No. B251854

IN THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARY CUMMINS
Plaintiff & Appellant,

vs.

AMANDA LOLLAR
Defendant & Respondent.

Appeal from Order of Los Angeles County Superior Court
Case No. BS143169, Hon. Carol Goodson

RESPONDENT'S BRIEF

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Court of Appeal
State of California
Second Appellate District, Division Three

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: No. B251854

Case Name: *Cummins v. Lollar*

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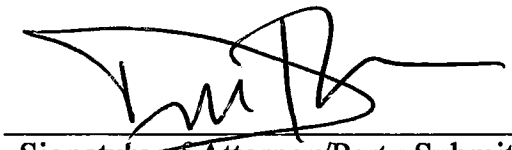

September 23, 2014

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INTRODUCTION

Appellant Mary Cummins, an unusually prolific, pro per litigant that has engaged in one frivolous appeal after another, is prosecuting this appeal in order to challenge the trial court's denial of an injunction against respondent Amanda Lollar. Having defied various trial court orders, and having been ordered to pay a six-million dollar judgment against her in a different case between these parties (1 CT 146), Cummins continues her vendetta against Lollar in this appeal.

The arguments raised by Cummins should be summarily rejected because her brief violates practically every single rule of appellate procedure. The trial court's rulings should be summarily affirmed.

DISCUSSION

I. The Trial Court's Decision on the Restraining Order Application Should Be Affirmed Because Cummins Has Failed to Meet Her Burden on Appeal to Establish Reversible Error.

A. Cummins's Violations of the Rules Governing This Appeal Preclude Reversal.

"A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (*Denham v. Superior Court*

(1970) 2 Cal.3d 557, 564; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

"A necessary corollary to this rule is that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed." (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 [internal quotes and brackets omitted]; accord, *Buckhart v. San Francisco Residential Rent Bd.* (1988) 197 Cal.App.3d 1032, 1036 ["if any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented"].)

As a result, an appellant seeking to reverse the judgment has the burden of demonstrating reversible error in the trial court. (*Robbins v. Los Angeles Unified School Dist* (1992) 3 Cal.App.4th 313, 318.) "This means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.) This burden also requires the appellant to demonstrate on the record that any asserted error was prejudicial to her case. It must appear "reasonably probable" that the outcome of the case would have been different in the absence of the alleged error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 746.)

Specifically, the burden imposed on Cummins requires her to: (1) provide an adequate record for review; (2) identify the issues for review; (3) provide reasoned analysis to support her position on the issues; and (4) identify specific facts and provide citations to the record. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532-1533 [appellant must provide adequate record to support claims of error]; *Interinsurance*

Exchange v. Collins (1994) 30 Cal.App.4th 1445, 1448 [absence of argument and citation to authority in briefs amounts to waiver of issues]; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1589 [appellant must cite to the record in her brief]; *Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 884-885 [contention unsupported by analysis or authority is waived].)

Cummins failed to meet any of these requirements for reversal. She failed to procure an adequate record in the trial court by insisting on using her own hand-held device to record the trial proceedings. She has effectively precluded this court from ascertaining the contents or the scope of the highly factual arguments presented in this case. As a result, Cummins cannot demonstrate that any error took place or that any alleged error was prejudicial.

While Cummins's brief rambles on regarding various alleged errors, an opening brief is not an appropriate vehicle for a party to "vent his spleen" after losing. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 32.) An appellant has a duty to summarize the facts fairly in light of the judgment. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 50.) The appellant's brief must set forth all of the material evidence bearing on the issue, not merely the evidence favorable to appellant. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Here, an inordinate amount of time must be spent attempting to determine what actually happened in the trial court, due to Cummins's failure to include a proper rendition of the facts. (See *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 165 [a court may award sanctions for a party's unreasonable violations of the rules of appellate procedure].)

While Cummins has asserted various "facts" throughout her incomprehensible brief, she has failed to provide any citations to objectively-verifiable sources to support them. The only citations she has

provided refer to *her own* motion papers (not even declarations) to support her assertions as to what took place in the trial court. The Court should "look askance at this practice of stating what purport to be facts—and not unimportant facts—without support in the record. This is a violation of the rules ... with the consequence that such assertions will, at a minimum, be disregarded." (*Liberty Nat'l Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846.) [1]

Otherwise, allowing a party to proceed in this manner violates "at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

In sum, having demonstrated her "utter disregard for the rules" governing appellate briefs which require Cummins to "support all statements of fact" with citations to the record (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 30), Cummins's "brief makes a mockery of those rules." (*Id.* [$32,000 sanctions imposed based in part on this ground]; see also *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885-886 [sanctions imposed based on "failure to confine the statement of the case to matters in the record on appeal" and "failure to support statements of matters in the record by appropriate references to the record"].)

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[1] "In its discussion of the facts," Cummins's brief is "entirely devoid of references to the record, and particularly to the reporter's transcript of testimony." (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 827, fn. 1.) Accordingly, the court "need not consider or may disregard" the factual summary presented by Cummins. (*Id.* [collecting cases]; accord, *Dominguez v. Financial Indem. Co.* (2010) 183 Cal.App.4th 388, 392, fn. 2 [because [respondent's] brief fails to provide a citation to the appellate record for these facts, we do not consider them"]; brackets added.)

To avoid such problems, rule 8.204(a)(1)(C) of the California Rules of Court requires all appellate briefs to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Courts interpret this rule to mean that the assertions of fact set forth in an appellate brief must be supported by a citation to the volume and page number of the record where that fact appears. (*See Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 936, fn. 4 [defendants' assertion of fact not supported by citation to record].) The reason is obvious: "It is not our place to comb the record seeking support for assertions parties fail to substantiate." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 534.) As a result, "[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

Based on these various violations throughout her entire brief, Cummins's arguments should be disregarded. In sum, Cummins's brief represents "nothing more than what amounts to a random and somewhat garbled recital of alleged grievances[.]" (*Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 Cal.App.3d 343, 347.)

B. Cummins's Brief Violates Additional Rules Governing Appeals, Thereby Precluding Reversal.

Rule 8.204(a)(1)(B) requires that each point in an appellate brief be supported by argument and, if possible, by citation of authority. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700.) "It is not our place to construct theories or arguments to undermine

the judgment and defeat the presumption of correctness." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) Accordingly, given Cummins's failure to properly present her factual and legal arguments on appeal, her contentions should be deemed to be forfeited. (*Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 165.)

Even setting aside these violations, the substance of Cummins's brief requires the court to conclude that any contentions are forfeited. Cummins has failed to present a valid legal argument demonstrating why this court should conclude the trial court prejudicially abused its discretion by denying the relief requested by Cummins. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["An appellate court is not required to examine undeveloped claims, nor to make arguments for parties"]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [appellate court's role is to evaluate legal argument with citation of authorities on the points made].) It is Cummins's burden to present an adequate record so as to affirmatively demonstrate trial court error. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794; accord, *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) "We cannot presume error from an incomplete record." (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412.) "[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

For example, to the extent that Cummins is challenging the trial court's decision to award attorneys' fees (or the sufficiency of the evidence to support the trial court's factual finding that fees are justified here), these claims are barred based on Cummins's failure to have a court reporter attend the hearing on the underlying motion. (See, e.g., *EnPalm, LLC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 775 (maj. opn.) [attorney

fee award]; *Foust v. San Jose Const. Co., Inc.* (2011) 198 Cal.App.4th 181, 189 ["Without a proper record, there is no way for this court to find that the trial court's conclusions were not supported by substantial evidence"; sanctions imposed]; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [sufficiency of evidence to support trial court's findings cannot be challenged without reporter's transcript].) In sum, given Cummins's burden of overcoming the presumption of correctness by affirmatively showing error based on an adequate record (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–114), she was required to have a court reporter attend the hearing. (See *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 ["in the absence of a required reporter's transcript and other [necessary] documents, we presume the judgment is correct"]; brackets added.)

Cummins apparently believes that she should have been allowed to use her own personal recording device to create a record on appeal. She is totally wrong. Although trial courts have discretion to allow the use of personal recording devices, when such permission is granted, "[t]he recordings must not be used for any purpose other than as personal notes." (California Rule of Court, rule 1.150(d).) Therefore, the fact that Cummins tried to use her own recording device does not excuse her failure to follow the rules for securing an adequate record.

Moreover, having ignored the relevant standards of appellate review, Cummins does not tailor her arguments according to the abuse-of-discretion review or sufficiency-of-the-evidence review standards, as she is required to do. (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1387-1390.) While the court's fee award was certainly not intended to punish Cummins as she appears to suggest, even if the court had awarded sanctions, "the question before this court is not whether the trial court should have imposed a lesser sanction; rather, the question is whether the

trial court abused its discretion by imposing the sanction it chose." (*Do It Urself Moving & Storage. Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36-37, superseded by statute on other grounds as stated in *Union Bank v. Superior Court* (1992) 31 Cal.App.4th 573.)

Cummins seeks to evoke sympathy from this court based on her pro per status. Cummins's status as a party appearing in propria persona does not provide a basis for preferential consideration. "A party proceeding in propria persona 'is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys.' [Citation.] Indeed, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney." (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1; *Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121.) As a result, the fact that a party has been representing herself does not exempt her from these mandatory appellate requirements. Litigants appearing in propria persona are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure and are held to the same standards as a litigant represented by counsel. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284; *Nwosu, supra*, 122 Cal.App.4th at 1246–1247.) "[O]therwise, ignorance is unjustly rewarded." (*Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1055-1056.)

Instead of complying with these rules, Cummins asserts that the trial court sabotaged her attempt to obtain injunctive relief. This is pure speculation. There is no evidence that was the case. In fact, the presumption on appeal is exactly the opposite: It must be presumed that the trial court followed the law and the evidence. (See *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 645-649; see also *Monogram Industries, Inc. v. Sar Industries, Inc.* (1976) 64 Cal.App.3d 692, 704 [it is presumed on appeal that a judge has not relied on irrelevant or incompetent evidence].) It is also

presumed that the trial court made any and all implied findings necessary to support its decision. (See, e.g., *SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462; *American Western Banker v. Price Waterhouse* (1993) 12 Cal.App.4th 39, 54, fn. 8 ["Ordinary rules of implied findings and substantial evidence apply" on appeal; addressing appellate review of dismissal motion].)

Cummins also violates the rule that it must be presumed that the evidence is sufficient to support the trial court's ruling; it is her burden to demonstrate that it does not. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Fredendall v. Shrader* (1920) 45 Cal.App. 719, 730 ["the presumption is that all the findings derive sufficient support from the evidence adduced at the trial"].) In carrying out her burden on appeal, Cummins was required (but failed) to fairly summarize all the facts and to do so in the light favorable to the order being appealed, drawing all inferences favorable to the trial court's decision. (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) Her failure to adhere to these basic rules forfeits her implicit contention that the evidence fails to support the trial court's order. (See *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 152 ["failure to so state the evidence shall be deemed a waiver of the claimed error"].) Cummins "cannot shift this burden onto [Lollar], nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked [her] responsibility in this respect." (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

In sum, Cummins's failure to procure an adequate record – such as the reporter's transcripts for the subject hearings – precludes her from challenging the sufficiency of the evidence. (See *Foust, supra,* 198 Cal.App.4th at 186-187 [collecting cases as to omission of hearing transcripts]; *Buckhart v. San Francisco Residential Rent Bd.* (1988) 197

Cal.App.3d 1032, 1036 ["if any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented"].)

Therefore, this Court should affirm the trial court's decision in light of Cummins's violations of these basic rules.

II. The Trial Court's Order on the Motion for Reconsideration Should Be Summarily Affirmed Based on Cummins's Violations of the Pertinent Rules in the Trial Court.

A. Having Failed to Follow the Procedures Governing Motions for Reconsideration, Cummins Cannot Seek Reversal Based on the Trial Court's Refusal to Grant Reconsideration.

In her scattershot brief, Cummins claims that the trial court erred by denying her motions for reconsideration. The record shows that the court initially granted a pro forma TRO but denied a request for an injunction against Lollar while awarding Lollar attorneys' fees. (1 CT 4; 1 CT 9.) Cummins subsequently filed a "motion to reconsider denial of civil restraining order, lawyer's costs and fees" on July 16, 2013. (1 CT 10.) Refusing to accept defeat, Cummins filed on August 15, 2013 an "amended motion to reconsider denial of civil restraining order, award of lawyer's costs and fees, request for new trial before a different judge." (1 CT 25.) No separate notice of motion or notice of intention to move for new trial was filed with these motions. In addition, while the second motion for reconsideration included a declaration that merely attached two documents

(1 CT 43), the first motion did not include a declaration at all.[2] Both motions were defective.

A motion for reconsideration must be accompanied by a declaration from the moving party stating what application was made previously; when and to whom the application was made; what order or decisions were made; and what new or different facts, circumstances or law are claimed to be shown. (CCP § 1008(a); see *Branner v. Regents of Univ. of Calif.* (2009) 175 Cal.App.4th 1043, 1048 (motion filed and served without supporting affidavit was invalid; affidavit filed later was insufficient and could not retroactively cure these defects).)

Because Cummins did not comply with these requirements (1 CT 67), she cannot show that the trial court abused its discretion in denying her two motions for reconsideration. See *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106 ("A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard").

B. To the Extent That Cummins Seeks Reversal Based on the Trial Court's Failure to Grant a New Trial, Cummins's Failure to Follow the Proper Procedure for Seeking Such Relief Precludes Reversal.

In her notice of appeal, Cummins claims that she is appealing from a "judgment after court trial" rather than from an appealable order. (2 CT 321.) While Lollar does not dispute the appealability of the July 1, 2013 order cited in the notice of appeal (1 CT 9), the appeal is defective, even if

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[2] The so-called "verification" submitted with the first motion did not satisfy the requirements for a declaration. (1 CT 20.)

we assume that this order was a judgment as Cummins has asserted in her notice of appeal.

Once judgment is entered, a party may obtain a modification of the judgment by direct attack only by filing appropriate post-judgment motions, such as a motion for new trial. (*Bowman v. Bowman* (1947) 29 Cal.2d 808, 814-815, abrogated on other grounds in *In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1168-69 ["Trial courts can modify or amend their judgments only as prescribed by statute" and a trial court may not "attempt to rectify a supposed error of law on summary motion procedure not allowed by statute"].) The record, however, shows that Cummins failed to follow the proper procedures for seeking a new trial.

"It is well settled that a timely filing of the notice of intention to move for a new trial is jurisdictional, and the time cannot be extended or waived by the parties." (*Marriage of Beilock* (1978) 81 Cal.App.3d 713, 72.) Furthermore, the parties cannot vest the court with jurisdiction through participation in the hearing on a new trial motion (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 151). In fact, because timely filing of a notice of intent to move for new trial is a jurisdictional requirement, this issue can even be raised for the first time on appeal. (See *Kientz v. Harris* (1953) 117 Cal.App.2d 787, 791-792 [applying this rule]; see also *Douglas v. Janis* (1975) 43 Cal.App.3d 931, 936 ["because compliance with the 15-day requirement of section 659 is jurisdictional[,] defendant's notice was totally ineffectual; the trial court had no power to entertain or act on the motion," and its decision "was void"].)

The original motion for reconsideration and the amended motion for reconsideration filed by Cummins were improper. (1 CT 10; 25.) Assuming that the July 1 order was a judgment, Cummins was required to file a notice of intention to move for new trial in order to seek a new trial. She never filed a notice of intention to move for new trial. She also did not file the

traditional notice required for other types of motions. Having failed to do so, her arguments should be summarily rejected.

To summarize, Cummins is not entitled to a new trial.

III. Cummins Cannot Challenge the Trial Court's Rulings on Her Disqualification Requests Again, Given This Court's Prior Denial of Her Statutory Writ Petition.

Cummins's brief repeatedly attacks the trial court's refusal to grant her request for disqualification of the trial judge. This argument is procedurally barred for multiple reasons.

We acknowledge that Code of Civil Procedure section 170.3(d) does not bar an appeal challenging the constitutional integrity of the judgment due to alleged judicial bias. (*People v. Brown* (1993) 6 Cal.4th 322, 333–335; *People v. Freeman* (2010) 47 Cal.4th 993, 1000.) Here, however, although the disqualification rulings were made before the notice of appeal was filed (2 CT 248, 314 [rulings]; 2 CT 321 [notice of appeal]), Cummins failed to raise this issue at the appropriate time. Cummins asserted the purported grounds for disqualification *after* the contested request for an injunction was decided against her. As a result, her "due process claims were forfeited by this dilatory conduct." (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1339 [due process claims forfeited where party had long been aware of ground for disqualification but "plainly took a 'wait and see' approach," not seeking disqualification until contested class certification motion and appellate review thereof were finally decided against it].)

Furthermore, while the law allows a statutory writ petition as the exclusive method for challenging rulings on disqualification motions on non-constitutional grounds (Code Civ. Proc., § 170.3(d)), Cummins

pursued that remedy. See Motion for Judicial Notice, Ex. 1 (filed concurrently with this brief). This Court previously rejected Cummins's arguments regarding the trial judge's refusal to recuse herself when Cummins filed a writ petition. "When an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113-114.) Nonetheless, this Court denied Cummins's writ petition. Given that this Court cited various case authorities rejecting Cummins's arguments regarding that ruling, this Court's decision was on the merits. Therefore, Cummins is barred from raising those arguments in this appeal. (See, e.g., *In re Rose* (2000) 22 Cal.4th 430, 444–446 [summary denial entitled to res judicata where writ review was the exclusive method for challenging decision on attorney's admission to the bar].)

CONCLUSION

The trial court's rulings should be summarily affirmed. Enough is enough.

Respectfully submitted,

DATED: September 23, 2014

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By _____

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CERTIFICATE OF WORD COUNT

Cal. Rules of Court, rule 8.204(c)

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DATED: September 23, 2014

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By_____

Dean A. Rocco
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AMANDA LOLLAR

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 South Flower Street, 29th Floor, Los Angeles, California 90071.

On **September 23, 2014**, I caused the foregoing document described as

RESPONDENT'S BRIEF

to be served on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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

Karina Ramirez

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