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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MIDLAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION, Plaintiffs and Petitioners, vs. KAMALA HARRIS, in Her Official Capacity as Attorney General for the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, JOHN CHIANG, in his official capacity as State Controller for the State of California, and DOES 1-10. Defendants and Respondents.	CASE NO. 34-2013-80001667 **NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES TO REQUEST FOR ADMISSIONS, SET ONE, PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY; MEMORANDUM IN SUPPORT THEREOF** Date: 04/24/15 Time: 9:00 a.m. Dept.: 31 Action filed: 10/16/2013

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 24, 2015, at 9:00 a.m. or as soon thereafter as the matter may be heard, in Department 31 of the Sacramento County Superior Court, located at 720 9th Street, Sacramento, CA 95814, Plaintiffs/Petitioners David Gentry, James Parker, Mark Midlam, James Bass, and Calguns Shooting Sports Association (collectively "Plaintiffs") will and hereby do move this Court for an order compelling Defendants/Respondents Kamala Harris and Stephen Lindley ("Defendants") to produce further responses to Plaintiffs' Requests for

Admissions, Set One, propounded on Defendants on May 14, 2014.

This Motion is brought pursuant to Code of Civil Procedure sections 2033.220(c) and 2033.290(a)(1) on the grounds that Defendants have provided evasive and incomplete responses to certain requests propounded by Plaintiffs. A declaration in conformance with Code of Civil Procedure section 2016.040 is provided herewith.

This Motion is based upon this notice, the attached memorandum of points and authorities, the supporting Declaration of Scott M. Franklin, the Separate Statement in Support of Motion to Compel Further Responses to Form Interrogatories, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley (the "Sep. Statement" or "Separate Statement"), upon all papers and pleadings currently on file with the Court, and upon such oral and documentary evidence as may be presented to the Court at the time of the hearing.

Please take further notice that pursuant to Local Rule 1.06(A), the Court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the department may be downloaded off the Court's website. If a party does not have online access, they may call the dedicated phone number for the department referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the Court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

Dated: February 17, 2015

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin, attorney for Plaintiffs

I. INTRODUCTION

Plaintiffs' Motion concerns Defendants' responses to six requests for admission propounded by Plaintiffs. Each of the six requests asks the Defendants to confirm the California Department of Justice's (the "Department" or "CAL DOJ") position on certain legal issues at the core of this case. Even though Defendant Kamala Harris is the "chief law officer of the state[,]"[1] Defendants claim they are unable to admit or deny six requests for admission that require the application of law to fact. It appears Defendants are "[u]nable to admit or deny" the relevant requests not because of an inability to reply, but rather because of a determination that providing sworn, non-evasive responses would be detrimental to Defendants' defense strategy. Because Defendants' responses are plainly evasive, the Motion should be granted.

II. STATEMENT OF FACTS

Plaintiffs served a first set of Requests for Admissions ("RFA") on Defendants on May 14, 2014, (Declaration of Scott M. Franklin In Support of Motion to Compel Further Responses to Requests for Admissions Propounded on Defendants Kamala Harris and Stephen Lindley [the "Franklin Decl."] ¶ 2). Defendants provided responses to RFA Set One on August 1, 2014, pursuant to a courtesy extension granted by Plaintiffs. (*Id.* ¶ 3). Soon thereafter, Plaintiffs' counsel evaluated the responses and determined them to be insufficient, and accordingly, Plaintiffs' counsel sent a letter to that effect to Defendants' counsel on October 17, 2014. (*Id.* ¶ 4). Specifically, as to the request for admissions at issue in the instant Motion, Defendants provided objections but no substantive responses. (*Id.*). On October 29, 2014, counsel for the parties held a telephonic conference to discuss the disputed discovery responses, and Defendants counsel agreed that as to each of the disputed responses, the Defendants would provide some form of further response (be it a substantive response or a statement that no further response would be voluntarily provided) by November 26, 2014. (*Id.* ¶ 5). At the request of Defendants' counsel, that response date was extended to December 9, 2014. (*Id.* ¶ 6).

On December 4, 2014, Defendants' counsel sent a letter to Plaintiffs' counsel proposing that the parties put the dispute concerning Defendants' RFA responses on hold. (Franklin Decl. at

[1] *See* http://oag.ca.gov/opinions, last visited February 9, 2015.

¶ 7). Defendants based this proposal on a claim that they intended to file a motion for judgment on the pleadings ("MJOP") at some point in the future, and that, if granted, the resolution of such motion could moot some of the disputed requests. (*Id.*). Plaintiffs' counsel first raised this concept during the phone call of October 29, 2014. (*Id.*). On December 5, 2014, Plaintiffs' counsel emailed Defendants' counsel requesting a further explanation of the argument that Defendants purportedly intended to raise in an MJOP. (*Id.* ¶ 8). Plaintiffs' counsel provided a summary of Defendants' purported MJOP argument in a response email dated December 10, 2014. (*Id.* ¶ 9).

The next day, Plaintiffs' counsel sent a letter to Defendants' counsel explaining why: (a) the MJOP argument did not appear meritorious; and (b) that the majority of the requests for admissions concerned facts and opinions related to causes of action that would not be resolved even if the contemplated MJOP were ultimately granted. (*Id.* ¶ 10). Thereafter, counsel agreed that Defendants would further respond to each disputed request by January 19, 2015, which was later extended upon Defendants' counsel's request to January 22, 2015. (Franklin Decl. ¶ 11).

Defendants served their amended RFA responses on January 22, 2015. (*Id.* ¶ 12). As to the six responses at issue in the instant Motion, Defendants' entire substantive response was "[u]nable to admit or deny." (Sep. Statement *passim*). None of those responses contain any explanation of the kind described in Code of Civil Procedure section 2033.220(c). (*Id.*). Accordingly, Plaintiffs' counsel sent a letter to Defendants' counsel on January 28, 2015, explaining why the amended responses provided were insufficient. (*Id.* ¶ 13). On February 4, 2015, counsel for the parties confirmed that the parties were at an impasse regarding, among other things, the six RFA responses at issue here. (*Id.* ¶ 14).

To facilitate the meet-and-confer process, counsel for the parties agreed to extend the filing deadline for the current motion several times, which was most recently extended to February 17, 2015. (*Id.* ¶ 15). Because multiple attempts to resolve the disputed matter in good faith were not entirely successful, the Motion, timely brought, is now required.

III. ARGUMENT

A. Generally Applicable Law Relevant to Responding to Requests for Admissions

> (a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party

permits.

(b) Each answer shall:

(1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party.

(2) Deny so much of the matter involved in the request as is untrue.

(3) Specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge.

(c) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter.

Civ. Proc. Code § 2033.220.[2] A responding party's failure to comply with section 2033.220(a-c) justifies a motion to compel further responses. Civ. Proc. Code § 2033.290(a)(1-2).

B. Definitions

The following terms are defined as follows for the purpose of this Memorandum.

APPS: the Armed Prohibited Persons System program, i.e., Prohibited Armed Person File (Penal Code section 30000), and enforcement activities based on data derived from APPS.

DROS FEE/DROS FEE FUNDS: the fee (which is currently set at $19.00) and funds collected pursuant to Penal Code section 28225 and Code of Regulations, title 11, section 4001.

DROS PROCESS: the background check process that occurs when a firearm purchase or transfer occurs in California.

DROS SPECIAL ACCOUNT: the Dealers Record of Sale Special Account of the General Fund (Penal Code section 28235).

C. Requests and Responses at Issue

1. Request for Admission Nos. 83-86, 88-89

Request No. 83

Admit that it is the position of CAL DOJ that law-abiding citizens who participate in the DROS PROCESS place an unusual burden on the general public as to the illegal possession of firearms.

Request No. 84

[2] Statutory references are to the Code of Civil Procedure, unless otherwise noted.

Admit that it is the position of CAL DOJ that law-abiding citizens who participate in the DROS PROCESS do not place an unusual burden on the general public as to the illegal possession of firearms.

Request No. 85

Admit that it is the position of CAL DOJ that law-abiding citizens who participate in the DROS PROCESS pose no greater burden on the public as to illegal firearm possession than do law abiding citizens who have not participated in the DROS PROCESS.

Request No. 86

Admit that it is the position of CAL DOJ that law-abiding citizens who participate in the DROS PROCESS pose a greater burden on the public as to illegal firearm possession than do law abiding citizens who have not participated in the DROS PROCESS.

Request No. 88

Admit that it is the position of CAL DOJ that law-abiding firearm owners have a greater interest, as compared to other law-abiding citizens who do not own firearms, in insuring firearms are not in the possession of persons who are not legally permitted to posses a firearm.

Request No. 89

Admit that it is the position of CAL DOJ that law-abiding firearms owners do not have a greater interest, as compared to other law-abiding citizens who do not own firearms, in insuring firearms are not in the possession of persons who are not legally permitted to posses a firearm.

(Sep. Statement 2:2-5, 6:7-8, 9:18-20, 15:2-4, 19:6-8, 23:12-14).

2. Defendants' Response(s)[3]

Defendants' initial response was an objection, which is discussed in detail in the Separate Statement. Defendants' amended response also included this statement: "Without waiving this objection, defendants respond as follows: Unable to admit or deny." (Sep. Statement *passim*).

C. <u>Reason Why Further Responses Should Be Produced</u>

1. Defendants' Responses Are Not Sufficient Because They Are Not Statutorily Authorized

Proper responses to requests for admission must include some combination of one or more of the following elements: (1) an admission concerning "so much of the matter involved in the request as is true;" (2) a denial as to "so much of the matter involved in the request as is untrue[;]" or (3) a statement as to "so much of the matter involved in the request as to the truth of which the

[3] Defendants provided the same responses to each of the six requests at issue.

responding party lacks sufficient information or knowledge." Civ. Proc. Code § 2033.220(b)(1-3). Because Defendants expressly state that they cannot admit or deny the relevant requests, it is clear that section 2033.220(b) subsections (1) and (2) are not at issue. The question is if Defendants' responses are proper under section 2033.220(b) subsection (3). As shown below, they are not.

Defendants' responses, e.g., "[u]nable to admit or deny" do not fall within section 2033.220(b)(3) because that section only applies if the "responding party lacks sufficient information of knowledge" on the truth of the matter at issue. Indeed, Defendants' responses completely fail to state, as required by section 2033.220(b)(3), that "a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable [Defendants] to admit the matter." Failure to comply with section 2033.220(b)(3) alone justifies an order requiring further responses.

More important than the procedural deficiency, however, is that Defendants appear to be improperly attempting to hide non-responsive answers under a guise of inability to comply. That is, a responding party does not have the option to claim an inability to admit or deny in response to a request for admission if the responding party has sufficient information or knowledge to provide some level of a substantive response. Civ. Proc. Code § 2033.220(b)(3). A review of Defendants' responses, and statements made during the meet-and-confer process, shows that Defendants' responses are not based on a lack of knowledge, but on a claim that "many of the requests for admissions will be mooted" if the Court grants the contemplated MJOP. (Sep. Statement *passim*; Franklin Decl. ¶7, [Ex. 2 at 4]) Though Plaintiffs dispute that claim (as discussed in Section III.C.4. below), the more salient point here is that section 2033.220(b)(3) simply does not provide grounds for a response based on an inchoate mootness argument. That section *only* applies if a party has a good faith inability to comply, meaning it is inapplicable here.

Because Defendants' responses are not proper pursuant to section 2033.220(a)-(c), further responses should be ordered.

2. There Is No Plausible Argument that Defendants Lack Sufficient Information or Knowledge to Admit or Deny the Requests at Issue

Defendants do not expressly claim that their failure to admit or deny the requests at issue

is based on a lack of sufficient information, notwithstanding their attempt to couch their responses in language indicating otherwise (see Section III.C.1.). The reason no such express claim is made seems relatively obvious: the Attorney General of California, the "chief law officer of the state[,]" is clearly able to express a legal opinion, as is required by the requests at issue. *See* Civ. Proc. Code § 2033.010 (stating that a request for admission may concern "application of law to fact"). Indeed, there can be no reasonable dispute that it is the sin qua non of the Office of the Attorney General to apply law to fact, and Defendants have not alleged any factual deficiency or uncertainty preventing Defendants from responding to the relevant requests.

Accordingly, because Defendants clearly do not "lack sufficient information or knowledge" to substantively respond to the relevant requests, they should be ordered to do so.

3. Defendants' Objections Are Evasive, As Fully Explained in the Separate Statement Provided Herewith

Because Defendants' amended RFA responses were provided notwithstanding an objection[4] previously raised, Plaintiffs will take a moment to address that objection, though a line-by-line response to the objection is stated in the Separate Statement filed herewith.

The Defendants object to the six requests at issue as "irrelevant, defendants having admitted that the use of DROS funds does not operate as a tax." (*E.g.,* Sep. Statement 2:18-19). The fact that Defendants intend to *argue* "that the use of DROS funds does not operate as a tax" does not automatically mean that the use of DROS FEE FUNDS does not operate as a tax. The relevant requests were propounded expressly because there is a dispute about whether DROS FEE FUNDS are operating as taxes. The requests are therefore relevant and the relevancy portion of the objection should be disregarded. Civ. Proc. Code § 2033.290(a)(2).

Defendants also object to each of the relevant requests as "an improper use of the request for admission procedure." (*E.g.,* Sep. Statement 2:9-20). Code of Civil Procedure section 2033.010, however, says otherwise, stating that a request for admission may concern "opinion relating to fact, or application of law to fact[.]" *See also Burke v. Superior Court*, 71 Cal. 2d 276, 282 (1969) ("When a party is served with a request for admission concerning a legal question

[4] Technically, the objection at issue is one long multi-part objection used repeatedly in response to each of the six requests of interest.

properly raised in the pleadings he cannot object simply by asserting that the request calls for a conclusion of law.").

Plaintiffs are confident Defendants' objection are without merit. Plaintiffs provided Defendants a detailed analysis of the objection—which concluded in a determination that the objection's sole intent was to improperly evade providing substantive RFA responses—in Plaintiffs' initial meet-and-confer letter, sent October 17, 2014. (Franklin Decl. ¶ 4 [Ex. 1 at 6-8]). Defendants have never even attempted to challenge the accuracy of that analysis.

Because Plaintiffs have a right to set to rest both legal and factual issues that might otherwise be argued at trial, because RFAs are the litigation tool intended to serve that need, and because the disputed RFAs concern relevant matters, Defendants' objections must fail.

4. The Court Should Not Delay Action on the Instant Motion Based on a Supposedly Forthcoming MJOP that Does Not Appear Likely to Be Granted

Plaintiffs do not intend to use the instant Motion as a platform to fully argue the merits of their Proposition 26 claim. Nonetheless, Defendants are attempting to avoid their discovery responsibility based on a supposition that they will obtain a dismissal of a cause of action in the future that, in retrospect, will show the discovery at issue was unnecessary. Accordingly, the argument provided in this Section is presented only to show that Defendants' hypothetical MJOP claim is not likely to be granted, and therefore there is no legal basis for the Court to excuse Defendants from complying with their duties under the Discovery Act.

a. *Defendants Incorrectly Contend that SB 819 Did Not Result in a "Higher" Tax Being Paid*

Article XIII A, section 3 of the California Constitution, enacted in 2010 as the result of Proposition 26, states in relevant part that "[a]ny change in state statute which results in any taxpayer paying a higher tax" cannot be adopted with "less than two-thirds of all members elected to each of the two houses of the Legislature." Defendants argue that, because the amount of the DROS FEE actually charged (i.e, $19.00) did not change as result of the passage of SB 819, the passage of SB 819 did not result in a "higher tax," and thus, Defendants insist, it is irrelevant that SB 819 passed by less than a two-thirds majority. (Franklin Decl. ¶ 8 [Ex. 3]). Based on this view

of the law, Defendants contend they should not have to provide certain discovery responses based on the supposition that those requests are only relevant to a Plaintiffs' Proposition 26 claim that Defendants contend they can ultimately defeat. Defendants are wrong.

b. *Defendants Appear to Be Intentionally Avoiding that It Is the Use of Levied Funds that Determines Whether a Levy Constitutes or Includes a Tax*

Defendants' claim that SB 819 did not result in a higher tax does not make sense. Prior to SB 819, "[t]he Department [wa]s not authorized to use DROS funds on the APPS program[.]" (Franklin Decl. ¶ 16 [Ex. 6 at No.16]). Upon the passage of SB 819, the Department *was* authorized to spend DROS FEE FUNDS on APPS. (Franklin Decl. ¶ 17 [Ex. 7 at 2]). Thus, even though the amount of the DROS FEE did not change, the percentage of the fee authorized for use on APPS did. That is, before SB 819, zero percent of the DROS FEE was authorized for use on APPS, and after SB 819, some percentage of the DROS FEE went to funding APPS. When a tax comes into being where no tax previously existed, that clearly creates a "higher tax[.]"

Indeed, the change is substantial. In Fiscal Year 2012/2013 (i.e., post-SB 819's adoption) the Department received "approximately $20,725,000 in budget funds from the DROS SPECIAL ACCOUNT." (Franklin Decl. ¶ 24 [Ex. 14 at 5:15-6:28]). Approximately $6,607,000 of the budget funds obtained—about one-third of the total amount—was spent on "APPS-related law enforcement activities." (*Id.*). Previously, APPS-related activities were funded primarily with unrestricted general fund money. (*Id*). Because a portion of the DROS FEE is now being used to generate millions in revenue for APPS, a program that operates to benefit the general public, the increase from no tax to some tax caused by the adoption of SB 819 plainly constitutes a "change in state statute which results in any taxpayer paying a higher tax[.]" Cal. Const. art. XIII A, § 3.

i. *At this Point in Litigation, Defendants Must Assume Arguendo the DROS FEE Is a Tax to the Extent It Is Used to Fund APPS*

Plaintiffs wish to clarify one issue. The analysis above relies on the premise that the use of DROS FEE FUNDS for APPS constitutes a "tax" as defined in the California Constitution. Cal. Const. art. XIII A, § 3(b). As a matter of simple fairness, Defendants must accept that premise as true at this early stage in litigation *regardless* of Defendants' actual position on the issue.

Accordingly, because the RFAs Defendants are attempting to avoid (see Section B.1. above) specifically seek information relevant to a key matter in this case, it is at least premature for Defendants to make any merits arguments in that regard. Cal. Const. art. XIII A, § 3(b). It would be inequitable for a court to allow a party to avoid discovery on an issue and at the same time argue the merits of that same exact issue. Therefore, Defendants' arguments on whether a "higher tax" was imposed under SB 819 is, at this juncture, necessarily limited to the question of whether SB 819 created a tax *increase*, not whether SB 819 created a tax.

c. *The California Department of Finance Has Established that DROS FEE Revenues Can Become Taxes When Transferred for a Non-Regulatory Use*

The State of California's Department of Finance has already provided guidance on this issue, and it plainly supports Plaintiffs' position. The State of California Manual of Funds clearly states that, as to funds in the DROS SPECIAL ACCOUNT, "[r]evenues in this fund are not proceeds of taxes. ***However, when transferred, may become proceeds of taxes***. These revenues are used to regulate the activities engaged in by the payers." (Franklin Decl. at ¶ 20 [Ex. 10]) (emphasis added). This passage was the same both *before* the passage of SB 819 (as stated in the 2010 version of the fund summary at issue) and *after* (the fund summary was revised in August 2012). (Franklin Decl. ¶ 20). Defendants produced the fund summary quoted above in discovery in this matter. (*Id.*). It confirms two important points: (1) the general purpose of the DROS SPECIAL ACCOUNT is to collect regulatory fees; and (2) the fact that DROS FEE FUNDS are collected under the guise of regulation does not prevent such fees from being converted into taxes when used for a non-regulatory purpose. (*Id.*)

SB 819 retroactively and proactively takes money purportedly collected for regulatory purposes and funnels it into APPS, thereby partially converting a regulatory fee into a general revenue funding mechanism, i.e., a tax. Because of this, Defendants' hypothetical MJOP is, at best, on shaky ground. In any event, Defendants' theory is plainly not so persuasive that it would justify the Court taking the highly irregular action of excusing timely compliance with a few very simple discovery responses. The Court should order further responses.

5. Defendants Should Not Be Allowed to Hide from Discovery Obligations Based on an Argument they Failed to Raise for Over a Year

"A motion for judgment on the pleadings, like a general demurrer, challenges the sufficiency of the plaintiff's cause of action and raises the legal issue, regardless of the existence of triable issues of fact, of whether the complaint states a cause of action." *Brownell v. L.A. Unified School Dist.*, 4 Cal. App. 4th 787, 793 (1992) (citation omitted). Thus, whether by demurrer or MJOP, Defendants could have brought a claim (i.e., that SB 819 did not create a "higher tax") at any time since this lawsuit was served in October 2013. The six requests at issue seek nothing more than to have Defendants confirm their legal position, which, frankly, already appears to be well established.

Because Defendants' hypothetical MJOP seems to be nothing more than a last-ditch effort to avoid providing substantive discovery responses, the Court should not exercise its discretion in favor of delaying or denying the discovery responses due to Plaintiffs.

IV. CONCLUSION

As explained above, the disputed responses concern a key aspect of this action, and Defendants' responses appear impermissibly crafted to evade. For the reasons stated above, Plaintiffs respectfully request the Court grant the Motion and provide the relief requested thereby.

Dated: February 17, 2015

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin, attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Christina Sanchez, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, CA 90802.

On February 17, 2015, the foregoing document(s) described as

NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES TO REQUEST FOR ADMISSIONS, SET ONE, PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY; M EMORANDUM IN SUPPORT THEREOF

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kamala D. Harris, Attorney General of California
Office of the Attorney General
Anthony Hakl, Deputy Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on February 17, 2015, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on February 17, 2015, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

CHRISTINA SANCHEZ