

IN THE SUPREME COURT STATE OF CALIFORNIA

_____)	S271483
Brianna McKee Haggerty,)	
)	
<i>Plaintiff-Appellant,</i>)	Court of Appeal No. D078049
)	
v.)	San Diego Superior Court No.
)	37-2019-00028694.PR.TR.CTL
Nancy F. Thorton, <i>et al.</i> ,)	
)	
<i>Defendants-Respondents.</i>)	
_____)	

Application for Leave to File Amicus Curiae Brief;

**Amicus Curiae Brief of Sal J. Balistreri in support of
Plaintiff-Appellant**

After a Decision by the Court of Appeal,
Fourth Appellate District and Hon. Julia Craig Kelety,
Judge of the San Diego Superior Court

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court rule 8.208, Sal J. Balistreri certifies that he is an individual and he and his counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amicus curiae and his counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics. Counsel listed below is not aware of any other entity or person who should be disclosed pursuant to Rule 8.208.

Respectfully Submitted,

By: */s/Paul B. Gruwell*
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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.487(e) of the California Rules of Court, the individual Sal J. Balistreri requests an order granting leave to file an amicus curiae brief in support of Plaintiff-Appellant. The proposed brief is attached to this application.

Mr. Balistreri is an individual whose interests may be affected by the Court's decision in this matter. He was the prevailing party at both the trial court and the appellate court in *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511 (*Balistreri*), a case accepted for review by this Court, but stayed pending the outcome of the present matter. Mr. Balistreri was the beneficiary under a family trust that included a mandatory provision for making modifications to the trust instrument. An amendment that would have repealed his beneficial interest under the family trust was executed in a manner that failed to conform to the modifications procedures established in the trust document.

Mr. Balistreri petitioned the probate court to nullify the amendment, thereby restoring his interest under the trust, and the trial judge granted the relief Mr. Balistreri sought. On review, the First Appellate District, Division Three, agreed with Mr. Balistreri, finding that the purported trust amendment that would have revoked Mr. Balistreri's interest failed to conform to the modification procedures established by the trust instrument. On May 11, 2022, the Court granted a petition for review of the decision in *Balistreri*. Further action, however, was deferred by this Court pending its consideration and disposition of the

present case, *Haggerty v. Thorton*, S271483 (*Haggerty*). (See S273909 (Order granting petition for review but deferring consideration and disposition).)

The facts presented in *Balistreri* are distinguishable from *Haggerty*, but the two cases share issues of law concerning purportedly nonconforming trust amendments and the correct interpretation of the qualifying phrase “[u]nless the trust instrument provides otherwise,” in Probate Code section 15402 and the appropriate application of Probate Code section 15401¹. The concurrently filed amicus brief examines what Mr. Balistreri maintains is the correct interpretation and application of Sections 15401 and 15402—both of which are at issue in the present case, *Haggerty*—as well as policy considerations in examining each statute.

Mr. Balistreri’s amicus brief argues that Section 15402 is clear and unambiguous and that the Court should adopt the majority’s opinion in *King v. Lynch* (2012) 204 Cal.App.4th 1186 (applying Prob. Code §15402). Section 15402 is clear and unambiguous in stating that a settlor of a revocable trust may modify a trust by the procedure for revocation *unless the trust instrument provides otherwise*. In other words, Section 15402 empowers a settlor to establish a prescribed method for modifying the settlor’s trust that deviates from the default, statutory procedure established by statute. To conclude otherwise would effectively rewrite Section 15402 and impose additional,

¹ Unless otherwise noted, all statutory references herein are to the Probate Code.

currently non-existent requirements on settlors who intend to draft mandatory procedures for modifying a trust. Questions regarding whether to include additional requirements in Section 15402, beyond the current statutory language, are more appropriately directed to the California State Legislature than to this Court.

This application is timely. Under California Rules of Court 8.520(f)(2), an application to file an amicus curiae brief “must be filed no later than 30 days after all briefs that the parties may file under this rule-other than supplemental briefs-have been filed or were required to be filed. For good cause, the Chief Justice may allow later filing.” This case was fully briefed on July 20, 2022, and this application was filed and served 30 days later, on or before August 19, 2022, making it timely.

No party to this action, nor their counsel, has provided support in any form with regard to the authorship, production, or filing of this application and brief.

I. SUMMARY OF ARGUMENT

The decision of the appellate court in *Haggerty*, from which the present appeal is taken, goes beyond the plain language of Section 15402. In deciding this matter, the Court should find that Section 15402 is clear and unambiguous and, in so finding, adopt the reasoning applied by the Fifth District Court of Appeal in *King v. Lynch* (2012) 204 Cal.App.4th 1186 (“*King*”) (applying Prob. Code § 15402).

First, Section 15402 is clear and unambiguous in stating that a settlor of a revocable trust may modify a trust by the procedure for revocation set forth in Section 15401, *unless*, that is, *the trust instrument provides otherwise*. In other words, Section 15402 empowers a settlor to establish a prescribed procedure for modifying the settlor’s trust that deviates from the default, statutory procedure. The *Haggerty* court incorrectly found that the qualifying phrase requires a settlor to distinguish between “modifications” and “revocations” in a trust instrument in order to establish a mandatory procedure for amending a trust, which effectively rewrites Section 15402 and imposes additional, currently non-existent requirements on settlors not contemplated by the Legislature.

Second, the *King* decision observed that, by enacting Sections 15401 and 15402, the Legislature revised the Probate Code to differentiate between trust revocations and modifications. By Section 15402, the Legislature established the power to amend a trust as a separate power with a lower threshold to opt out of the statutory framework than the

“explicit” and “exclusive” threshold to opt out of the statutory framework for revocation under Section 15401, subdivision (a)(2).² This lower threshold appears intentional, as demonstrated by the Legislature’s use of the unambiguous qualifying phrase in Section 15402, “[u]nless the trust instrument provides otherwise.” Applying the plain language reading of Section 15402, which rules of statutory construction require, compels the conclusion that *any* trust amendment procedure set forth in the trust instrument is sufficient to satisfy the “provides otherwise” portion of Section 15402 and to eliminate the availability of the statutory method stated in Section 15401, subdivision (a)(2) as an acceptable alternative for trust amendments.

Third, *Haggerty* interpreted Section 15402 in a manner that is consistent with the dissenting opinion in *King* and found that the method of modification of a trust instrument is the same as the method of revocation, “unless the trust instrument provides otherwise.” But *Haggerty* mistakenly interpreted the qualifying language of Section 15402 to mean “unless the trust instrument distinguishes between revocation and modification.” (*Haggerty*, supra, 68 Cal.App.5th at 1011.) *Haggerty*’s conclusion is supported only by its failure to apply the majority’s analysis in *King* and by exceeding what is the clear and unambiguous

² Section 15401, subdivision (a)(2) provides, in relevant part, “If the trust instrument *explicitly* makes the method of revocation provided in the trust instrument the *exclusive* method of revocation, the trust may not be revoked pursuant to this paragraph.” (Emphasis added.)

meaning of Section 15402. There would be no point in including a method for modification in a trust instrument if *any other means* would suffice, as *Haggerty* found.

II. ARGUMENT

A. Probate Code Section 15402 Is Clear And Unambiguous.

It is well-settled that if a statute's meaning is without ambiguity, doubt, or uncertainty, then the language controls and there is nothing to "interpret" or "construe." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.) The text of Section 15402 needs no interpretation. Section 15402 provides as follows:

Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation.

This language is clear and unambiguous. The statute establishes that the procedures for trust revocation, as set forth in Section 15401, apply to trust modifications, *unless the trust instrument provides any other modification procedure*. Merriam-Webster's dictionary defines the word "unless" as follows: "except on the condition that" or "under any other circumstance than." (Merriam-Webster Online, 2020, "Unless", available at <https://www.merriam-webster.com/dictionary/unless>.)

In other words, Section 15402 empowers the settlor to establish a procedure for modifying a revocable trust that deviates from the default, statutory procedure of Section 15401.

Such is keeping with the principle that the *intent* of the settlor should be honored, as codified in Probate Code section 21120, which states:

The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer.

In Section 15402, there is nothing to “interpret” or “construe,” not at least without ignoring rules of statutory construction and imposing additional, non-existent requirements on settlors who intend to draft mandatory procedures for modifying a trust. Section 15402, therefore, is clear and unambiguous. This conclusion was the same reached and applied by the court in *Balistreri*.

The court in *Balistreri* was asked to determine whether a purportedly nonconforming trust amendment was valid under Section 15402. The settlors, Sal Balistreri (“Sal”) and Mary Balistreri (“Mary”), created a revocable trust (“Balistreri Family Trust”) that stated:

Any amendment, revocation, or termination of any Trust created by this instrument shall be made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee.

(*Balistreri*, supra, 75 Cal.App.5th at 515.)

Under the original Balistreri Family Trust, at Sal's death his community property interest in a piece of real property in San Francisco would be distributed to his children from a prior marriage, one of whom is Mr. Balistreri. But both Sal and Mary signed a First Amendment to the Balistreri Family Trust, which amended that distribution so that the San Francisco property would be held in trust after Sal's death. But Sal and Mary failed to have their signatures on the First Amendment acknowledged by a notary and Sal died the day after signing the First Amendment. (*Id.* at 515.)

Mary petitioned the probate court to confirm the validity of the First Amendment. Mr. Balistreri opposed the petition and filed a competing one. (*Ibid.*) The trial court, relying on Section 15402 and case law interpreting it, concluded that the First Amendment was "null and void" because Sal's signature was not notarized, *as the Balistreri Family Trust stipulated.* (*Id.* at 515-516.) The trial court denied Mary's petition to confirm the validity of the First Amendment. (*Id.* at 516.)

The court in *Balistreri* explained that Section 15401 provides two methods for the revocation of a trust. First, a trust may be revoked as set forth in the trust revocation procedure established by the trust instrument. Second, if the trust instrument does not state that the revocation procedure set forth in the trust instrument is the exclusive procedure for revocation, then the trust may be revoked by a writing, other than a will, signed by the settlor and delivered to the trustee while the settlor is living. (*Id.* at 516.) Thus, Section 15401, the court held,

provides a default procedure for revocation that applies when the trust instrument is *silent* on revocation, or the trust instrument *does not* provide the exclusive revocation procedure. (*Ibid.*)

Citing to *King*, the *Balistreri* court stated that when the trust instrument is silent on modification, the trust may be amended by the same procedure by which it may be revoked, either by statute under Section 15401 or as set forth in the trust instrument. *But* when the trust instrument specifies how a trust is to be modified, *then that method* must be used to amend the trust. (*Id.* at 517.) “Thus, when a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid.” (*Ibid.*)

The court in *Balistreri* acknowledged the *Haggerty* decision but found its interpretation of Section 15402 misplaced. “The most plain and straightforward reading of the qualifying phrase, ‘[u]nless the trust...provides otherwise,’ in section 15402,” the *Balistreri* court stated, “is that when a trust provides for the use of a specific modification method, that method must be used.” (*Id.* at 520.) In light of this conclusion, the court affirmed the trial court’s ruling, thereby confirming Mr. Balistreri as the prevailing party. (*Id.* at 522.)

Accordingly, Mr. Balistreri urges that the Court, like the court in *Balistreri*, conclude that Section 15402 is clear and unambiguous and that it apply the most straightforward reading of the qualifying phrase, “[u]nless the trust instrument provides otherwise,” found in the statute.

B. The *King v. Lynch* Decision Correctly Interprets and Applies Probate Code Section 15402.

Here, both the appellate court in *Haggerty* and in Mr. Balistreri's matter, *Balistreri*, looked to the *King* decision in resolving the issues presented. *King* was decided by a majority of the court, with a filed dissent. (*See King, supra*, 204 Cal.App.4th at 1194 (J. Detjen dissenting).) In *King*, the trust instrument of the two settlors set forth the following regarding modification of the trust instrument:

During the joint lifetimes of the Settlers, this Trust may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlers and delivered to the Trustee, and with respect to separately owned property by an instrument in writing signed by the Settlor who contributed that property to the Trust, delivered to the Trustee.

(*King, supra*, 204 Cal.App.4th at 1188.)

After the wife became incompetent, the husband solely executed three amendments to the trust instrument. The Fifth District Court of Appeal upheld the trial court's decision that the three amendments were invalid and without effect because the three amendments were signed by only one of the settlors in contravention of the express terms of the trust instrument. (*See id.* at 1194.)

The appellant in *King* argued that the modification provision was not expressly or impliedly exclusive and therefore the husband alone could amend the trust by the revocation

procedure set forth in Section 15402. The appellate court reasoned that “[T]his analysis requires concluding that under Sections 15401 and 15402, no distinction exists between the trust amendment provisions and trust revocation provisions. However, the genesis and language of section 15402 belie this result.” (*Id.* at 1190-1191.)

The *King* court explored the history of the enactment of Sections 15401 and 15402. (*See id.* at 1193-1194.) Both sections became operative in 1987. Before 1987, former Civil Code section 2280 was the law governing trust *revocations* and no statute specifically addressed trust *modifications*. “Rather, courts held that, in general, a power of revocation implied the power of modification.” (*Id.* at 1191 *citing Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 781-782.) But *King* observed that “[w]hen the Legislature enacted sections 15401 and 15402, it differentiated between trust revocations and modifications. This indicates that the Legislature no longer intended the same rules to apply to both revocation and modification.” (*Id.* at 1193.) The Legislature could have enacted one statute that combined the rules for trust revocation and trust modification. (*See e.g., Rashidi v. Moser* (2014) 60 Cal.4th 718, 726 *quoting City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395 (“Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.”).) Indeed, “as is evident from section 15401, the Legislature knew how to limit the exclusivity of a revocation

method provided in a trust and chose not to impose such a limitation on modifications in section 15402.” (*Ibid.*)

Applying this reasoning, the *King* court acknowledged that the “settlers bound themselves to a specific method of modification” as stated in the trust instrument and “thus, under section 15402 the trust could only be amended in that manner.” (*Id.* at 1194.) Holding otherwise, the *King* court concluded, “would cause the amendment provision to become superfluous and would thereby thwart the settlers’ intent.” (*Ibid.*) The majority in *King* ended its decision by concluding: “[t]herefore, in this case, to be effective, the amendments needed to be signed by both [settlers]. The trust specified a modification method and thus, under section 15402 the trust could only be amended in that manner. The settlers bound themselves to a specific method of modification.” (*Id.* at 1194.)

Under *King*’s reasoning, by enacting Section 15402, the California State Legislature established the power to amend as a separate power with a lower threshold to opt out of the statutory framework than the “exclusive” and “explicit” threshold needed to opt out of the statutory framework for revocation under Section 15401, subdivision (a)(2). The lower threshold of Section 15402 appears intentional, as demonstrated by the Legislature’s use of the unambiguous phrase in Section 15402, “[u]less the trust instrument provides otherwise.” This is significantly different from Section 15401, subdivision (a)(2), which requires explicit provisions to opt out of the statutory framework for revocations. The court in *King*, and the court in *Balistreri*,

asserted that, had the Legislature intended the power to amend under Section 15402 to be subject to the same threshold to opt out of the statutory framework as in Section 15401, subdivision (a)(2), the Legislature could have used the same language in both sections. The “plain language reading” of Section 15402, as stated by the *King* and *Balistreri* courts, and as urged here by Mr. Balistreri, compels the conclusion that any trust amendment procedure set forth in the trust amendment is sufficient to satisfy the “provide otherwise” requirement under Section 15402 and to eliminate the availability of the statutory method provided in Section 15401, subdivision (a)(2) as an acceptable alternative for trust amendments.

Reviewing the meaning of the “provides otherwise” condition of Section 15402, the Court should also weigh the settlor’s intent. (See Probate Code § 21120.) “The paramount rule in construing [a trust] ... instrument is to determine intent from the instrument itself and in accordance with applicable law.” (*Balistreri*, supra, 75 Cal.App.5th at 516 quoting *Brown v. Labow* (2007) 157 Cal.App.4th 795, 812.) Following this paramount rule, the *Balistreri* court found that the settlors’ intent was expressed in the original trust instrument, such that their purported intent as expressed in a subsequent trust amendment was insufficient to override their manifest intentions described in the amendment procedures provision of the original instrument and not in any subsequent, nonconforming amendments. (*Id.* at 519.) These stated intentions were binding, as *Balistreri* correctly observed, in the

determination of whether allegedly nonconforming trust amendments were valid, even though those nonconforming amendments expressed a contrary intent regarding the distribution of trust assets at the death of the settlors. (*Ibid.*)

The interpretation of Section 15402, as stated by the majority in *King*, also makes it more likely that attempts by manipulative third parties who seek to unfairly exploit a settlor into modifying a trust for the third party's benefit will be thwarted. This point is made well in the Plaintiff-Appellant's Opening Brief at pages 15 and 42-43 and *King* essentially acknowledged this point when it noted that Section 15402 permitted a trustor could choose to "bind . . . herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement." (*King, supra*, 204 Cal.App.4th at p. 1193, internal citation omitted.) And where the settlor does take advantage of Section 15402, "that method [set forth in the trust instrument] must be used to amend the trust." (*Ibid.*)

A third-party who seeks to exert undue influence over an elderly settlor in order to gain a beneficial interest in a trust instrument has no incentive to *revoke* a trust. Rather, a trust modification or amendment is the means to such a devious end. *King's* finding that Section 15402 empowers a settlor to proscribe their own modification requirements, however stringent, and that to be effective, an amendment must follow the trust's procedures, will add an additional safeguard against instances of elder abuse by those who seek to unduly benefit from a settlor

through wrongful conduct, such as undue influence and fraud.

C. The *Haggerty* decision exceeds the plain text of Section 15402 and contravenes the sound reasoning of the majority in the *King* decision.

Haggerty and *Balistreri* are factually distinguishable—the trust instrument in *Haggerty* proscribes that its modification procedure “may” be followed, whereas in *Balistreri* the trust instrument states that its procedure for modification “shall” be followed. (See *Haggerty, supra*, 68 Cal.App.5th at 1010 (“may”) and *Balistreri, supra*, 75 Cal.App.5th at 515 (“shall”).)³ But *Haggerty* went beyond the plain meaning of Section 15402 and mistakenly relied on the dissenting opinion in *King*, whereas, in both respects, *Balistreri* did not.

The *Haggerty* decision arrived at a different outcome than *King*, finding that a trustor may displace the fallback method for trust modification, as proscribed by Section 15401, only if the trust proscribes an explicitly exclusive method or a method that differs from revocation.⁴ In *Haggerty*, the trust at issue included a reservation of rights providing that the trustors “may” amend the trust, “by an acknowledged instrument in writing” (*Haggerty, supra*, 68 Cal.App.5th at 1010.) After the death of one

³ It is plausible to interpret the use of the word “may” in the *Haggerty* trust as meaning that a settlor “may” elect to modify their trust, but if they do make that decision, then the method proscribed in the trust for amendments is the procedure that *must* be used.

⁴ Notably, the court in *Haggerty* acknowledged materially different facts as compared to those presented in *King*, and as such, the *Haggerty* court made clear that it did not comment on whether *King* was correctly decided, but still relied on its dissenting opinion. (See *Haggerty, supra*, at 38, 39 fn 2.) As a result, much of the *Haggerty* court’s discussion of the *King* decision is dicta.

of the settlors, the remaining settlor amended the trust, but she did not notarize the amendment. (*Id.* at 1007.) In reaching its conclusion, *Haggerty* found the dissent in *King* more persuasive than its majority opinion and adopted the dissent’s position that a settlor must explicitly exclude the fallback statutory method for it to be unavailable. (*Id.* at 1010-1011.)

Haggerty concluded that a settlor could amend a trust instrument pursuant to the revocation procedure in Section 15401 because it did not appear that the “settlor intended to bind herself to the specific method described in the trust agreement, to the exclusion of other permissible methods.” (*Id.* at 1012.) *Haggerty* provided that “the trust does not distinguish between revocation and modification” and thus “it does not ‘provide otherwise’ than the general rule, and under section 15402 the trust may be modified by any valid method of revocation.” (*Ibid.*) Because the revocation and modification methods set forth in the trust were not explicitly exclusive, the statutory method under section 15401 was available. The settlor, *Haggerty* ultimately found, satisfied the statutory method not described in the trust instrument by signing and delivering the amendment to herself as trustee and thus the modification was valid. (*Ibid.*)

The panel in *Haggerty*’s decision rewrites Section 15402. Nothing in Section 15402 supposes that the Legislature intended for a settlor to include an explicit and exclusive method for trust modification in order to opt out of the statutory framework of Section 15401. The court in *Balistreri*, by contrast, explained

that Section 15401 provides two methods for the revocation of a trust.⁵ First, a trust may be revoked as set forth in the trust revocation procedure established by the trust instrument. Second, and if the trust instrument does not explicitly state that the revocation procedure set forth in the trust instrument is the exclusive procedure for revocation, then the trust may be revoked by a writing, other than a will, signed by the settlor and delivered to the trustee while the settlor is living. (*Id.* at 516.) Thus, Section 15401, the court held, provides a default procedure for revocation that applies when the trust instrument is silent on revocation, or the trust instrument does not explicitly provide the exclusive revocation procedure. (*Ibid.*)

Citing to *King*, the court in *Balistreri* stated that when the trust instrument is silent on modification, the trust may be amended by the same procedure by which it may be revoked, either by statute or as set forth in the trust instrument. But when the trust instrument specifies how a trust is to be modified, then that method must be used to amend the trust. (*Id.* at 517.) “Thus, when a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid.” (*Ibid.*) Indeed. The most straightforward, commonsense understanding of the qualifying phrase “unless the trust provides

⁵ At the outset, the court in *Balistreri* stated that the de novo standard of review applied to questions of statutory construction and to the interpretation of a trust instrument. Further, the court stated that the paramount rule in construing a trust instrument is to determine the settlor’s intent from the trust instrument itself and in accordance with applicable law. (*Balistreri*, *supra*, 5 Cal.App.5th at 516.)

otherwise,” is that “when a trust provides of the use of a specific modification method, that method must be used.” (*Id.* at 520.)

III. CONCLUSION

It would be judicially imprudent for this Court to impose unwritten, policy-driven requirements beyond the plain language of Section 15402 or Section 15401. Mr. Balistreri respectfully submits that, for the foregoing reasons, this Court should find Section 15402 is plain and unambiguous and, in so concluding, uphold the majority’s decision in *King* and reverse the *Haggerty* decision.

Respectfully submitted,

This 17th day of August, 2022.

/s/ Paul B. Gruwell
Paul B. Gruwell

CERTIFICATE OF WORD COUNT
[Cal. Rules of Ct., rule 8.204 (c)(1)]

I hereby certify the text of this brief consists of 4,739 words as counted by the “Word Count” feature of the Word processing program used to generate the brief.

/s/ Paul B. Gruwell
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Proof of Service

I am employed in the County of Marin, State of California.
I am over the age of 18 and not a party to the within action.

On August 17, 2022, I served the foregoing document described as APPELLANT'S OPENING BRIEF ON THE MERITS in case number S271483 on the interested parties in this action.

See attached service list:

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

Executed this 17th day of August, 2022, at San Rafael, California.

Jeaneene Tringali

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