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December 23, 2005

Honorable Chief Justice and Associate Justices
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: Elkins v. Superior Court, Supreme Court No. S139073
Informal Response To Petition for Review, Directed By Court Letter of December 16, 2005

Honorable Justices:

Pursuant to this Court's instruction, Real Party in Interest Marilyn Elkins (Marilyn) submits this informal letter response to petitioner Jeffrey Elkins' petition for review filed November 23, 2005.

Introduction

The petition for review, like the petition for writ of mandate that it replicates, presents an incomplete picture of the proceedings below. In particular, petitioner Jeffrey Elkins (Jeffrey) sidesteps all discussion of his failure to preserve the issues he now raises and the extent to which he waived below the challenges he now belatedly makes. Moreover, after the

writ and review petitions were filed, Jeffrey filed a notice of appeal from the judgment that is the subject of his petition. Consequently, Jeffrey has an existing and currently pending legal remedy such that extraordinary relief is not warranted. Nor does this matter raise meritorious due process claims, for the central contention asserted by Jeffrey—that a court rule or case order providing for direct testimony in the form of written declarations violates due process—has been examined and rejected by the Ninth Circuit court in *In re Adair* (9th Cir.1992) 965 F.2d 777. None of Jeffrey's remaining contentions survives analysis. Therefore, the petition should be denied.

The Pending Appeal Is An Adequate Remedy

As this Court is well aware, the existence of an "immediate direct appeal is presumed to be adequate, and a party seeking review by extraordinary writ bears the burden of demonstrating that appeal would not be an adequate remedy under the particular circumstances of that case." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113, citing *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370.) Here, Jeffrey asserts only that appeal is not adequate since he seeks an order directing the court not to apply its local rule or the pretrial order entered in his case. This does not constitute "particular circumstances" but rather merely asserts the relief Jeffrey would be requesting on appeal.

On November 29, 2005, Jeffrey filed a "protective" appeal from the judgment that is the subject of his writ petition. A copy of the notice of appeal is attached. As his record, Jeffrey intends to use an appendix in lieu of a clerk's transcript (presumably incorporating or replicating the writ appendix) and the reporter's transcript of the September 19, 2005 trial already lodged with the Court of Appeal in connection with his writ petition, so there will be no delays on this appeal for record preparation. Marilyn can supply her own appendix should Jeffrey not include key documents, such as the direct-testimony declarations and trial briefs with attached exhibits that Jeffrey filed in the earlier bifurcated date-of-separation proceeding, which rebut his statement in the present proceeding that he was only doing what he did before. As Jeffrey has neither alleged nor shown any urgency requiring immediate review by writ, as the appeal will afford Marilyn the opportunity to insure a complete record, and as the Court of Appeal will address the same issues on the appeal as are raised in the present writ proceeding, the appeal is an adequate remedy and Jeffrey's petition for review should be denied on this ground alone.

Jeffrey Failed To Preserve Below the Issues Now Asserted

As this Court noted in *Phelan v. Superior Court, supra* 35 Cal.2d at 372, before seeking mandate, a party must establish that he preserved the issues below and requested of the trial court the relief he is requesting by

writ. "Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it appears that the demand would have been futile." (*Id.*) See also *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 484 (prior to hearing Wife objected to policy limiting evidence to declarations without cross-examination and stated need for oral testimony, upon which trial court invited her to file a petition for writ of mandate); *McLaughlin v. Superior Court* (1983) 140 Cal.App.3d 473, 476 (prior to reference to mediation, petitioner objected to court procedure denying cross-examination of recommending mediator as unconstitutional, moved for a protective order, and filed the writ petition when it was denied); *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309,1315-1316 (petitioner first sought continuance to give court opportunity to read file and then brought motion to set aside the denial of motion under the "pre-read" rule on grounds it violated due process, filing writ petition when it was denied).

Here, in contrast, Jeffrey never objected to any of the provisions of the local rule or of the trial scheduling order. Regarding declarations in lieu of oral direct testimony, for example, the local rule permits direct oral examination in unusual circumstances or for rebuttal (AA Tab 1, ¶ 3), and the trial scheduling order is even more permissive, requiring only approval

in advance for oral direct. (AA Tab 2, ¶ 1.) Jeffrey never asked for such approval, never expressed any interest in offering oral direct testimony, and never objected before or at trial to this provision.

Regarding trial exhibits, the local rule requires that documents be provided to the opposing party or counsel five calendar days before trial in order to be received in evidence, but expressly makes an exception "for good cause shown" and provides an alternative of a short continuance to permit proper notice. (AA TAb 1, ¶ 2). Jeffrey failed to make his proposed exhibits available for inspection by Marilyn's counsel within the required period, did not seek to show good cause for an exception to this rule, and did not seek a continuance. The trial scheduling order requires trial exhibits to be attached to either the opening or responsive declaration and that the declaration set forth the evidentiary foundation for admission for each exhibit, but no such requirements exist for documents or exhibits to be used for impeachment. (AA Tab 2, ¶ 2.) Moreover, as discussed below, at trial the court gave Jeffrey an opportunity to establish the evidentiary foundation for his late-produced exhibits, but Jeffrey chose not to do so.

Jeffrey notes (petition at 5) that the issue of the parties' separation had been bifurcated and tried separately. What Jeffrey does not reveal is that the date-of-separation trial was conducted under a trial scheduling order, filed January 20, 2005, containing all of the provisions that are the

subject of Jeffrey's current challenge and that Jeffrey not only did not object to the order, he complied with it by timely filing declarations and trial briefs and by attaching exhibits to be introduced at trial as required by the rule. These pleadings and order, which Jeffrey did not include in his writ appendix but which Marilyn will include in the record on appeal, rebut Jeffrey's statement to the court at the September 19, 2005 trial that he was "just going by the trial rules we had when we went for a bifurcated trial earlier this year, and in that trial, we did nothing but present exhibits. . . until the day of trial." (RT 6:17-21.)

Moreover, when the April 22, 2005 trial scheduling order was served on him, Jeffrey did not object to any of the order's provisions. Instead, he proceeded under the rule by timely filing an initial declaration and a trial brief and attached to the latter three exhibits to be introduced at trial. (AA Tabs 9 and 10.) Marilyn also complied with the rule by timely filing a trial brief and a more lengthy declaration to which she attached 14 exhibits comprising 138 pages. (AA Tabs 4 and 5.) She also timely filed the responsive declaration permitted by the order, to which she attached two responsive exhibits. (AA Tab 6.) Jeffrey chose not to file a responsive declaration, for reasons which he never explained, thus voluntarily forfeiting a second opportunity to comply with the order's requirements regarding exhibits.

The trial scheduling order required that two days before trial, the parties exchange with each other, and provide to the court, those exhibits from their declarations which they actually intended to use at trial. (AA Tab 2, ¶ 8.) Again, Jeffrey never objected to this provision nor asked for any relief from it. Marilyn complied with this provision; Jeffrey did not. Instead, on the Friday afternoon before the Monday trial, Jeffrey provided Marilyn's counsel with a binder containing 38 exhibits, 35 of which had not been attached to his declaration or trial brief and which were therefore 10 court days late under the order.

When Marilyn objected to the admission of these exhibits, for which no evidentiary foundation had been given in Jeffrey's sole declaration, Jeffery did not indicate that he had had any problems with gathering the exhibits in a timely manner, nor specify any circumstances that would have prevented him from complying with the local rule and trial scheduling order. Instead, as noted above, his only excuse was that he was following the procedure used for the bifurcated proceeding. This was not credible, not only because he was not following the earlier procedure, but because his attachment of three exhibits to his current declaration indicated his understanding that exhibits were not produced on the day of trial but rather as attachments to declarations. Any doubt on this score would have been

resolved on his receipt of Marilyn's declaration, which attached 138 pages of exhibits.

As the unrefuted declaration submitted by Marilyn's counsel revealed, Jeffrey had frequently failed to comply with court orders in the case, even orders he himself had requested, thus driving up the cost of the litigation. (AA Tab 8.) Jeffrey's failure to follow the trial scheduling order, while affording him the benefit of Marilyn's adherence to it which gave him 10 court days to scrutinize her direct and documentary evidence but denying her that same benefit, was simply more of the same.

Far from harshly enforcing the trial scheduling order, however, the trial judge only tentatively ruled that the tardy exhibits would not be admitted and offered Jeffrey the opportunity to convince him otherwise:

> THE COURT: . . .I've reviewed your declaration. Tentatively, I am going to rule in favor of [Marilyn's attorney]. I'm going to allow you at one of the breaks. . . to rethink your argument and give me the specific evidentiary foundations for these documents, but I don't see it in your declaration. . . the objections will be sustained tentatively subject to further argument after the morning break.

(RT at 9:25-10:3, 10:21-22.) But Jeffrey chose not to take this opportunity. Instead, prior to the break, when the court queried Jeffrey as to whether he had questions for Marilyn on the issue of dissolving the status of marriage, Jeffrey simply voluntarily rested his entire case. (RT at 14:11-17.) The court urged him to go one step at a time. (RT. at 14:20-21.) The court then

invited Jeffrey to cross-examine Marilyn, but Jeffrey spontaneously rescinded his earlier request to do so. (RT 14:28-15:4.) The court was careful to be sure it understood Jeffrey correctly, at which point Jeffrey spontaneously also withdrew his request to cross-examine the valuation expert. (RT at 15:17-23.) Jeffrey did not link either rescission to his proposed trial exhibits, and of course under the order, both witnesses could have been cross-examined either without exhibits or using the exhibits for impeachment purposes.

The following exchange then occurred:

> THE COURT: It's over to your case now, Mr. Elkins.
>
> MR. ELKINS: I rest.
>
> THE COURT: Well, before you rest, I'm assuming you would like to admit into evidence your declaration.
>
> MR. ELKINS: No. I rest.
>
> THE COURT: All right. I understand you're saying you're resting, but I just want to make sure the record's clear about what you're doing. I'm understanding you to say to me that you do not wish to offer your declaration into evidence.
>
> MR. ELKINS: I rest, your Honor.
>
> THE COURT: Is that a yes?
>
> MR. ELKINS: Yes.

(RT 16:2-19.)

When Jeffrey next disavowed a stipulation he had entered only that morning with Marilyn's counsel and took a dramatically different position on the disposition of the family residence, RT 17:8-20:6, the court urged Jeffrey to get legal advice ("I would, again, recommend, as I have always recommended to you, to get legal advice") and took the matter under submission rather than making an immediate ruling in reliance on Jeffrey's unexpected position changes or on Marilyn's proposed order after trial. RT 20:7-27 (emphasis added). The court invited Jeffrey to take the week and either settle the issues or ask the court to rule on the proposed orders, thus giving Jeffrey another opportunity to present objections or to request admission of the challenged exhibits or other relief prior to the court deciding the case. Once again, Jeffrey did not avail himself of this opportunity.

It must be recalled that Jeffrey was not an unsophisticated unrepresented party but rather the founder of a telecommunications company who was asking the community to pay him $20,000 a month to manage that company's complex litigation. (AA Tabs 9 and 10.) The fact is, Jeffrey was not forced to a default by onerous rules. Rather, he took the calculated risk of producing his exhibits 10 court days later than required by the order (to which he never objected) to gain an advantage, and then

completely and voluntarily abandoned his whole case when the gamble did not pay off.

The Local Rule and Trial Scheduling Order Provisions Regarding Direct Testimony Violate Neither Statutory Law Nor Due Process

The gravamen of Jeffrey's petition for review is that the local rule and court order providing for direct testimony by declaration violate statutory law and due process. But as we have seen, Jeffrey waived this claim by never asserting it below. Jeffrey's real complaint is that he was not given a free pass to keep his trial exhibits from Marilyn while enjoying 10 court days before trial to review hers. He ignores completely that he dropped the ball when the court nevertheless gave him the opportunity to establish the admissibility of the late-produced exhibits at trial. And he nowhere suggests that the rule and order regarding early exchange of trial exhibits violate any statute or any constitutional provision.

Should the court nonetheless reach Jeffrey's claims that the rule and order regarding direct by declaration contravene statutory law, they are without merit. Jeffrey acknowledges that courts and judges may adopt rules and procedures for the efficient processing of trials in their counties or courts. (Petition at 18-19.) The only statutes Jeffrey claims are affected by Local Rule 12.5 or the trial scheduling order are Evidence Code §772 and Code of Civil Procedure §§607 and 631.7, setting forth the order of proof,

and Evidence Code §780 regarding credibility. (Petition at 20-21.) But direct testimony by declaration, even if it were mandatory (which it isn't under the rule or order) does not change the *order* of proof. And even if it did, it would not violate these statutes, as both provide that the stated order may be changed by the court; thus, Evidence Code §772 provides that the judge may do so on good cause or in its discretion, and Code of Civil Procedure §631.7 provides that bench trials will follow jury trial orders of proof "unless the court otherwise directs." As for credibility, Evidence Code §780 merely provides that the court may consider various factors in assessing a witness' credibility and testimony, and nowhere mentions direct testimony. The challenged local rule and order both provide for oral cross-examination, and do not prohibit oral redirect, thus providing the court ample opportunities to assess credibility. And, of course, both permit a litigant to request, or the court to order, oral direct should it be necessary to assess credibility.

Nor does the rule or order violate due process. To mount a due process challenge, Jeffrey must establish that the rule and order "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Lammers v. Superior Court, supra* 83 Cal.App.4th at 1324 (emphasis added). Since both rule and order permit a party to request oral

direct testimony, it cannot be said that either inevitably prohibits direct live testimony.

And Jeffrey is in no position to claim that his right to request such live testimony was somehow burdened, when he indicated no desire for live direct below and never complained about this aspect of the rule but rather willingly participated in it. As a litigant not represented by counsel, direct testimony by declaration gave Jeffrey some distinct benefits, as it gave him two opportunities (in the opening and responsive declaration) to set out and swear to all the facts he thought were important without interruption or objection. Moreover, as an in pro per, live "direct" is often awkward, since there is no second person to pose direct questions, with the result that in such circumstances live direct, like direct by declaration, frequently is simply a narrative. Further, the procedure also assists pro per litigants in their preparation for cross-examination, since they have the direct testimony days before trial and are not at the disadvantage live direct produces, where pro per litigants are not as adept as experienced trial counsel in meeting live testimony.

The thrust of Jeffrey's argument is that the trial scheduling order denied him the opportunity to be heard. But in some respects the order expands this opportunity. It provides for opening and reply declarations of any length in lieu of live direct testimony. The amount of time allocated to

a trial, on the other hand, is frequently and permissibly limited. Here, for example, Jeffrey participated in setting trial for only one day. The direct-by-declaration process is intended to, and does, "provide for orderly presentation of evidence, and . . . make efficient use of the time available for hearing of this matter." (AA Tab 2, first sentence.)

Moreover, in addition to permitting litigants to request exemption from the direct-by-declaration provision, both rule and order make all direct-testimony declarations subject to cross-examination and legal objections. Thus both rule and order comport with due process of law. In *In re Adair* (9th Cir.1992) 965 F.2d 777, the court upheld a similar procedure against a similar due process challenge. As Jeffrey's challenge is based on the Federal Constitution (Petition at 25), federal case law is apposite. In *Adair,* a federal bankruptcy court employed a standard procedure requiring that direct testimony be presented by written declaration subject to oral cross-examination and redirect. *In re Adair, supra* 965 F.2d at 779. The U.S. District Court for the Central District of California affirmed the bankruptcy court's ruling after trial, rejecting appellants' statutory and due process challenges to the direct-by-declaration procedure, *Id.* at 778, and the Ninth Circuit affirmed. The court noted that it had previously held that the use of written testimony is an acceptable technique for shortening bench trials and that oral cross-examination and

redirect preserved the opportunity for the judge to evaluate demeanor and credibility. *Id.* Specifically addressing the due process challenge, the court found that the procedure did not raise significant due process concerns, because the procedure ensured that the accuracy of witness statements could be tested by cross-examination, that credibility could be initially established by factual consistency in the declarations, and that the judge had the opportunity to observe witness demeanor and gauge their credibility during oral cross-examination and redirect. *Id.* at 780.

All of the same factors are present here and establish that neither the Local Rule nor the trial scheduling order regarding direct examination raises substantial due process concerns. Here, in addition, Jeffrey affirmatively waived any challenge by not objecting to the procedure but rather using it, by rejecting even the trial court's attempt to enter his declaration into evidence, by choosing not to establish at trial the admissibility of exhibits not attached to the declaration despite the court's invitation to do so, and by choosing to forego the cross-examination the order and trial judge afforded him. Consequently, Jeffrey's claim that the rule or order was unconstitutionally applied as to him rings especially hollow.

The Exhibits Were Not in Evidence, Not Because the Court Excluded Them, But Because Jeffrey Abruptly Rested His Case and Withdrew His Evidence

Jeffrey does not make a direct statutory or constitutional challenge to the requirement, under the Rule and under the order, that parties identify and exchange trial exhibits at prescribed times prior to trial, presumably because no statute or constitutional provision prohibits such commonsensical procedures. On the contrary, Superior Courts have inherent power to "adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council." (*Citizens Utilities Co. v Superior Court* (1963) 59 Cal.2d 805, 812-813; see also Code of Civil Procedure §187.) Practice guides advise trial counsel to contact court staff for a particular judge to become acquainted with customary practice regarding such issues as identifying and premarking trial exhibits in advance of trial. (See, e.g., Hogoboom & King, Cal. Prac. Guide: Family Law (Rutter, 2005) §§13.14, 13.80, 13.82, 13.84.) Here, the Trial Scheduling Order gives both parties full notice of the practices and procedures that will be applied to the case.

Procedures by which the content of direct testimony is conveyed by declaration and the identification and exchange of trial exhibits occur in

advance of trial not only provide for an efficient yet full presentation of evidence, but also effectively avoid trial by ambush. Such procedures are especially appropriate in family law, where by statute parties owe fiduciary duties of disclosure.

In support of his claim that the court abused its discretion in not admitting Jeffrey's late-produced trial exhibits, Jeffrey ignores completely (1) the fact that the court only made a tentative ruling regarding the exhibits and gave Jeffrey an opportunity to rethink his argument and demonstrate the admissibility of the exhibits after the morning break and (2) that Jeffrey did not avail himself of this opportunity but simply rested his case and, with no prompting by the court, withdrew all of his evidence. As a result the court never revisited or finalized its tentative ruling excluding Jeffrey's exhibits. It was Jeffrey who short-circuited the process, preventing the court from exercising its discretion and making a ruling. If this resulted in a judgment by default, it was only because Jeffrey made it so.

Jeffrey's new counsel's strained assertion that Jeffrey's decision to forego cross-examination was based on the fact that his late-produced proposed trial exhibits were not admitted (Petition at 15-16) is belied by the record. Jeffrey's lament about the exhibits was not connected to his decision to forego cross-examination but rather to his decision to rest his case and "give up my position." (RT at 20:1-5.) This decision, in turn,

followed Jeffrey's decision not to orally establish the admissibility of the exhibits, although the court had expressly invited him to do so.

Jeffrey also complains that the trial scheduling order conflicts with Local Rule 12.5 regarding the amount of time before trial that the trial exhibit exchange must occur (Petition at 31-32), but this distinction would not change the result here. Jeffrey did not deliver his documents to Marilyn's counsel until Friday afternoon for the Monday morning trial. (RT 12:23-28.) Local Rule 12.5 required this to happen five calendar days before trial, here, by Wednesday. Thus Jeffrey failed to comply with the Rule as well as the order.

Jeffrey asserts that exempting Jeffrey but not Marilyn from the order's provisions would not prejudice Marilyn, but of course this is not correct. Because Marilyn complied with the order, Jeffrey had her extensive opening declaration and attached trial exhibits for almost two weeks prior to trial, giving him all of that time to prepare for trial, including preparing for her cross-examination. Permitting Jeffrey to present his voluminous proposed trial exhibits the last workday afternoon before trial would have seriously compromised her ability to prepare equally for trial. Indeed, had Jeffrey not rested his case but instead followed through on the court's invitation and persuaded the court to admit his exhibits, the prejudice to Marilyn would have been such as to warrant a continuance.

Finally, Jeffrey's statements that his "exhibits were excluded not because they were inadmissible" and that they were "not excluded because there was anything wrong with the evidence he proffered or because he did not act in good faith" (Petition at 33) are breathtaking in their inaccuracy. The exhibits were initially and tentatively excluded for Jeffrey's failure to comply with the rule or provide any good reason for not doing so. But they were finally excluded only because Jeffrey turned down the opportunity to have them admitted and instead first rested his case and then himself gutted it of any evidence. Moreover, many of Jeffrey's exhibits were hearsay or irrelevant. Those which had been previously submitted to the expert, Mr. Eggers, could have been used to cross-examine him whether admitted into evidence or not, especially since the order by its terms did not apply to documents used for impeachment. The same is true of documents related to Marilyn and her cross-examination.

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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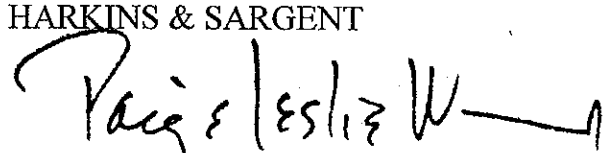

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