No. S199435

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ESTATE OF DUKE

ROBERT B. RADIN and SEYMOUR RADIN,

Plaintiffs and Respondents,

vs.

JEWISH NATIONAL FUND and CITY OF HOPE,

Defendants and Appellants.

Court of Appeal of the State California, Second Appellate
District, Division Four, Case No. B227954
Los Angeles County Superior Court, Case No. BP108971
Hon. Mitchell Beckloff

ANSWERING BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES OR ENTITIES

Pursuant to California Rules of the Court, rule 8.208(e)(3), I certify that petitioners and respondents Robert Radin and Seymour Radin know of no entity or persons that must be listed under Rule 8.208(e)(1) or (2).

Dated: July 23, 2012 SNELL & WILMER

SACKS, GLAZIER, FRANKLIN & LODISE LLP

By _____
Margaret G. Lodise
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The will at issue does not involve a mistake; rather, it involves a missing term, and failure to provide for the circumstances that in fact existed at the testator's death.

Irving Duke wrote a will at the age of 72 which – should Irving die first – gave all his property to his new wife Beatrice, who was 14 years his junior. Alternatively, should he and Beatrice die at the same time, Irving equally divided his estate between two charities, the City of Hope and the Jewish National Fund. Beatrice in fact predeceased her husband. Irving died five years later. At his death, the will, which remained unchanged, still contained no provision for the disposition of property should Irving survive Beatrice. Under this Court's controlling authority, Irving's property – valued at over $5 million – therefore passes through intestacy to his two surviving blood relatives, his nephews Seymour and Robert Radin, with whom he lived prior to his remarriage.

There is no reason to change the longstanding law of this state – which is consistent with the law of a majority of other jurisdictions – to rewrite the will in favor of the charities. Permitting reformation of wills for "mistake" would undermine the role formalities play in ensuring the orderly distribution of property in accordance with a testator's written intent, and increase the quantity and duration of hostile claims in probate

court. Moreover, even by adopting the revised formulation for will reformation embodied in the Restatement, this Court would still not be able to provide the charities what they want. Even the Restatement prohibits the wholesale insertion of terms into a will. It makes little sense to up-end probate administration in this state to achieve a result for two individual claimants; it makes even less sense to radically alter the law of wills for two claimants who cannot even benefit from the change.

At the very least, if this Court nonetheless believes that some change in the law may be needed, we respectfully submit that the Legislature, rather than this Court, should be allowed to clarify the explicit contours of the circumstances under which reformation of wills for mistake will be allowed.

STATEMENT OF THE CASE

A. Overview: The Radin And Duke Families.

Isador Radin immigrated to the United States from Russia and married Rose Duke. (AA 14.) By the mid-1940s, they had a large home in Los Angeles, where they lived with their extended family: their children Seymour and Robert, Rose's younger brother Irving, and Irving's first wife Ramona. (AA 14.) Irving helped Isador run Isador's businesses, which included managing a parking lot. (AA 14.) Rose took care of her brother Irving in a manner her sons describe as "paternal." (AA 21; see also AA 28.)

In the year immediately prior to Rose's death, Irving, Rose and Isador lived with Seymour. (AA 56.) When Rose died in 1964, she gave her estate – which consisted entirely of her husband Isador's property – to Irving. (AA 26-27.) When Isador needed some of that money back after Rose's death, Irving refused. (AA 27, 71-72.)

Nonetheless, after Irving moved out of the family home, he continued to visit Isador until Isador's death in 1976. (AA 15, 112.) According to Seymour and Robert, they drifted apart from Irving over the years following the death of both their parents, but there was no official rift

in the family and he remained "Uncle Irving" to them. (AA 15.) [1] Other than working for Isador, Irving apparently had no other meaningful employment. (AA 27.) Therefore, Rose's sons Seymour and Robert believe that whatever may now constitute Irving's estate originally came from their mother and father. (AA 27.)

B. Following A Late Marriage Irving Duke Prepares A Holographic Will That Transfers His Property To His Wife If He Predeceased Her. Then The Unthinkable Happens: Irving's Wife Dies Before Him.

On October 30, 1984 – when his new wife Beatrice was 58 and he was 72 – Irving Duke prepared a holographic will. (AA 109-111, 121.) The will provided that all of his property was to go to Beatrice upon his death. (AA 121.) Alternatively, should he and Beatrice die "at the same moment," the will provided that his estate be equally divided between the City of Hope "in the name and loving memory of my sister, Mrs. Rose Duke Radin" (who had given Irving her husband's money decades earlier), and the Jewish National Fund "to plant trees in Israel in the names and loving memory of my mother and father – Bessie and Isaac Duke." (AA 122.) The

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[1] The charities make much of the fact that Seymour allegedly thought Irving was himself "evil." (OBOM, p. 6.) This misstates Seymour's testimony. Seymour in fact said: "[I]f Irving had been decent to me I would have welcomed him back in spite of the evil that he did [in refusing to give Isador his money back]. They say blood is thicker than water." (AA 81.)

will left one dollar to Irving's brother Harry Duke and generally "disinherit[ed] all persons whomsoever claiming to be, or who may lawfully be determined to be [Irving's] heirs at law." (AA 121-122.) The will contained no provision for disposition of Irving's property should his wife die before him.

Beatrice died before Irving at the age of 75 from heart disease. (AA 111.) At the time of her death in 2002, Irving was 89. (AA 109.)

C. After His Wife's Untimely Death, Irving Makes Charitable Contributions But Does Not Change His Will.

In late 2003 and early 2004, following his wife's death, Irving Duke met with a Senior Gift Officer at City of Hope, Sherrie Vamos, to set up three separate $100,000 gift annuities benefitting the City of Hope. (AA 167-168.) Ms. Vamos came to Irving's apartment, where, as City of Hope's counsel later described, Irving "lived like a pauper." (AA 167-168; RT A15.) Vamos carefully documented in writing the fact and terms of each of these annuities at the time they were set up. (AA 172-182.)

On one visit in early January 2004, Vamos says, Irving told her he was "leaving his estate to City of Hope and Jewish National Fund." (AA 168.) Vamos visited Irving's apartment later that month to obtain the third gift annuity. (AA 168.) She never inquired about the purported will provision, nor sought written confirmation of any purported inheritance.

After January 2004, until his death in November 2007, Irving had no further contact with Vamos or any other charitable gift officers from the City of Hope.

D. Irving Dies Five Years After His Wife. The Will Still Contains No Provision For TheTransfer Of Property If Irving Survives His Wife.

Beatrice died in January 2002; Irving died in late 2007, more than five years later. (AA 109, 111.) In that entire five year period, Irving did not amend his will to account for events as they in fact happened: he had still made no provision in his will for the transfer of property should his much younger wife predecease him. He had, however, created an addendum to the will in 1997, while Beatrice was still alive, to make clear that all of their assets were community property. (AA 124.)

E. Months After Irving's Death, The City Of Hope, Jewish National Fund, And Irving's Nephews Seymour And Robert Radin All Learn He Has Died. All Make Claims To Irving's Estate.

Three months after Irving's death, the Public Administrator removed Irving's holographic will from a safe deposit box. (AA 183.) Shortly thereafter Seymour and Robert Radin were informed of Irving's death and that they might have claims to inherit Irving's property. (AA 140.)

Subsequently, the City of Hope and Jewish National Fund sought to probate the will and asked that an employee of the Fund be named as administrator. (AA 135-136.) This occurred without any notice to Seymour or Robert, Irving's only surviving blood relatives . (AA 135, 140.)

F. The Probate Court Declines The Charities' Request To Rewrite The Will, And Determines That The Estate Should Pass To The Radins -- As Irving's Last Surviving Relatives-- Under The Intestacy Laws.

Seymour and Robert petitioned for distribution of the estate. (AA 134-146.) They moved for summary judgment, urging that because the will did not provide for the transfer of property where Beatrice predeceased Irving, Irving's estate should pass to them through intestacy. (AA 95-106.) The City of Hope and the Jewish National Fund opposed the motion, arguing that the will was ambiguous and should be read to effectuate what they believe to be Irving's apparent intent to give his money – nearly $5 million dollars – to them. (AA 147-158; RT A16.)

The probate court declined to find an ambiguity, and granted summary judgment in favor of the Radins. (AA 253-254.) [2] The court told the charities' counsel that he thought they were "asking [him] to rewrite the

[2] The court initially denied the motion on procedural grounds. (AA 214.) The court later reconsidered that ruling and, determining that there were no procedural bars to granting summary judgment, did so. (AA 251; RT B1-B9.)

will," which he declined to do, and that he could not "find any ambiguity in the will. . . . [e]ven with the extrinsic evidence [they] offered." (RT A3, A11.) Following his wife's death, Irving "never created a new estate plan" and the court determined that, as a result, it could not "use extrinsic evidence to create a testamentary disposition that does not appear in the will as doing so would be conjecture." (AA 254.) The court entered judgment in the Radins' favor, and the charities appealed. (AA 265-268, 271.)

G. The Court Of Appeal Affirms, Citing Binding Precedent Of This Court And Concluding That The Will Was Not Ambiguous.

The Court of Appeal affirmed, concluding that under this Court's controlling decision in *Estate of Barnes* (1965) 63 Cal.2d 580, it could not rewrite the will because Irving's will "simply made no disposition whatsoever of the property in the event Irving outlived his wife by several years, as eventually occurred. . . .[T]his omission does not render the will ambiguous." (Typed opn., p. 8.)

H. The Charities Petition For Review, Seeking To Overturn This Court's Prior Decisions.

City of Hope ("COH") and the Jewish National Fund ("JNF") filed a petition for review with this Court, asking this Court to reconsider the

controlling decision in *Estate of Barnes*. On March 21, 2012, this Court granted review to determine whether the four corners rule should be reconsidered to permit mistakes in a will to be reformed, provided there is clear and convincing extrinsic evidence of the decedent's intent.

ARGUMENT

I. CALIFORNIA'S SYSTEM OF WILL INTERPRETATION SHOULD NOT BE DISTURBED.

A. This Court's Decision to Prohibit Reformation for Mistake Has Been Carefully Considered and Has Withstood the Test of Time.

The charities request that this Court overturn longstanding law for their benefit. This Court should decline their invitation to make such a dramatic change in California law. For nearly 50 years, California and a majority of other states have held that the courts should not write wills. This Court reasoned '[t]o say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the . . . property." (*Estate of Barnes* (1965) 63 Cal.2d 580, 583 [citing to *In re Belden* (1938) 11 Cal.2d 108, 112].) [3]

The *Barnes* opinion that the charities decry as formalistic and out-of-step was decided three years before the *Russell* opinion they describe as

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[3] The rule from *Barnes* is still influential years later. *See, e.g., Feitter v. LaChance(In re Krokowsky)* (1995) 896 P.2d 247, 250 (relying on *Barnes*.)

ground-breaking; neither case was decided by a narrow margin. Compare *Estate of Russell,* (1968) 69 Cal.2d 200 with *Estate of Barnes,* 63 Cal.2d 580. In *Russell,* this Court determined that extrinsic evidence of intent was appropriate to address latent, as opposed to patent, ambiguities, thus extending the ability of claimants to admit evidence outside the will. (*Russell, supra* 69 Cal. 2d at 212-213.) The following year, however, this court reaffirmed the holding in *Barnes* and extended its reasoning to an incomplete decree of distribution. The court reasoned that the same rule should apply because the decree did "not provide for a disposition which encompasse[d] all contingencies" and that "[i]ncompleteness alone [would] not allow resort to the will." (*Estate of Callnon* (1969) 70 Cal.2d 150, 160.)

B. There Is No Reason to Abandon California's Will Interpretation Policy.

The charities argue that California's current system of allowing extrinsic evidence to explain ambiguities, but not to contradict the unambiguous meaning of the will or to add a provision to a will where none exists, is unworkable. (OBOM, p. 22.) They cite to four cases, two of which were decided before *Barnes,* to show the purported lengths the courts have gone to avoid the *Barnes* rule. (OBOM, p. 20, 21.) A brief review of these cases, however, shows that they were appropriately decided without unnecessarily twisting the existing rules.

The court's determination in *Estate of Akeley* (1950) 35 Cal.2d 26, 28 that a reference to 25% in the context of a clause that purported to distribute the entire estate must mean that each beneficiary would get 1/3 was not a reformation for mistake so much as a resolution of an ambiguity. The will stated that the testator was disposing of "all the rest, residue and remainder of my estate" followed by the use of 25% in front of the divisions to the three different charities. While, as the charities point out, Justice Traynor in his concurrence expressed the belief that 25% could not mean 1/3, there is no question that the face of the will created an ambiguity. In *Barnes* and in the case before this Court, in contrast, there is no trace of an ambiguity in the relevant terms of the will.

In *Estate of Karkeet* (1961)56 Cal.2d 277, decided eleven years after *Akely*, this court interpreted "executrix" to mean "beneficiary" based on a review of the meaning of the term "executrix" and in light of the will as a whole and remanded to the lower court for the admission of previously excluded extrinsic evidence. This Court determined that the will was ambiguous based on the four corners of the document, not from any outside source. Extrinsic evidence was only admitted after the ambiguity was determined to exist. Three of the justices who participated in *Karkeet* later joined in the opinion in the *Barnes* case. They apparently did not view either *Akely* or *Karkeet* as requiring further discussion when *Barnes* was

decided.

The other two cases cited by Appellants, *Estate of Kime* (1983) 144 Cal.App.3d 246 and *Estate of Taff* (1976) 63 Cal.App.3d 319, turn on the meaning of specific technical words. The Probate Code is clear that, where a technical word is used, the word is accorded its technical meaning *unless there is evidence that the Testator accorded it a different meaning.* (Prob. C. §21122.) In both these cases, such evidence existed. In *Taff*, the court cited to *Estate of Russell, supra,* 69 Cal.2d 200 as having abrogated the plain meaning rule and allowed evidence as to the testator's meaning as to a particular word. In *Kime*, the court's admission of extrinsic evidence again was premised upon the fact that the decedent was unfamiliar with legal language and thus the use of the term "executris" created an ambiguity which could be resolved by extrinsic evidence. While the court in *Kime* complained about former Probate Code Section 105, its complaint was directed at a bar on oral statements of the testator, not to California's rule of requiring the existence of a patent or a latent ambiguity in a will before allowing extrinsic evidence to reform it. [4]

Contrary to the charities' assertion, then, the courts have not gone to great lengths to avoid unfair results from the application of the current rules

[4] In the twenty years since the *Kime* decision, the Legislature has addressed various issues related to wills, their formalities, and interpretation, but has declined to take the unprecedented step that the charities now urge.

of construction. They have simply applied the existing rules of construction to sets of facts to which they squarely apply. The lack of a problem with the current approach in California is demonstrated by the fact that the cases cited span a period of over 60 years and number only four. The charities apparently believe that they are entitled to some special treatment. This Court should not upset the entire probate system to accommodate this case.[5]

II. THE UNIQUE NATURE OF WILLS EXPLAINS WHY COURTS SHOULD NOT ABANDON CURRENT POLICY AND ALLOW REFORM OF WILLS FOR MISTAKE.

A will is a unique document authored as a final message, or a "last testament," to the world. It becomes operative and is often first read only after the writer has permanently departed his or her audience. "The instrument encompasses a gamut of emotions; it not only allows the testator to dispose of his property at death, but also forces him to sort out his feelings for those who have most affected his life." (Joseph W. deFuria , *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation* (1990) 40 Cath.U. L.Rev. 1, 1 ["Mistakes from Scriveners'

[5]The whole issue of will interpretation could have been avoided in this case had City of Hope followed up in any way concerning Irving Duke's supposed statement that he was leaving his estate to the two charities; Irving could have reviewed his will and made a change if he so desired.

Errors"].)

Unlike a trust or a contract, both of which may be oral and formalize a relationship wills are required to be in writing and do not document an ongoing relationship. Rather, they direct the disposition of property. They are subject to probate, with an agreed upon time for challenge on the basis of a limited set of circumstances. Once admitted to probate, the terms of the will, as interpreted by the court, govern the distribution of the testator's property. Once probate is closed, the will ceases to be of any force and effect.

A will's peculiarity and gravity demonstrate (1) how reformation for a mistake in a will is different from other contexts and (2) why courts do not and should not reform wills for mistakes.

A. Reformation For Mistake In Other Contexts Has Peculiar Safeguards That Are Absent With Wills.

The charities contend that trusts and contracts may be reformed for mistake and that this should apply to wills. (OBOM, p. 13, 14.) Courts only allow reformation of documents other than wills when they can be assured safeguards will preserve the author's intent, and the number of individuals who may seek reformation is limited. But reformation of wills for mistake leaves wills open to challenge by any person with a tangential claim to the testator's estate.

Courts permit reformation of an inter vivos trust for mistake in the limited circumstances of a scrivener's error. (See, *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1604 [finding the power to reform an inter vivos trust "where a drafting error defeats the trustor's intention" based on common law].) To the extent California courts extend reformation of inter vivos trust beyond drafting errors, they have statutory authority to do so (Prob. Code Sections 15400 *et seq.*) and better objective evidence to judge it than they would with a will. Trust administration frequently begins before the testator's death. This gives the trustor, in conjunction with a personally selected trustee, the opportunity to amend the trust and correct misapprehensions before he dies. Reformation is permitted because the trustor's and trustee's acts during this time provide objective indicia of intent. A will in contrast has no such history to compare for reformation requests.

Reformation of a contract is permitted because the presence of the contracting parties makes the evidence more reliable. The parties themselves can ensure the extrinsic evidence is aggressively vetted and accurately portrayed. Being familiar with the negotiations and events leading up to the creation of the contract, they are the best sources to identify and contest any extrinsic evidence. With a will, on the other hand, the deceased testator is the best source and takes to the grave with her the

unexpressed reasoning that led to it.

The number of contract reformation claims is also naturally limited by the number of parties to the contract, rather than to the hundreds of acquaintances who could make a claim on a will. Any family member, third party or organization who feels slighted or opportunistic can claim that "if only the testator had really said what he meant" they would certainly be included in the will. And the only person who can answer why she omitted the supposed bequest is unavailable to answer that question.[6]

In the case at bar, the charities try to create an ambiguity where none exists by reference to statements and actions of the testator long after the will was executed. Once the will was prepared, any other statements about what the will purportedly said, or what the testator intended, should be viewed with disfavor. Testators have been known to make assertions to others about the existence or content of wills, safe in the knowledge that it is what is written that governs, not what is said. (*Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 964 ["From a practical standpoint, common experience teaches that potential testators may change their minds... thus

[6] The charities argue that there are many situations where the testimony of a deceased person is allowed; from this, they urge such testimony is not inherently unreliable. The issue is not unreliability. In other situations where statements of the decedent are allowed, they are allowed to address a question that has arisen as to the decedent's intent, not to create an issue as to intent where none previously exists.

we must as a policy matter insist on the clearest manifestation of commitment the circumstances will permit."]; *Loy v. Loy* (Ky.Ct.App. 1952) 246 S.W.2d 578, 579.)

Wills can be overturned for fraud, duress or undue influence, where it can be shown that the purported intent of the testator reflected in the will is not actually the intent of the testator. (See *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604 [permitting reformation for fraud and duress because it "destroy[s] free agency on the part of the testator"].) They may also be challenged and overturned on grounds of mistake where the mistake affects the formation of testamentary intent. (*Estate of Smith* (1998) 61 Cal.App.4th 259, 270 [affirming longstanding California law allowing for consideration of mistake only in the limited circumstance where it shows the lack of testamentary intent].) Reformation, however, is still limited to terms that are "fairly susceptible [to] two or more meanings." (*Estate of Russell, supra,* 69 Cal.2d at 212.) That rule should not be changed because the safeguards required to allow broader reformation of documents simply do not exist with unambiguous wills.

B. Wills Are Subject to Formalities That Will Be Overridden If Reformation for Mistakes Is Allowed.

The law requires people to engage in certain formalities for a court to enforce a writing as a will. Those formalities make sure that the testator's

intent is embodied in the document and that a court can identify the intent. (Langbein, *Substantial Compliance with the Wills Act,* (1975) 88 Harv. L.Rev. 489, 492 (hereafter Compliance with the Wills Act).) Slavish adherence to technical specifications—commonly called formalism—can obscure a court's vision of testator intent. Conversely, if courts completely disregard the formalities, the functions they serve will be lost and a court will write a will which the testator did not write.

Permitting reformation for alleged mistakes disregards will formalities and undermines the functions they serve. Will formalities encourage testators to thoughtfully commit their property to someone. (*Compliance with the Wills Act, supra*, 88 Harv. L.Rev. at p. 494.) The time and effort put into compliance with the formalities force the person to contemplate whether she wants to dispose of her property in that particular way. Reformation for mistake undermines this important function. A court could re-write the will for a set of circumstances that an individual never considered or, worse, considered and rejected. (See *Barnes, supra*, 63 Cal.2d at 583-84 [concluding that "[h]ad [the testatrix's] attention been directed, after her husband's death, to the lack of a disposition of her property, she might have chosen petitioner... or she might have selected different beneficiaries"].)

Formalities also insure that the court has reliable evidence to

distribute a testamentary disposition. (*Compliance with the Wills Act*, *supra*, 88 Harv. L.Rev. at p. 496.) Going outside the four corners of the will, in contrast, encourages courts to rely on evidence that may not properly reflect the testator's true intent. As one judge observed, "[p]ersons often make false or misleading statements when talking about their own wills for the very purpose of concealing the truth. There is probably no secret that is more jealously guarded than the contents of one's will." (*Loy v. Loy*, *supra*, 246 S.W. 2d at 579.; see also *Noble v. Bruce* (Md.Ct.App. 1998) 709 A.2d 1264, 1277 ["Such evidence might be pure speculation as to the testator's intent"].) A testator may also make statements that are not consistent with the final disposition of his will due to social pressure or a desire to "mystify curious or expectant relatives." (*Loy*, *supra*, 246 S.W.2d at p.579.)

For a court to rewrite a will based on such statements would sacrifice too much of the purpose that will formalities serve. Rewriting a will in such a situation amounts to the court "writ[ing] a will which the testator did not write," rather than implementing a testator's intent. Where, as here, the alleged mistake is an omission, the danger of writing a will the testator did not write is that much greater.

C. The Relaxation Of Other Formalities In Will Execution Does Not Mean Reformation For Mistake Should Also Be Allowed.

The charities argue that this court should view a statutory relaxation in will formalities as an invitation to allow reformation in more contexts. (OBOM, p. 48.) Petitioners overstate the import of these statutory changes. The only recent change to the requirement for will formalities in California was the amendment of Probate Code Section 6110 in 2008. That amendment both increased the formalities for will execution by requiring that a witness to a will sign during the testator's lifetime and adopted a harmless error standard for failure to comply with the execution requirements of Section 6110.

As explained in the legislative analysis, the first change was to clarify confusion that had been brought about by two separate court of appeal decisions, one allowing a will to be signed by a witness after the testator's death and one finding such a will invalid. The second change adopted a harmless error standard but clarified that it did so in light of the increasing prevalence of computer usage, surmising that persons who might formerly have handwritten a will (with the mere requirement of a signature) would now turn to their computer and use will drafting programs to create their own wills. (Assem. Leg. Analysis, AB 2248, 2007-2008 Leg.

Session) The change to a harmless error standard thus was not an attempt to lessen required formalities but, rather, was implemented to address a perceived issue with holographic wills which are already subject to relatively limited formalities.

D. Allowing Reformation Based On These Circumstances Is, Implicitly, An Attack On The Intestacy Laws.

By insisting that Irving Duke's property pass through his (rewritten) will rather than through intestacy, the charities implicitly attack the wisdom of the intestacy laws. (OBOM p. 52.) The intestacy laws, which enjoy widespread judicial and academic support, further a number of "societal goals." These include: "'continuation of the regime of private property as dominant in the social order,' avoiding complicated property titles and excessive subdivision of property, encouraging the accumulation of wealth, providing for ease of administration and maintaining respect for the legal system." (Susan N. Gary, *Adapting Intestacy Laws to Changing Families* (2000) 18 Law & Inequality 1, 9. [citations omitted].) Intestacy laws are designed to pass down property in an "efficient and expeditious" manner in the absence of a will. (*Estate of Griswold* (2001) 25 Cal.4th 904, 912.)

While courts in California have construed wills to avoid intestacy, they have not done so out of distrust of the intestacy laws. However, the charities apparently believe that, where a will has been drafted, courts

should allow extrinsic evidence to re-draft that will, in an effort to avoid the intestacy statutes at all costs. Reforming wills to avoid intestacy at all costs undermines the intestacy laws themselves and the balance they strike between the efficient disposition of property and vindication of a testator's intent.

E. Unjust Enrichment Where It Exists Should Not Be A Factor.

California, and indeed the law of every other state in the country, allows a testator to leave his or her property to whomever he or she chooses. No party can claim a right to an inheritance absent, perhaps, a contract to make a will. And yet the charities speak of the "unjust enrichment" that might result if purportedly result if unintended beneficiaries benefit from a mistake. (OBOM p. 33.)

In this case, of course, it is particularly inappropriate to speak of unjust enrichment in regards to Irving's family. Irving was involved with and largely dependent upon his family for the first 65 years of his life, only losing contact as he and his nephews aged, the family stopped living under the same roof and Irving received a bequest from his sister. The charities on the other hand had no knowledge of Irving in the first 73 years of his life, in the last few years of his life, or at any time prior to his writing the will. Nor were the charities even aware of his death until notified by the

public administrator who discovered the holograph nearly three months after Irving's death. [7] Why the public administrator made no attempt to notify the family is a mystery, and Robert and Seymour testified that had they been requested to assist with funeral arrangements, they would have. (AA 31, 70-71)

The charities provided virtually nothing to Irving during his life, but seek to write in for themselves a bequest that Irving never made. Irving made a will in 1984 with the clear intent to provide for his much younger wife. In the event that he and his wife were to die together, he set aside a gift for charity. He did not contemplate that he might survive his wife. He never revisited the will once that situation occurred. And now the charities seek to obtain his substantial estate by writing a clause into the will that Irving chose not to write. If anyone is to be unjustly enriched from this scenario, it is the charities.

F. Avoidance of Malpractice Claims Is Similarly Unpersuasive As A Rationale for Reform.

The charities misstate the threat of a malpractice claim in California. California specifically protects attorney from claims by supposedly intended beneficiaries. (*Chang v. Lederman* (2009) 172 Cal.App.4th 67

[7] As the case below was adjudicated on summary judgment, many facts were not developed, such as how the charities, who were presumably paying an annuity to Mr. Duke, could be unaware for months that he had passed away.

[finding an attorney owes no duty of care to a non-client potential beneficiary]; *Radovich v. Locke-Paddon*, *supra* 35 Cal.App.4th 964 [finding an attorney does not owe a duty to a "potential" beneficiary].) Arguably, changing the standard to allow a potential beneficiary to make a claim against the estate where there is no ambiguity broadens the chance that, ultimately, the attorney may be responsible for malpractice. (See, e.g., *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 [including as an element for determining a malpractice claim the degree of certainty that the plaintiff suffered harm]; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 589 [applying *Biakanja* standards and addressing the likelihood of harm as a factor].)

III. ALTERING THE SETTLED DOCTRINE OF WILL REFORMATION DISRUPTS THE ORDERLY DISTRIBUTION OF PROPERTY, AND ADDS DELAYS AND EXPENSE TO PROBATE ADMINISTRATION.

A. The Restatement Formulation Will Increase The Quantity And Duration Of Hostile Claims In Probate Court.

The charities brush off one of the most significant issues raised by the proposed adoption of the Restatement formulation they urge: the change is likely to significantly increase litigation concerning wills and, correspondingly, costs for probate administration. (OBOM p. 52 [dismissing as baseless other jurisdictions' conclusions that [t]he number of

groundless will contests could soar."].)

Wills are more susceptible to additional claims due to the absence of a living representative, the ease of asserting a claim, and the emotional attachment family members may have to certain property. Those with a potential claim are also more likely to believe the testator made a mistake in granting the property to a sibling, cousin, or charity, rather than to them. (*Flannery v. McNamara* (Mass.Sup.Ct. 2000) 738 N.E.2d 739, 746 [noting that reformation for mistake would "essentially invite disgruntled individuals excluded from a will to demonstrate extrinsic evidence of the decedent's 'intent' to include them"].) Indeed, allowing reformation for mistake would encourage disputes about what a testator intended just as enforcing oral wills would. (See *Recommendation Relating to Holographics and Nuncupative Wills,* (1982)16 Cal. Law Revision Com. Rep. 301, 309 ["[C]ourts have historically looked upon [nuncupative] wills with disfavor because of the opportunity for fraud and abuse"].)

Even if more suits do not occur, the administrative burden will rise as courts will be required to take testimony in more cases rather than resolving them as a matter of law. Courts will be urged to consider conversations from decades ago, review private correspondence intended solely for the recipient, and pry into every facet of the departed's thoughts. Unbound from a written document, parties will naturally bring additional

evidence to cast doubt on disputed terms in a will or to explain why they were inadvertently omitted. (*Flannery*, *supra*, 738 N.E.2d at p.746 [concluding that admitting extrinsic evidence to explain mistakes in unambiguous wills would "lead to untold confusion in the probate of wills"].) "Judicial resources are simply too scarce to squander on such consequences." (*Id.*)

B. Neither A Heightened Evidentiary Standard Nor Malicious Prosecution Would Sufficiently Deter The Increase Of Litigation.

1. The Higher Evidentiary Standard Will Not Protect Instruments or Deter Filing

The heightened evidentiary standard urged by the charities will not deter initial filings, even if in the end claimants may not be able to prove their claims. A claim that cannot be supported by clear and convincing evidence is still not subject to a demurrer, and likely not even to summary judgment, thereby necessitating more trials. Moreover, the application of a higher clear and convincing evidence standard may not mean that parties will calculate their likelihood of success any differently or that they will decline to pursue claims in the first place. (See generally, Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, (2002) 34

Conn.L.Rev. 453, 472-73.) Even if a heightened clear and convincing evidence standard caused claimants to settle rather than go to trial, this would not reduce the number of filings in the first place. Nor is there substantial evidence that the clear and convincing evidence standard will deter fraud or protect wills and testator's intent. (*Id.* at 473-74.) Thus, there is no indication that a heightened standard of proof will deter claims, truncate litigation, or reduce the incidence of fraudulent claims.

2. Malicious Prosecution Will Not Deter Filing Either.

The charities argue that the clear and convincing evidence standard will deter litigation and fraud. But a higher standard of proof will not prevent claims from being brought in the first place, nor preclude courts from using their resources to decide them. Disappointed heirs will likely think they have such evidence and, in most cases, find an attorney willing to take their case, or simply bring the case *in pro per*. The eventual failure of the claim would provide a disincentive only if the disappointed heir is subject to malicious prosecution.

However, the probable cause and malice requirements of malicious prosecution make liability difficult to prove. (See *Crowley v. Katleman* (1994) 8 Cal. 4th 666, 676.) Among the most difficult cases would be ones like this, where the evidence consists primarily of private conversations. The heightened evidentiary standard may deter some litigants, but the low

cost of pursuing a claim and the potential reward would still incentivize more frivolous claims to burden the courts. This case is a clear example. The charities' case is based on one conversation that purportedly took place twenty years after the execution of the will and four years before the decedent's death. Based on that one conversation, the charities have taken the case all the way to this Court.

IV. THE POLICY ADVOCATED BY PETITIONERS IS A POLICY ADOPTED BY ONLY A SMALL MINORITY OF STATES.

The charities repeatedly ask this Court to adopt purportedly modern, progressive law and follow what the charities term a "growing trend" among sister states. (OBOM, p. 28.) In fact, there is no such trend. A review of sister states law reveals that, prior to the adoption of the Restatement Third language in 2003, only two states had by judicial decision allowed any form of reformation absent ambiguity: 1) Hawaii: *In re Estate of Ikuta* (1981) 639 P.2d 400, 406 (allowing reformation of a testamentary trust as the trust would fail of its purpose without the reformation, but not discussing the theory or concept of reformation) and 2) Connecticut: *Erickson v. Erickson* (1998) 716 A.2d 92 (accepting reformation only in the context of a scrivener's error).

Moreover, in the ten years since the finalization of the Restatement,

only three states have adopted the Restatement formulation by statute: Colorado (by statute effective in 2010 after changes to the Uniform Probate Code, which Colorado follows); Florida (by statute effective in 2011 as apparently recommended by the Florida Trusts and Estates bar); and Washington (by statute effective in 2012 as recommended by the Washington Trusts and Estates bar). Only two states – New York and Indiana – have explicitly adopted the Restatement formulation by judicial decision. (See *In re Herceg* (N.Y.Sur.Ct. 2002)747 N.Y.S.2d 901 [Explicitly considering and adopting the Restatement view in connection with a scrivener's error testified to by the drafting attorney]; *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos* (Ind. 2009) 895 N.E.2d 1191 [in the context of a malpractice action, allowing reformation of testamentary trusts -years after the probate was concluded- to avoid adverse tax consequences].) Neither of these cases involved anything beyond a scrivener's error and one of them involved reformation of a trust, rather than a will.

The charities concede that at least three courts have explicitly considered and rejected the Restatement position: *Flannery, supra,* 738 N.E.2d 739; *In re Lyons Marital Trust* (Minn.App. 2006) 717 N.W.2d 457; and *In re Last Will & Testament of Daland* (Del.Ch. 2010) 2010 WL 716160, *5.

The charities dismiss the *Flannery* court's concern about the floodgates of litigation. But courts have continually expressed concerns about increased litigation and problems of proof arising from reformation of wills in the absence of ambiguity.

Similarly, in *Lyons*, the court declined to adopt the Restatement view after considering long-standing Minnesota law, as well as *Flannery,* other decisions in Massachusetts, and Texas and Maryland law prohibiting reformation for mistake.

The 2010 decision in *Daland* analyzed Delaware law, and referenced Delaware's position, analogous to that of California, that it is not the role of the court to write a will. As the court pointed out, wills and trusts are not identical; moreover, wills are subject to statutory requirements that trusts are not. (*Daland, supra,* 2010 WL 716160 at *4.)

The charities similarly discount the cases cited by *Lyons* (*Noble v. Bruce*, *supra*, 709 A.2d 1264 and *Brinker v. Wobaco Trust, Ltd.* (Tex. Civ.App. 1980) 610 S.W.2d 160) on the grounds that they do not even address the Restatement. The Restatement was not even finalized at the time of these decisions. The cases do, however, discuss the longstanding law against will reformation. *Noble* specifically discusses the public policy behind the bar on reformation of wills and *Brinker,* although dealing with the reformation of a testamentary trust, makes clear the Texas policy

against reforming wills. It is clear that the *Lyons* court, as well as the *Flannery* and *Dahland* courts, considered the public policy behind the bar on reformation and found will reformation for mistake alone wanting. [8]

[8] Other states have continued to adhere to the policy prohibiting reformation as well, long after Professor Langbein first raised the possibility of reformation for mistake in 1982 and the Restatement formulation appeared in 2003. See, e.g. *Beasley v. Wells* (Ala. 2010) 55 So.3d 1179, 1184 (affirming a lower court decision to bar extrinsic evidence); *Vukmir v. Vukmir* (Alaska, 2003) 74 P.3d 918, 920 (Agreeing with other courts that "it is unnecessary to look beyond the words of a will when those words clearly express the testator's or testatrix's intent."); *Estate of Wilson* (Maine, 2003) 828 A.2d 784, 786 ("A court may resort to extrinsic evidence to discern the intention of the testator if the will is ambiguous.); *Matthews v. Matthews-Buler* (Neb.Ct.App. 2005) 702 N.W.2d 821, 826 ("[P]arol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain."); *In re Estate of Treloar* (New Hampshire, 2004) 859 A.2d 1162, 1164 (Extrinsic evidence inadmissible; the court's task "is not to investigate the circumstances to divine the intent of the testator; rather, it is to review the language contained within the four corners of the will..."); *Kidder v. Olsen* (Ore.App.Ct. 2001) 31 P.3d 1139, 1143 ("[M]istakes by the testator as to the effect of otherwise unambiguous wording, "may not be considered by a court in construing a will. 'It is what a testator said in his will rather than what he meant to say that should be determined.'...thus extrinsic evidence cannot be used to contravene an otherwise clear expression of intent."); *In re Estate of Hyman* (S.C.Ct. App. 2004) 606 S.E.2d 205, 207 ("Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. *Id.* Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity."); *Estate of Klauzer* (S.D. 2000) 604 N.W.2d 474, 478 ("We determine that the testator's intent is clearly expressed within the four corners of the document. We are bound by the unambiguous language of the will. Therefore, extrinsic evidence is not needed."); *In re Estate of Garrett* (Tenn. Ct.App. 2001) 2001 Tenn.App. LEXIS 764 at *16-17 ("Where the language of a will is plain and unambiguous, extrinsic evidence is not admissible to vary, alter or contradict the terms of the will."); *Eckstein v Estate of Dunn* (Vermont, 2002) 816 A.2d 494, 498 ("The court's primary objective in a case such as this is to discern the testator's intent...[i]f provisions of a will are ambiguous, the court may consider extrinsic evidence..."); *In re Stanton* (Wyoming, 2005) 114 P.3d 1246, 1249 ("[i]f a will is unambiguous the intent of the testatrix is to be determined solely from the language of the will. If a will is ambiguous, extrinsic evidence may be utilized to properly interpret the will."(citation omitted).)

Each of these courts relied on a substantial body of law developed for more than 100 years concerning reformation of wills. They did not, as the charities suggest, merely reject the Restatement position without analysis.

Thus, even today, 30 years after the idea of expanding will reformation for mistake was first suggested by Professor Langbein (*Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* (1982) 130 U. Pa. L. Rev. 521) and nearly 10 years after the Restatement adopted Langbein's analysis, the vast majority of states continue to adhere to the traditional approach that reformation is not available where there is no indication of ambiguity in the will itself. As summed up nearly 100 years ago by the New Jersey Court of Appeals:

> "..., it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless.

(*In re Gluckman's Will* (1917) 101 A.295.)

Simply put, there is no ground swell for change of this position in the handful of statutes and cases cited by the charities. This Court should not abandon years of carefully considered law and create a new doctrine for this case.

V. THIS COURT SHOULD REJECT THE PROPOSITION THAT THIS COURT NEED ONLY CARVE OUT A NARROW EXCEPTION TO WILL REFORMATION FOR THE CHARITIES TO PREVAIL.

A. Even If This Court Were To Change Will Reformation Law In This Case, The Charities Would Not Benefit. The Restatement, Too, Prohibits Redrafting Wills For Changed Circumstances.

The Restatement allows reformation for mistakes arising from "scriveners' errors." A scrivener's error is a typographical mistake made by someone other than the testator. (*Mistakes from Scriveners' Errors*, *supra*, 40 Cath. U. L. Rev. at 1-2 n.3.) But this case is not about a scriveners' error. The will in this case is in the testator's own hand, diligently produced to embody his intent at the time he wrote the will when he fully believed his wife who was 14 years his junior would survive him. The alleged mistake that he made was that he did not provide for a situation that he failed to contemplate (surviving his wife). The alleged mistake therefore

results from a failure to plan; adding a clause to account for a situation Irving Duke never provided for would be akin to producing a will from thin air. The Restatement agrees that under these circumstances, reformation is improper. Restatement §12.1, Comment h, specifically notes that changes in circumstances, whether due to a change of facts or a change of mind by the testator after the execution of the will, do not qualify for reformation. That is precisely the situation here.

The charities nonetheless suggest that, as a holograph, this will should be subject to a different standard. (OBOM, p. 40.) This argument must fail. First, the Restatement itself makes no such distinction. Second, deference to a holographic will would lead to courts always being able to supply missing words, phrases and clauses whenever the testator chose to dispose of property via a holograph. There is no reason to hold holographs to a radically different standard than attorney drafted wills. Such a standard would unsettle will interpretation and randomly subject testators to different results depending on the circumstances under which they create their wills.

B. The Implied Gift Doctrine Applies in Very Limited Circumstances and Should Not Be Liberalized.

The charities' fallback argument is that, at the very least, the implied gift doctrine, which they characterize as an "imposter for reformation,"

should be liberalized. (OBOM, p. 39.) If extrinsic evidence were considered in this case, they argue, an implied gift would result.

The charities couch the proposed liberalization of the implied gift doctrine as an alternate route for this Court to take which would not require it to abandon California's current will reformation law. (OBOM, pp. 38-39.) Not so. Such a departure from the current law of implied gifts would be fully as radical as the departure from will reformation law. The charities present neither evidence nor argument for taking such a drastic step.

Implied gifts are allowed in California in very limited circumstances, where the "intention to make a gift clearly appears from the instrument taken by its four corners and read as a whole." (*Brock v. Hall* (1949) 33 Cal.2d 885, 889.) However, the determination must be made based on a "trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event." (*Id.* at 889.) This cannot be done here. Indeed, the *Barnes* court concluded that will in that case did not raise an implied gift. The terms of this will are virtually identical to those in *Barnes.*

Nonetheless, the charities argue that extrinsic evidence would allow the Court to determine Irving's "probable intent," and imply a gift where "as here, the problem with the will is that it is incomplete." (OBOM, p. 40.)

But allowing extrinsic evidence would undercut the whole notion of implied gifts and would amount, in the case of an "incomplete will," to writing a new will based on evidence outside the will.

The charities urge that a holograph presents a special circumstance in which extrinsic evidence would be useful to interpret what laypersons really meant. (OBOM, p. 40.) But they assume that had Irving Duke consulted an attorney, he would not have left a gap in his will. They cannot know this. At the time Irving made the will, he clearly believed that his wife would outlive him except, perhaps, in the case of a mutual accident, and planned accordingly. There is no predicting how he might have planned if he thought he would survive. Moreover, this argument fails to recognize the fact that an implied gift is a disfavored remedy[9] and is limited in scope for sound policy reasons. If a holograph is truly unclear, current law regarding ambiguity allows such ambiguity to be addressed. If there is not an ambiguity, allowing extrinsic evidence to write the will jettisons the

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[9] *Seattle-First Nat'l Bank v. Tingley* (Wash., 1978) 589 P.2d 811, 814 (refusing to find a gift by implication as such gifts are disfavored and citing to cases from Texas, Illinois and Wisconsin that the necessary showing of intent "must be so strong that a contrary intent cannot be supposed to have existed in the testator's mind"); *Ridgely v. Pfingstag* (1947) 188 Md. 209, 228 (refusing to find a gift by implication where the meaning of the words are clear as the courts cannot make a new will or supply an omission); *In re French's Estate* (Pa., 1928) 140 A. 549(finding that provision for income to children during lifetime and distribution to grandchildren after death of all children created an intestacy as to the income interest after the death of some but not all of the children, and finding that the intention to avoid an intestacy was not sufficient to imply a gift).

formalities required for wills.

The charities' third point, that the will "strongly suggests Irving intended a gift to charities if his wife predeceased him" (OBOM, p. 41) is simply speculation on their part. They read much into the disinheritance clause and criticize the *Barnes* court for not giving more weight to the disinheritance clause in that case, citing two out of state cases where disinheritance clauses existed and implied gifts were allowed to persons other than family. In so arguing, however, the charities misunderstand the nature of the disinheritance clause in both *Barnes* and this case. Irving specifically disinherited his brother Harry.[10] However, the clause providing for the disinheritance of other heirs is generic in form and does not show any particular animosity to any other member of the family. In this regard, this case is unlike either *Russell v. Russell* (N.J.Super.Ct.App. 1951) 85 A.2d 296 (where the will contained specific language relating to the disfavored son and why he was disfavored) or *In re Estate of Hardie* (N.Y.Sur.Ct. 1941) 26 N.Y.S.2d 333 (will contained specific language about negative attitude toward family).

The charities claim there would be no reason for a will providing for Irving and Beatrice's simultaneous death. Not so. At the time the will was

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[10] And Robert and Seymour are not heirs of Harry, but, rather, the sons of Irving's "beloved sister" Rose.

drafted, it served to dispose of Irving's estate in the likely event that Irving, who was 14 years' Beatrice's senior, predeceased Beatrice. Irving provided for the charities as an alternative to his primary plan to provide for his wife. Had Beatrice survived, the money would all have gone to Beatrice, rather than to the charities and Beatrice would have been free to do with it as she wished. This is, of course, identical to the situation in *Barnes* and makes it very difficult to see an overwhelming intent to provide for the charities. Had facts unfolded as Irving most likely expected when he wrote the will, the charities would have received nothing.

Finally, the charities contend that the will here, providing as it does for charities, should be given special dispensation over a will that does not provide for charities. (OBOM., p. 42.)They argue that the gifts to charity made in Irving's will specifically honored the memories of his sister and his parents. This language reflects Irving's direction to the charities to make reference to Irving's mother, father and his sister. It does not shed light on Irving's intent were the initial conditions for the gift not met.

VI. THIS COURT SHOULD NOT CARVE OUT A NEW EXCEPTION TO WILL REFORMATION FOR A SINGLE CASE. INSTEAD, THE COURT SHOULD AWAIT A LEGISLATIVE SOLUTION.

The charities argue not only that this Court has the power to modify

the common law rules of will reformation, but that it should do so because of the legislature's supposed relaxation of extrinsic evidence standards by repeal of Probate Code Section 105 and the enactment of section 21102. (OBOM, p. 43.) Although Probate Code Section 105 was repealed, Section 6111.5 remains in effect. Section 6111.5 allows extrinsic evidence to be used to determine whether a document is a will and to discern ambiguities in the will, but does not contemplate allowing such evidence to "clarify" testator's intent or to shed light on a purported "mistake."

Likewise, Probate Code Section 21102 neither expands nor limits the current law on extrinsic evidence. The failure to expand it, despite the fact that the concept of will reformation was available and presumably known to the Law Revision Commission in 1994, is significant. Indeed, as the charities note, the Law Revision Commission declined to address the possibility of reformation for mistakes on the ground the subject required more study. (OBOM, p. 47.) The charities therefore urge this Court to go where the Law Revision Commission has been unwilling to go.

To do as the charities urge would open a Pandora's box all in the effort to benefit two individual charities and without regard to the widespread consequences to the orderly and efficient administration of probate in this state. The Court should decline to do so. If any change is to be made, this Court should allow the Legislature to make it instead.

CONCLUSION

For all the foregoing reasons, the trial court's grant of summary judgment should be affirmed.

Dated: July 23, 2012

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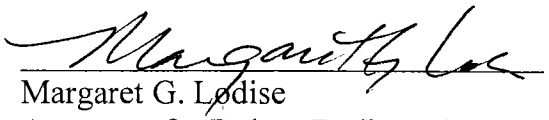
By: 
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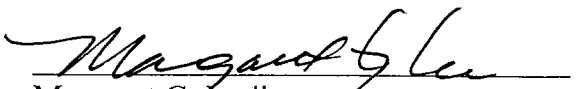
By 
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PROOF OF SERVICE

Supreme Court of California Case No. No. S199435
Los Angeles Superior Court Case No. BP108971

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I am employed in the County of Los Angles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 South Grand Avenue, Suite 3500, Los Angeles, California 90071-3475.

On **July 23, 2012** I served the foregoing document described as: **ANSWERING BRIEF ON THE MERITS** on the parties by placing true copy(ies) thereof in a sealed envelope(s) addressed as follows:

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California Court of Appeal Case No. S199435
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