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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 NADIA NAFFE, an individual,

12 Plaintiff,

13 vs.
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15 JOHN PATRICK FREY, an
16 individual, and the COUNTY OF LOS
ANGELES, a municipal entity,

17 Defendants.
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) Case No. CV 12-8443 GW (MRWx)

) Honorable George H. Wu

) **DEFENDANT COUNTY OF**
) **LOS ANGELES' REPLY TO**
) **PLAINTIFF'S OPPOSITION TO**
) **DEFENDANT'S MOTION TO**
) **DISMISS PLAINTIFF'S FIRST**
) **AMENDED COMPLAINT**
) **PURSUANT TO FED. R. CIV. P.**
) **12(b)(6)**

) Date: April 18, 2013
) Time: 8:30 a.m.
) Crtm: 10

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22 TO THE HONORABLE COURT, ALL PARTIES, AND TO THEIR
23 COUNSEL OF RECORD:

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1 Defendant County of Los Angeles hereby submits the following
2 Memorandum of Points and Authorities in Reply to Plaintiff's Opposition to
3 Defendant's Motion to Dismiss.
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6 Dated: March 4, 2013

LAWRENCE BEACH ALLEN & CHOI, PC

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By /s/ Alexandra B. Zuiderweg

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Alexandra B. Zuiderweg

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Attorneys for Defendant

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County of Los Angeles

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction.**

3 In her opposition to Defendant County of Los Angeles' ("the County")
4 Motion to Dismiss, Plaintiff Nadia Naffe ("Plaintiff") fails to address the vast
5 majority of the arguments made by the County with respect to her state law claims,
6 as well as voluntarily dismisses her claim under 42 U.S.C. § 1983 against the
7 County. What little argument her opposition does contain simply repeats the
8 conclusory allegations found in her First Amended Complaint ("FAC"), while
9 citing to no legal authority indicating that such allegations are sufficient to establish
10 that John Patrick Frey ("Frey") was acting in the course and scope of his
11 employment with the County when he published on his personal political blog.
12 Ultimately, as set forth below, Plaintiff's opposition simply confirms that she has
13 failed to allege sufficient facts to establish the County's liability under state law,
14 despite being provided with a second chance to do so. As such, the County's
15 Motion to Dismiss should be granted without leave to amend.

16 **II. Plaintiff Has Dismissed Her Claim Pursuant To 42 U.S.C. § 1983 Against**
17 **The County Of Los Angeles.**

18 In her opposition, Plaintiff has agreed to dismiss her first claim pursuant to
19 42 U.S.C. § 1983. (Plaintiff's Opposition ["Opp."] at 1:3-4.) Accordingly, no
20 further argument regarding this claim is necessary.

21 **III. Plaintiff's Failure To Address Numerous Grounds For The Dismissal Of**
22 **Her State Law Claims Should Be Deemed Consent To The Dismissal Of**
23 **Those Claims.**

24 With respect to Plaintiff's state law claims, Plaintiff advanced no argument
25 whatsoever in response to the County's contentions that they should be dismissed
26 on the grounds that they lack a statutory basis and are barred by California
27 Government Code § 821.6. A party's failure to address an argument in her

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1 opposition is “deemed consent to the granting . . . of the motion.” L.R. 7-9, 7-12;
2 *see, Adam Mortgage Electronic Registration Systems, Inc.*, 2011 WL 63651 *2 n. 1
3 (C.D. Cal. 2011). Accordingly, because Plaintiff has failed to include any response
4 to these arguments, on this ground alone, Plaintiff’s state law claims should be
5 dismissed against the County.

6 Additionally, the only argument Plaintiff does advance in her opposition, in
7 fact, confirms that the County is entitled to the absolute immunity provided by
8 California Government Code § 821.6. Plaintiff contends that Frey “threatened to
9 investigate Ms. Naffe from [sic] possible criminal violations using the full force of
10 his authority as a prosecutor.” (Opp. at 1:14-16.) However, this is precisely the
11 type of conduct afforded immunity under § 821.6. *See, All Angels*
12 *Preschool/Daycare v. County of Merced*, 197 Cal.App.4th 394, 408 (2011)
13 (“[I]mmunity under section 821.6 extends to communications made by the
14 employee that have a connection with the investigation or prosecution process);
15 *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1049-50 (2007) (immunity
16 applied to city and its officers for statements made in press releases, irrespective of
17 whether statements were reasonable or “made maliciously as a part of threatened
18 prosecution”); *Southern Cal. Rapid Transit Dist. v. Superior Court*, 30 Cal.App.4th
19 713, 726 (1994) (interpreting § 821.6 to bar civil suits based upon threat, initiation,
20 or prosecution of a judicial action). Accordingly, Plaintiff’s state law claims fail on
21 this additional ground.

22 **IV. Plaintiff Cites No Authority That Publishing A Personal Blog**
23 **Specifically Disclaiming Any Association With The District Attorney’s**
24 **Office Constitutes An Action Within The Course and Scope Of Frey’s**
25 **Employment.**

26 Even ignoring Plaintiff’s blatant failure to address the vast majority of the
27 arguments raised in the County’s Motion to Dismiss, Plaintiff fails to point to a
28 single factual allegation indicating that Frey was acting in the course and scope of

1 his employment when he posted articles on a personal blog that he expressly states
2 is **not associated with the District Attorney’s Office**. (FAC, ¶ 14.)

3 Tellingly, the only cases Plaintiff cites in support of her conclusory assertion
4 that Frey was acting in the course and scope of his employment only bolster the
5 County’s position. For example, Plaintiff cites to *Perez v. Van Groningen & Sons,*
6 *Inc.* 41 Cal.3d 962, 969 (1986) throughout her opposition. In *Perez*, a tractor
7 operator was performing his normal task of disking when the injury occurred, but
8 invited the plaintiff to ride along, even though the employer had not authorized him
9 to do so. *Id.* at 965. In holding that the tractor operator was acting in the course
10 and scope of his employment, the court held that “[a]s long as it is clear that at the
11 time of the injury the employee was following his employer’s instructions to disk
12 the orchard, the fact that he was not authorized to take a passenger is immaterial.”
13 *Id.* at 969. Similarly, in *Meyer v. Blackman*, 59 Cal.2d 668, 673 (1963), the court
14 held that an employee who had received instructions to run an errand using his
15 employer’s vehicle was acting in the course and scope of his employment when a
16 traffic collision occurred. *Id.* at 673. Here, by contrast, Frey received no
17 instruction from the County to publish a political blog, nor did he publish a blog as
18 part of Frey’s normal job duties with the District Attorney’s Office.

19 Moreover, in both *John R. v. Oakland Unified School Dist.*, 38 Cal.3d 438,
20 447(1989) and *Martinez v. Hagopian*, 182 Cal.App.3d 1223, 1229 (1986), two
21 additional cases cited by Plaintiff, each court held that the employers **could not** be
22 vicariously liable for their respective employee’s conduct, even though the
23 purportedly wrongful conduct occurred during activities directly related to the

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1 defendant's employment (in the case of *John R.*) and at the defendant's place of
2 employment (in the case of *Martinez*).¹

3 Simply put, Plaintiff has not pointed to a single factual allegation illustrating
4 that Frey was acting in the course and scope of his employment when he published
5 a blog regarding his political beliefs, nor has she cited to any authority in support of
6 her baseless assertions that vicarious liability should attach to the County for his
7 personal conduct. Indeed, as set forth in the case law cited in Plaintiff's own
8 opposition, conclusory allegations that purportedly injurious conduct occurred at a
9 place of employment, during work hours, is simply not enough to support County
10 liability. *See, John R*, 38 Cal.3d at 447; *Martinez*, 182 Cal.App.3d at 1129; *see*
11 *also, Alma W. v. Oakland Unified School Dist.*, 123 Cal.App.3d 133, 140 (1981)
12 (holding that mere presence at the place of employment and attendance to job duties
13 before and after the subject conduct are insufficient to establish respondeat superior
14 liability).

15 **V. Plaintiff Does Not Seek Leave To Amend And, Accordingly, Should Not**
16 **Be Afforded Another Opportunity To File An Amended Complaint.**

17 Because Plaintiff's opposition does not request leave to file an amended
18 complaint, leave should not be granted by the Court. In any event, at the hearing on
19 Frey's motion to dismiss Plaintiff's original complaint, the Court made it very clear
20 that Plaintiff would have **one**, and only one, opportunity to add factual allegations
21 in support of her claims. Despite being provided with this second chance, Plaintiff
22 has failed to include any such allegations in her FAC. As such, Plaintiff's FAC
23 should be dismissed again, this time with prejudice.

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25 ¹ In *John R.*, the California Supreme Court found that a school district could not
26 be vicariously liable for a teacher's molestation of a student during a school-
27 sanctioned extracurricular activity. *John R*, 38 Cal.3d at 447. In *Martinez*, the
28 Court of Appeal held that the operators of a vineyard could not be vicariously
liable for the death of an individual who engaged in a physical altercation with a
worker while visiting the vineyard. *Martinez*, 182 Cal.App.3d at 1129.

1 **VI. Conclusion.**

2 Based on the foregoing, the Court should grant the County's Motion to
3 Dismiss in its entirety.

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5 Dated: March 4, 2013

LAWRENCE BEACH ALLEN & CHOI, PC

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By /s/ Alexandra B. Zuiderweg

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Alexandra B. Zuiderweg

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Attorneys for Defendant

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