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COUNTY OF SAN MATEO
and CHRISTINA CORPUS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

A.B.O. COMIX, KENNETH ROBERTS, ZACHARY GREENBERG, RUBEN GONZALEZ-MAGALLANES, DOMINGO AGUILAR, KEVIN PRASAD, MALTI PRASAD, and WUMI OLADIPO,

Plaintiffs,

v.

COUNTY OF SAN MATEO and CHRISTINA CORPUS, in her official capacity as Sheriff of San Mateo County

Defendants.

(Exempt from Filing Fees pursuant to Government Code §6103)

Case No. 23-CIV-01075

Assigned for All Purposes to:
Hon. V. Raymond Swope, Dept. 23

DEFENDANTS' OBJECTION TO THE DECLARATION OF CARA GAGLIANO IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE AND EXHIBIT ONE THERETO

Date: December 4, 2023
Time: 2:00 PM
Dept.: 23

Action Filed: March 9, 2023
Trial Date: None Set

I. INTRODUCTION

Plaintiffs' Sur-Opposition—which they style as a "Sur-Reply"[1]—claims "Zachary Greenberg filed a grievance protested Defendants' mail policy" and Defendants "introduc[ed] new evidence through a request for judicial notice" that "falsely claim[ed] that he did not" do so.[2] But the exhibit they submit in support of this claim is hearsay and must be excluded for two reasons. First, the declaration purporting to authenticate wholly lacks foundation. Second, the declaration does not comply Code of Civil Procedure ("CCP") § 2015.15.

II. ANALYSIS

A. The Declarant Lacks Personal Knowledge to Authenticate the Exhibit

Writings are not presumed to be "what they purport to be" and "must be authenticated in some fashion." *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525. "Authentication of a writing is required before it may be received in evidence." Evid. Code § 1401. Thus, to offer an exhibit into evidence for any purpose, a declarant must "establish a foundation based on personal knowledge for authenticating … the documents attached." *San Diegans for Open Gov't v. SDSU Res. Found.* (2017) 13 Cal.App.5th 76, 108. This is because A declarant's "fail[ure] to establish foundation" renders the declaration and its exhibits inadmissible "hearsay." *Id.* "To authenticate a writing, its proponent must introduce evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 249 (disapproved on other grounds by *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 776 fn. 4).

This rule applies with equal vigor to when an "attorney for [a party] … has filed a declaration in opposition to [an opposing party's] motion." *Wilson v. Sup. Ct.* (1964) 226 Cal.App.2d 715, 721. "Declarations by … party's counsel as to essential facts are generally objectionable as hearsay ... except where the lawyer somehow has personal knowledge of the facts. Otherwise, the lawyer's declarations are inadmissible hearsay." Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 9:61, p. 9(I)-34 (citing *Star Motor*

[1] A Sur-Reply is a "movant's second supplemental response to another party's opposition to a motion." *Surreply*, Black's Law Dict. (11th ed. 2019).
[2] Plaintiffs' Sur-Reply to Defs' Motion for Judgment on the Pleadings ("Sur-Opp'n") at 2:1-7.

Imports, Inc. v. Sup. Ct. (1979) 88 Cal.App.3d 201).

Applying this rule, the court in *O'Laskey* found that a recording of a conversation was inadmissible for lack of foundation because the attorney-declarant failed to authenticate it. 224 Cal.App.3d at 250. The attorney's declaration attested that he "received the … tape from [a private] investigator" who the "attorney hired" to conduct an investigation on behalf of his client. *Id.* at 244, 249. The court held the tape was inadmissible hearsay because "no foundation for the tape was laid" because the attorney-declarant was not present during the conversation and thus, the "attorney [could not] know the true and complete extent of the conversation." *Id.* at 250.

Here, Plaintiffs represent that Mr. Greenberg "filed a grievance protesting Defendants' mail policy on or about October 20, 2022" and any claim that Mr. Greenberg did not grieve the mail policy is demonstrably false" because "Mr. Greenberg in fact *did* file a grievance protesting the County's mail policy." Sur-Opp'n at 2:2-3, 3:4-5 (emphasis in original). But Plaintiffs' purportedly authenticating declaration fails the test for foundation discussed above. Like the lawyer in *O'Laskey*, the attorney declarant states that "[Mr.] Greenberg provided [her] with an Inmate Grievance Form…." Gagliano Decl. ¶ 2. Based on this, she asserts that "he signed [the form]" and she implies that it is authentic. *See id.* The declarant does not attest that she was present when Mr. Greenberg purportedly signed or filed the alleged grievance. Indeed, she does not even attest that she represented or was even acquainted with him when he purportedly signed it on "October 20, 2022." *See id.* Thus, the declaration and its exhibit must be excluded.

B. The Declaration and the Exhibit Are Inadmissible Under CCP § 2015.15

The declarant concludes by stating: "I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed this 31st day of October, 2023, at Brooklyn, New York." Gagliano Decl. at 4:22-24. But California law requires that declarants strictly conform to the requirements of § 2015.15 and include all essential statutory language. Section 2015.15 provides that an unsworn declaration will have the same "force and effect" as a sworn declaration if it is "declared by [the declarant] to be true under penalty of perjury, is subscribed by [the declarant], and …. *if executed at any place, within or without this state*, states the date of execution and that it is so certified or declared *under the laws*

of the State of California." (Emphasis added).

Section 2015.15's command that declarations include the words "*under the laws of the State of California*" is not "pointless or optional." *Kulshrestha v. First Union Comm'l Corp*. (2004) 33 Cal.4th 601, 611 (emphasis in original). This is because courts must "assume each term has meaning and appears for a reason." *Id.* And "[f]ar from being surplusage, the statutory phrase that petitioner ignored discloses California's interest in preventing and punishing perjury even as to documents signed outside the state." *Id.* Thus, it is "clear that out-of-state declarations offend [§] 2015.5, and are not deemed sufficiently reliable for purposes of that statute, unless they follow its literal terms." *Id*. Accordingly, a declaration that was "not signed under penalty of perjury under the laws of the State of California as required by [§] 2015.5" has "no evidentiary value." *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217. Here, Plaintiffs' counsel's declaration states "I declare under penalty of perjury *under the laws of the United States* that the foregoing is true and correct to the best of my knowledge. Executed this 31st day of October, 2023, at Brooklyn, New York." Gagliano Decl. at 4:22-24 (emphasis added). Thus, it is hearsay.

DATED: November 6, 2023

Respectfully submitted,

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By: 

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