JLS-AGS

PROOF OF SERVICE

Date: December 11, 2017

Time: 10:00 .a.m.

Place: Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

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1 At the time of service, I was over 18 years of age and **not a party to this action**. I
2 am employed in the County of San Diego, State of California. My business address is 501
West Broadway, 19th Floor, San Diego, CA 92101-3598.

3 On December 4, 2017, I served true copies of the following document(s) described
4 as

5 **12.04.17 LETTER TO OFFICE OF SAN DIEGO COUNTY COUNSEL**
6 **OBJECTIONS TO SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL**
7 **ACTION AND REQUEST FOR PRODUCTION OF DOCUMENTS FROM NON-**
8 **PARTY JOURNALIST KELLY LYNN DAVIS**

9 on the interested parties in this action as follows:

10 Melissa M. Holmes
11 Office of San Diego County Counsel
12 1600 Pacific Highway, Room 355
13 San Diego, California 92101-2469
14 (619) 531-4874
15 Attorneys for Defendant County of San Diego

16 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed
17 to the persons at the addresses listed in the Service List and placed the envelope for
18 collection and mailing, following our ordinary business practices. I am readily
19 familiar with the firm's practice for collecting and processing correspondence for
20 mailing. On the same day that correspondence is placed for collection and mailing,
21 it is deposited in the ordinary course of business with the United States Postal
22 Service, in a sealed envelope with postage fully prepaid. I am a resident or
23 employed in the county where the mailing occurred.

24 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
25 document(s) to be sent from e-mail address KParke@sheppardmullin.com to the
26 persons at the e-mail addresses listed in the Service List. I did not receive, within a
27 reasonable time after the transmission, any electronic message or other indication
28 that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct and that I am employed in the office of a member of
the bar of this Court at whose direction the service was made.

Executed on December 4, 2017, at San Diego, California.


Kimberly K. Parke, CCLS

EXHIBIT “D”

SheppardMullin

Sheppard Mullin Richter & Hampton LLP
501 West Broadway, 19th Floor
San Diego, CA 92101-3598
619.338.6500 main
619.234.3815 main fax
www.sheppardmullin.com

619.338.6645 direct
gcurmmins@sheppardmullin.com

December 4, 2016

File Number: 07ER-114470

VIA E-MAIL AND U.S. MAIL

Melissa M. Holmes
Office of San Diego County Counsel
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
e-mail: melissa.holmes@sdcounty.ca.gov

Re: Subpoena to Journalist Kelly Lynn Davis
U.S. District Court for the Southern District of California Case No.: 15-cv-00629-JLS
(AGS)
Subpoena/Subpoena Duces Tecum

Dear Counsel:

I and Matthew Halgren are counsel for journalist Kelly Davis with respect to the subpoena you served on her. A copy of the subpoena is attached. The purpose of this letter is to request that you withdraw the subpoena in light of the law set forth below regarding reporter shield law protections under California law and the First Amendment to the U.S. Constitution. All of **Davis' published information** is available from public websites, including that for the San Diego Union-Tribune. Accordingly, this letter addresses any **unpublished information** sought by the subpoena gathered in the course of newsgathering and reporting activities. If you wish to discuss the issues raised herein further, my cell phone is 619-990-0123.

1. **California's Journalist Shield Law Protects Unpublished Information**

Article I, section 2, subdivisions (a) and (b) of California's Constitution allow journalists to refuse to testify about any unpublished information sought in civil cases. (*Delaney v. Superior Court*, 50 Cal. 3d 785 (1990); *New York Times Co. v. Superior Court*, 51 Cal. 3d 453 (1991), *Miller v. Superior Court* (1999) 21 Cal. 4th 883.) In 1980, the people of California elevated this protection to an absolute constitutional immunity against compelled testimony from nonparty journalists ("Shield Immunity") in civil cases in article I, section 2(b) of California's Constitution. (*Id.*) The Shield Immunity states in pertinent part:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine or other periodical

EXHIBIT D

SheppardMullin

Melissa Holmes, Esq.
December 4, 2016
Page 2

publication, ... shall not be adjudged in contempt by a judicial ... body ... for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, ... or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

...

As used in this subdivision, ***'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated*** and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated. (Emphasis added.)

The legislative history behind the constitutional mandate of "shall not be adjudged in contempt" makes clear that judges do not have the power to dilute this protection. (Cal. Const. art. I, § 2.) The Supreme Court, in ruling that the language of article I, section 2(b) is "clear and unambiguous," stated:

The language of article I, section 2(b) is clear and unambiguous The section states plainly that a newsperson shall not be adjudged in contempt for "refusing to disclose *any* unpublished information." (Italics added.) . . . The use of the word "any" makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence. . . . In the context of article I, section 2(b), the word "any" means without limit and no matter what kind.

(*Delaney, supra*, 50 Cal. 3d at pp. 797-798 [with emphasis].) The Court dismissed any distinction between observations and other information: "Information" includes "reception of knowledge" and "knowledge obtained from reading, *observation* or instruction. (*Id.*, citing Webster's Dictionary.) The Court concluded:

As we have explained, article I, section 2(b) contains an unambiguous definition of "unpublished information." . . . It is bedrock law that if "the law-maker gives us an express definition, we must take it as we find it . . ." (Citation omitted.) . . . "[C]ourts, in construing the constitution, are bound to suppose that any inconveniences involved in the application of its provisions, according to their plain terms and import, were considered in its formation, and voluntarily accepted as less intolerable than those

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Melissa Holmes, Esq.
December 4, 2016
Page 3

which are thereby avoided, or as fully compensated by countervailing advantages." (Citation omitted.)

(*Id.* at p. 814.)

The case of *In re Jack Howard*, 136 Cal. App. 2d 816 (1955) (interpreting the statutory predecessor to article I, section 2(b) of California's Constitution) demonstrates the far-reaching contours of the Supreme Court's mandate that journalists not be compelled to testify to any unpublished information. In *In re Jack Howard, supra*, the court held that, even where a news article contains quoted statements of an identified individual, it cannot be assumed that the use of quotation marks means the statement attributed to the source in the newspaper was actually made by the source to the newsreporter. *Id.* at 818-819. Rather, the court reasoned, the information could have been secured "in many ways; that is, [the reporter] might ... have learned of [the information] from another person; ... he might have listened to a recording [of the statement]; or the story might have been telephoned to his newspaper and rewritten by someone else under his byline." *Id.* Thus, questions to a newsreporter as to whether statements attributed to a source in a news article were actually made by the source violate California's shield law protections.

In 1999, the California Supreme Court solidly reaffirmed the strength of the shield in *Miller v. Superior Court, supra*, ruling that a *prosecutor's* desire or need for evidence under article I, section 29 of the California Constitution cannot overcome the constitutional shield immunity. *Id.* at 898. The Court plainly held that the state constitutional provision giving the people "the right to due process of law" in criminal cases *does not conflict with or limit* journalist shield law protections, and thus the protection applies to all unpublished information sought by the prosecutor, whether confidential or not. *Id.* at 843 (also noting the prosecution's right to due process "has not been recognized to encompass the breach of established evidentiary privileges and immunities" in other jurisdictions as well).

Thus, California's Constitution is clear that no journalist covered by the Shield Immunity has to testify to or produce any unpublished information, which encompasses all information other than the broadcast.

2. Code of Civil Procedure Section 1986.1 Also Protects Newsreporters

In 2000, California's Legislature added section 1986.1 to California's Code of Civil Procedure to underscore the importance of constitutional protections afforded journalists and to require courts to make the following findings for holding any journalist in contempt:

(c) If a trial court holds a journalist in contempt of court in a criminal proceedings notwithstanding subdivision (b) of Section 2 of Article I of the California Constitution, the court shall set forth findings, either in writing or on the record, stating at a minimum, *why the information will be of material assistance to the party seeking the evidence, and why alternate sources of the information are not sufficient to satisfy the defendant's right to a*

SheppardMullin

Melissa Holmes, Esq.
December 4, 2016
Page 4

fair trial under the Sixth Amendment to the United States Constitution and Section 15 of Article I of the California Constitution. (Emphasis added.)

This provision was added to prevent the press from being made an investigative arm of the state or private litigants unnecessarily. See *Delaney, supra*, 50 Cal. 3d at 821 ("Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information."); *Miller, supra*, 89 Cal. Rptr. 2d at 821 (noting "[t]he threat sources will be reluctant to talk to the press if they believe they are effectively talking to law enforcement officials, especially if the information is confidential; further noting the press will lose credibility as an independent and objective source of information if associated with the state).

3. California's Shield Immunity Applies To Davis

a. The Plain Language of California's Shield Immunity Shows It Applies To Davis

Article I, section 2(b) of the California Constitution makes clear it applies to Davis and the subpoena you have issued. Based on the California Shield Immunity, Davis hereby refuses to testify regarding production or publication of the news story or to produce the records requested which are "unpublished information."

Because California's constitutional immunity for journalists provides substantive protections for journalists, it applies in federal court cases, as well as state court cases. Article I, section 2(b) immunities can be overcome only where a criminal defendant demonstrates that nondisclosure of the information requested would deprive him of his federal constitutional right to a fair trial. *Delaney*, 50 Cal. 3d at 809; *Miller, supra, passim*. In order to meet this burden, a criminal defendant must show there is a *reasonable possibility* the information requested will *materially assist his defense*. *Id.* Competent evidence, not mere speculation, is required to meet this burden. *Id.* Moreover, the evidence must be *material*, not merely relevant, to the defense. Only where this threshold burden is met can the court then engage in balancing the importance of protecting the unpublished information and the rights guaranteed under the shield law against the defendant's right to a fair trial. *Delaney*, 50 Cal. 3d at 809.

If permitted to balance these conflicting interests, a court must consider the following factors: (1) whether the information is confidential or sensitive; (2) the interests sought to be protected by the shield law (*e.g.*, whether disclosure would unduly restrict the journalists' access to future sources and information, especially given that the primary purpose of the shield law is to protect newsgathering); (3) the importance of the information to the defendant, *i.e.*, is the evidence dispositive or sufficiently material to require disclosure; and (4) the practicality of obtaining such information from an alternative source. *Delaney, supra*, 50 Cal. 3d at 810-813. Finally, where the information is confidential or sensitive, an *in camera* hearing must be held. *Id.*

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Melissa Holmes, Esq.
December 4, 2016
Page 5

Here, the subpoena can not meet the *Delaney* test as Davis's testimony and records are being sought in a civil case. This, in addition to the other factors, show the *Delaney* test cannot be met.

4. California's Shield Law Applies Here Pursuant to Federal Rule of Evidence 501 and Federal Common Law

a. Rule 501 Requires Recognition of the Reporter's Privilege Against Compelled Testimony Under Federal Common Law

Davis has a further basis to refuse to testify, under federal common law and California's shield law, as applicable in federal court via Federal Rules of Evidence Rule 501.

Rule 501 holds that in federal question cases privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." It applies with equal force in civil cases, criminal cases and grand jury proceedings. *See* Fed. R. Evid. 1101. The United States Supreme Court's guidance in *Jaffee v. Redmond*, 518 U.S. 1 (1996), compels recognition of a reporter's privilege under Federal Rule of Evidence 501, separate from the privilege recognized under First Amendment jurisprudence. *See In re Grand Jury Subpoena to Judith Miller*, 438 F.3d 1141 at 1170-72 (D.C. Cir. 2005) (Tatel, J., concurring) (applying *Jaffee* to find the existence of a common-law reporters' privilege); *see also New York Times Co. v. Gonzales*, 459 F.3d 160, 181 (2d Cir. 2006) (Sack, J., dissenting) ("I have no doubt that there has been developed in [the last] thirty-four years federal common-law protection for journalists' sources under [Rule 501] as interpreted by *Jaffee*"). Rule 501 expressly empowers the federal courts to recognize and elucidate privileges "in the light of reason and experience." Fed. R. Evid. 501.

In *Jaffee*, in the absence of any federal legislation, the Supreme Court recognized a federal psychotherapist-patient privilege. In concluding that Rule 501 compelled recognition of such a privilege, the Court identified three factors: 1) whether important private and public interests would be served by recognition of the privilege; 2) whether the evidentiary cost of recognizing the privilege was likely to be modest; and 3) whether similar protections were afforded by the states.

Here, the first factor is plainly satisfied, for reasons well-stated by the Ninth Circuit in *Bursey v. United States*:

The First Amendment interests in this case are not confined to the personal rights of [the journalists]. Although their rights do not rest lightly in the balance, far weightier than they are the public interests in First Amendment freedoms that stand or fall with the rights that these witnesses advance for themselves. . . . The larger purpose was to protect public access to information....

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Melissa Holmes, Esq.
December 4, 2016
Page 6

Bursey, 466 F.2d 1059, 1083-84 (9th Cir. 1972) (citations omitted) (overruled on other grounds by *In re Grand Jury Proceedings* 863 F.2d 667, 670 (9th Cir. 1988); see also *Shoen I*, F.3d at 1292; *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (recognizing reporter's privilege under Rule 501 in part because "[a] journalist's inability to protect the confidentiality of sources . . . will . . . seriously erode the essential role played by the press in the dissemination of information . . . to the public").

Thus, just as the Supreme Court concluded in *Jaffee* that the psychotherapist-patient privilege serves "[t]he mental health of our citizenry"—"a public good of transcendent importance" (518 U.S. at 11)—the reporter's privilege serves the political, economic and social health of our citizenry by allowing the public to make informed decisions.

The second factor identified in *Jaffee* is also satisfied: The important interests served by the reporter's privilege outweigh any evidentiary costs. This is true because, without a privilege, sources will be much less likely to provide information to the press that prosecutors and/or litigants will be interested in discovering. *Jaffee*, 518 U.S. at 11-12.

The third *Jaffee* factor looks to whether there is a consensus among the states in favor of recognizing the privilege. An overwhelming consensus exists today about the reporter's privilege. Shield laws have been adopted in 40 states, and the District of Columbia. See <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/number-states-shield-law-climbs>.

A final factor in determining whether a reporter's privilege should be recognized under Rule 501 is the treatment afforded reporters under the law of California. See, e.g., *Tennenbalm v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (in determining federal law of privilege, court "may also look to state privilege law — here, California's — if it is enlightening").

California's shield law "protects a newsperson from being adjudged in contempt for refusing to disclose either: (1) unpublished information, or (2) the source of information, whether published or unpublished." *Delaney v. Superior Court*, 50 Cal. 3d 785, 805 (Cal. 1990); *Miller v. Superior Court*, 21 Cal. 4th 883 (1990); *Fost v. Superior Court*, 80 Cal.App.4th 724, 730 (2000) (citation omitted); Cal. Const. art. 1, § 2(b); see also Cal. Evid. Code § 1070. "The shield law is, by its own terms, absolute rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process." *Miller v. Superior Court*, 21 Cal. 4th 883, 890 (1999) (emphasis in original).

Courts have also held that California's constitutional shield laws (the "Shield Law") "protects all unpublished information, even information that 'could or would confirm or amplify the published information or information derived therefrom.'" *McGarry v. University of San Diego*, 154 Cal.App.4th 97 (2007).

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Melissa Holmes, Esq.
December 4, 2016
Page 7

Moreover, courts have underscored that even published information may not be compelled from a reporter where a party will be deprived of cross-examination with respect to related, unpublished information by the California shield law. *Fost v. Superior Court*, 80 Cal.App.4th at p. 728. Where a witness refuses to submit to cross-examination, the "conventional remedy" is to exclude the testimony. *Id.* at pp. 734-737.

5. Davis Is Entitled to First Amendment Protection As Well

The First Amendment to the United States Constitution provides *supplemental protection* to California's Shield Immunity. The party seeking the information has the burden to show that the information sought is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. (*Shoen v. Shoen*, 48 F.3d 412, 415 (9th Cir. 1995).) As in *Shoen, supra*, this test cannot be met in this case, for the same reasons the *Delaney* test cannot be met, and because Davis's testimony and sources would be cumulative of other sources from which the information sought can be obtained.

6. Conclusion

For the reasons set forth, Davis requests that the subpoena be immediately withdrawn. If the subpoena is not withdrawn, you will need to bring a motion to compel Davis' deposition. Davis reserves her right to request her attorneys' fees and costs as a sanction in light of the law set forth above.

Please also be aware she has been suffering from significant health complications. As we discussed, you will accommodate her illness if the court grants your motion to compel.

Thank you for you anticipated cooperation.

Very truly yours,



Guylyn R. Cummins
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:484861288.1
Enclosure

cc:

EXHIBIT D

EXHIBIT “E”



County of San Diego

THOMAS E. MONTGOMERY
COUNTY COUNSEL

OFFICE OF COUNTY COUNSEL
1600 PACIFIC HIGHWAY, ROOM 355, SAN DIEGO, CA 92101
(619) 531-4860 Fax (619) 531-6005

MELISSA M. HOLMES
Senior Deputy County Counsel
Direct Dial: (619) 531-5838
E-Mail: melissa.holmes@sdcounty.ca.gov

December 6, 2017

Guylyn R. Cummins
Matthew Halgren
501 West Broadway, 19th Floor
San Diego, California 92101-3598
gcummins@sheppardmullin.com
mhalgren@sheppardmullin.com

VIA E-MAIL & U.S. MAIL

Re: Chassidy NeSmith, et al. v. County of San Diego, et al.
U.S.D.C. Case No. 15cv0629-JLS (JMA)

Dear Ms. Cummins,

I am writing in response to your letter sent via email on Monday, December 4, 2017 at 4:44 p.m. As we discussed during our telephone conference on that day, it is Defendant's position that the subpoena is lawful in light of the allegations in Plaintiff's complaint relying on Ms. Kelly's articles as well as her communications with Plaintiffs' counsel. Thus, Defendant will not be withdrawing the subpoena.

Based on the statements in your letter that a motion to compel will be necessary if Defendant does not withdraw the subpoena, I have notified the court reporter and Plaintiffs' counsel that the deposition will not be going forward on Monday, December 11, 2017 as noticed.

Per the Court's Local Rule 26.1(a), we need to set up an in person meet and confer conference before filing a motion to compel. I am available to come to your office for the conference at the following times: December 8, 2017 at 10:30 a.m.; December 11, 2017 at 8:30 a.m.; or December 12, 2017 anytime between 8:30 a.m. and 4:00 p.m. If you would prefer, we can meet at my office.

//

//

EXHIBIT E

-2-

December 6, 2017

I have also attached a copy of the operative complaint in this case. Paragraphs 70 through 85 involve Plaintiffs' reliance on Ms. Davis' reporting.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By


MELISSA M. HOLMES, Senior Deputy

MMH:at

cc#15-90156

CC: Danielle Pena and Chris Morris *via e-mail only*

EXHIBIT E

EXHIBIT “F”

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 By RICKY R. SANCHEZ, Senior Deputy (SBN 107559)
MELISSA M. HOLMES, Senior Deputy (SBN 220961)
3 FERNANDO KISH, Senior Deputy (SBN 236961)
ROBERT A. ORTIZ, Senior Deputy (SBN 246849)
4 1600 Pacific Highway, Room 355
San Diego, California 92101-2469
5 Telephone: (619) 531- 4860

6 Attorneys for Defendant County of San Diego

7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10

11 CHASSIDY NeSMITH, individually and as
Guardian ad Litem on behalf of SKYLER
KRISTOPHER SCOTT NeSMITH, and as
12 Successor in Interest to THE ESTATE OF
KRISTOPHER SCOTT NeSMITH,

13

Plaintiffs,

14

v.

15

16 COUNTY OF SAN DIEGO, SAN DIEGO
COUNTY SHERIFF'S DEPARTMENT;
WILLIAM D. GORE, SAN DIEGO
17 COUNTY SHERIFF; VISTA DETENTION
FACILITY; and DOES 1 – 100 inclusive,

18

Defendants.

19

No. 15cv00629-JLS (AGS)

[PROPOSED] ORDER AND
STIPULATION TO EXCLUDE
TESTIMONY AND EVIDENCE RE
KELLY DAVIS ARTICLES AND
RESEARCH

Courtroom: 4A
Hon. Janis L. Sammartino

20

It is hereby stipulated by the parties that:

21

1. The reporter Kelly Davis will be precluded from providing testimony

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(written or oral) in the above captioned matter;

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2. Any publications (including but not limited to newspaper and online articles,

25

26

op/eds, tweets, blog posts, interviews or statements) by Kelly Davis or co-written by Kelly

27

Davis, or other publications that reference or relate to Kelly Davis' publications regarding

28

EXHIBIT F

1 suicide, mortality, or death rates in the County of San Diego jails shall not be admitted as
2 evidence or referred to for any purpose in this action; and

3 3. Any research, notes, opinions, charts, or conclusions Kelly Davis made or
4 has regarding suicide, mortality or death rates in the County of San Diego jails (or other
5 publications or reports referencing Kelly Davis' research, notes, opinions, charts, or
6 conclusions) shall not be admitted as evidence or referred to for any purpose in this action.
7

8 IT IS SO STIPULATED
9

10
11 DATED: December __, 2017

MORRIS LAW FIRM, APC

12
13 By: *Christopher Morris*
CHRISTOPHER MORRIS
DANIELLE PENA

14 Attorneys for Plaintiffs Chassidy NeSmith,
15 Individually and as Guardian ad Litem on behalf of
16 Skyler Kristopher Scott NeSmith, and and as
Successor in Interest to Kristopher Scott NeSmith

17 DATED: December 8, 2017

THOMAS E. MONTGOMERY, County Counsel

18
19 By: *Melissa M. Holmes*
MELISSA M. HOLMES, Senior Deputy
20 Attorneys for Defendant County of San Diego

21
22 Per the stipulation of the parties, it is HEREBY ORDERED THAT:

23 1. The reporter Kelly Davis will be precluded from providing testimony
24 (written or oral) in the above captioned matter;

25 2. Any publications (including but not limited to newspaper and online articles,
26 op/eds, tweets, blog posts, interviews or statements) by Kelly Davis or co-written by
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Kelly Davis, or other publications that reference or relate to Kelly Davis' publications regarding suicide, mortality, or death rates in the County of San Diego jails shall not be admitted as evidence or referred to for any purpose in this action; and

3. Any research, notes, opinions, charts, or conclusions Kelly Davis made or has regarding suicide, mortality or death rates in the County of San Diego jails (or other publications or reports referencing Kelly Davis' research, notes, opinions, charts, or conclusions) shall not be admitted as evidence or referred to for any purpose in this action.

IT IS SO ORDERED.

Dated: _____, 2017

Hon. Janis L. Sammartino

EXHIBIT “G”

From: [Holmes, Melissa](#)
To: [Guylyn Cummins](#); [Matthew Halgren](#)
Cc: [Kimberly Parke](#); [Dina Flores](#); [Thell, Az](#); [Katz, Alexa](#); [Trujillo, Amy](#)
Subject: RE: Nesmith v. County of San Diego - Subpoena to Kelly Lynn Davis
Date: Thursday, December 14, 2017 3:32:00 PM
Attachments: [Proposed Order and Stipulation to Exclude Testimony and Evidence Re Kelly Davis Articles and Research.final.pdf](#)

Ms. Cummins and Mr. Halgren:

Attached please find the proposed stipulation we discussed on Tuesday. If Plaintiffs' counsel is willing to sign the stipulation, there will be no need to depose your client. Per our discussion, Ms. Cummins said she would inquire with Plaintiffs' counsel as to whether the stipulation is amenable. In light of the deadline to file a motion to compel, please get back to me by Tuesday, December 19, 2017 as to whether the stipulation will work.

In the meantime, please do not hesitate to call me if you have any questions or concerns.

Melissa Maria Holmes, Senior Deputy
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469
Phone: (619) 531-5836; Fax: (619) 531-6005
E-Mail: melissa.holmes@sdcounty.ca.gov

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EXHIBIT “H”



Sheppard Mullin Richter & Hampton LLP
501 West Broadway, 19th Floor
San Diego, CA 92101-3598
619.338.6500 main
619.234.3815 main fax
www.sheppardmullin.com

619.338.6645 direct
gcummins@sheppardmullin.com

December 19, 2017

File Number: 0100-092355

Melissa M. Holmes
Senior Deputy
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

Re: Chassidy NeSmith, et al. v. County of San Diego, et al.
Journalist Kelly Lynn Davis

Dear Ms. Holmes:

We have communicated with Christopher Morris, counsel for plaintiffs in the action referenced above. Mr. Morris is willing to agree to your stipulation provided that it includes the additional language in paragraph 2 reflected in the enclosed version of the stipulation.

The Ninth Circuit has explained that, under Federal Rule of Evidence 201(b), “[c]ourts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (internal quotation marks omitted). Thus, the Ninth Circuit has taken judicial notice of newspaper articles for the purpose of showing that the public was on notice of the allegations or statements made in the articles, even while specifically holding that the allegations or statements could not be offered for the truth of the matters they asserted. *Id.*

The enclosed stipulation provides for use of Ms. Davis's articles for purposes identical to those permitted under Federal Rule of Evidence 201(b). The stipulation states that Ms. Davis's articles may not be used “except for the limited purpose of proving that the allegations made in the articles were in the public realm at the time of the articles' publication and not for the purpose of proving the truth of the allegations.” Under the stipulation, as you requested, all parties would be precluded from calling Ms. Davis to testify.

It would be impossible for Ms. Davis to provide any information in response to your subpoena that would change the fact that her articles were published and that their allegations were in the public realm. If the parties enter into this stipulation, any information Ms. Davis could provide in response to your subpoena would be entirely irrelevant because the fact of publication and the concomitant public notice of the allegations stated in the articles would be the only issue for which the articles could be considered. We therefore expect that you will agree to this version of the stipulation and will withdraw your subpoena.

EXHIBIT H

SheppardMullin

Melissa M. Holmes
December 19, 2017
Page 2

We also note that any information Ms. Davis could provide in response to your subpoena would be hearsay, and all information that she possesses regarding the matters discussed in her articles is available from alternate sources. In particular, data on the number of deaths in county jail systems in California and when the deaths occurred, in which you seem to be particularly interested, are available from the jail systems themselves.

We are hereby confirming that, as we discussed during our meeting on December 12, 2017, in the event that you do not withdraw your subpoena and instead move to compel Ms. Davis's testimony, we will likely move for sanctions to recoup the cost of opposing the motion. As we explained in our letter of December 4, 2017, Ms. Davis is entitled to the reporter's privilege against compelled testimony under both state and federal law. Specifically, under California law, the constitutional immunity against any compelled testimony in a civil case is absolute. We also reiterate that the journalist's interests against compelled testimony are especially strong in this case because Ms. Davis is suffering from severe health issues, and complying with your subpoena would be unduly burdensome in light of her recovery needs and treatment schedules.

Please let us know whether you agree to this stipulation. We will be happy to address any questions or concerns you may have.

Very truly yours,



Guylyn R. Cummins
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH 485014700.1

EXHIBIT H

EXHIBIT “I”

1 THOMAS E. MONTGOMERY, County Counsel
 County of San Diego
 2 By RICKY R. SANCHEZ, Senior Deputy (SBN 107559)
 MELISSA M. HOLMES, Senior Deputy (SBN 220961)
 3 FERNANDO KISH, Senior Deputy (SBN 236961)
 ROBERT A. ORTIZ, Senior Deputy (SBN 246849)
 4 1600 Pacific Highway, Room 355 San Diego, California 92101-2469
 Telephone: (619) 531- 4860
 5
 6 Attorneys for Defendant
 County of San Diego

7
 8 **UNITED STATES DISTRICT COURT**
 9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 CHASSIDY NeSMITH, individually
 and as Guardian ad Litem on behalf of
 11 SKYLER KRISTOPHER SCOTT
 NeSMITH, and as Successor in Interest
 12 to THE ESTATE OF KRISTOPHER
 SCOTT NeSMITH,

13 Plaintiffs,

14 v.

15 COUNTY OF SAN DIEGO, SAN
 16 DIEGO COUNTY SHERIFF'S
 DEPARTMENT; WILLIAM D. GORE,
 17 SAN DIEGO COUNTY SHERIFF;
 VISTA DETENTION FACILITY; and
 18 DOES 1 – 100 inclusive,

19 Defendants.
 20

No. 15cv00629-JLS (AGS)

[PROPOSED] ORDER AND
 STIPULATION TO EXCLUDE
 TESTIMONY AND EVIDENCE RE
 KELLY DAVIS ARTICLES AND
 RESEARCH

Courtroom: 4A
 Hon. Janis L. Sammartino

21 It is hereby stipulated by the parties that:

- 22 1. The reporter Kelly Davis will be precluded from providing testimony
 23 (written or oral) in the above captioned matter;
 24 2. Any publications (including but not limited to newspaper and online
 25 articles, op/eds, tweets, blog posts, interviews or statements) by Kelly Davis or co-
 26 written by Kelly Davis, or other publications that reference or relate to Kelly Davis'
 27 publications regarding suicide, mortality, or death rates in the County of San Diego
 28 jails shall not be admitted as evidence or referred to for any purpose in this action

1 except for the limited purpose of proving that the allegations made in the articles
2 were in the public realm at the time of the articles' publication and not for the
3 purpose of proving the truth of the allegations; and

4 3. Any research, notes, opinions, charts, or conclusions Kelly Davis made
5 or has regarding suicide, mortality or death rates in the County of San Diego jails (or
6 other publications or reports referencing Kelly Davis' research, notes, opinions,
7 charts, or conclusions) shall not be admitted as evidence or referred to for any
8 purpose in this action.

9 IT IS SO STIPULATED

10
11 DATED: December ___, 2017 MORRIS LAW FIRM, APC

12
13 By: *Christopher Morris*
CHRISTOPHER MORRIS
DANIELLE PENA
14 Attorneys for Plaintiffs Chassidy NeSmith,
15 Individually and as Guardian ad Litem on behalf
16 of Skyler Kristopher Scott NeSmith, and and as
17 Successor in Interest to Kristopher Scott
NeSmith

18 DATED: December ___, 2017 THOMAS E. MONTGOMERY, County
19 Counsel

20
21 By: *Melissa M. Holmes*
MELISSA M. HOLMES, Senior Deputy
22 Attorneys for Defendant County of San Diego

23 Per the stipulation of the parties, it is HEREBY ORDERED THAT:

24 1. The reporter Kelly Davis will be precluded from providing testimony
25 (written or oral) in the above captioned matter;

26 2. Any publications (including but not limited to newspaper and online
27 articles, op/eds, tweets, blog posts, interviews or statements) by Kelly Davis or co-
28 written by Kelly Davis, or other publications that reference or relate to Kelly Davis'

1 publications regarding suicide, mortality, or death rates in the County of San Diego
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6 3. Any research, notes, opinions, charts, or conclusions Kelly Davis made
7 or has regarding suicide, mortality or death rates in the County of San Diego jails (or
8 other publications or reports referencing Kelly Davis' research, notes, opinions,
9 charts, or conclusions) shall not be admitted as evidence or referred to for any
10 purpose in this action.

11 **IT IS SO ORDERED.**

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Dated: _____, 2017

Hon. Janis L. Sammartino

DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California. My business address is 1600 Pacific Highway, Room 355, San Diego, California, 92101.

On January 3, 2018, I served the following documents:

NOTICE OF MOTION AND MOTION TO COMPEL THIRD PARTY WITNESS KELLY DAVIS TO APPEAR FOR DEPOSITION AND PRODUCE THE REQUESTED DOCUMENTS COMPLIANCE WITH SUBPOENAS;

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL THIRD PARTY WITNESS KELLY DAVIS TO APPEAR FOR DEPOSITION AND PRODUCE THE REQUESTED DOCUMENTS IN COMPLIANCE WITH SUBPOENAS; and

NOTICE OF LODGMENT IN SUPPORT OF MOTION TO COMPEL THIRD PARTY WITNESS KELLY DAVIS TO APPEAR FOR DEPOSITION AND PRODUCE THE REQUESTED DOCUMENTS IN COMPLIANCE WITH SUBPOENAS

In the following manner:

- (BY E-MAIL)** By emailing an electronic copy of the documents listed above to the following e-mail addresses: gcummins@sheppardmullin.com, mhalgren@sheppardmullin.com
- (BY MAIL)** By causing a true copy thereof, enclosed in a sealed envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

Guylyn R. Cummins
Matthew Halgren
501 West Broadway, 19th Floor
San Diego, California 92101-3598

- (BY CM/ECF)** I cause to be transmitted a copy of the foregoing document(s) this date via the United States District Court's ECF System, which electronically notifies all counsel as follows:

(Chassidy NeSmith, et al. v. County of San Diego, et al;
USDC Case No. No. 15-cv-0629-JLS (AGS))

Christopher S. Morris Esq.
Chanell A. Kachi, Esq.
Danielle R. Pena, Esq.
MORRIS LAW FIRM, APC
501 West Broadway, Suite 1480
San Diego, CA 92101
(619) 826-8060 phone
cmorris@morrislawfirmapc.com
dpena@morrislawfirmapc.com
ckachi@morrislawfirmapc.com

Executed on January 3, 2018, at San Diego, California.

By: 
AMY TRUJILLO