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No. 102298-1

SUPREME COURT OF
THE STATE OF WASHINGTON

COURT OF APPEALS NO.: 84426-1-I

DAN YOUNG, an individual,

Petitioner.

v.

TODD S. RAYAN and JANE DOE RAYAN, husband and wife; SAMUEL WILKENS and JANE DOE WILKENS, husband and wife; PENNY ROHR and JOHN DOE ROHR, wife and husband; and ALTHAUSER RAYAN ABBARNO, a Washington Limited Liability Partnership,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

Defendants-Respondents are Todd Rayan, Samuel Wilkens, Penny Rohr, and the law firm Althauser Rayan Abbarno, LLP (collectively "Althauser").

II. CITATION TO COURT OF APPEALS DECISION

The published decision is *Young v. Rayan et al.*, No. 84426-1-I (Wash. Ct. App. July 24, 2023) ("*Young*"). A copy of the Slip Opinion ("Slp. Opn.") is attached to the Petition for Review as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny Plaintiff-Appellant Mr. Young's Petition for Review under RAP 13.4(b), where:

1. Mr. Young fails to establish any basis for review under RAP 13.4;

2. Accepting review would result in the issuance of an advisory opinion; and

3. This case presents no issue of substantial public interest that should be determined by this Court.

IV. STATEMENT OF THE CASE

Althauser adopts by reference its Statement of the Case in its Brief of Respondents to Division I of the Court of Appeals. However, throughout his Statement of the Case, Mr. Young takes excessive liberty in characterizing unfounded innuendo as fact. Stripped of Mr. Young's embellishments, this litigation is simply an attorney's attempt to save face for unlawfully obtaining, and retaining, a will copy from a custodian of a privileged file. The following Statement of the Case sets the record straight.

A. Mr. Young makes outlandish assertions that the record entirely fails to support.

Mr. Young offers factual statements that he fails to support with citations to the record and/or that the record entirely fails to support. The court should disregard such statements. RAP 10.3(a)(5); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238 (1992). For example, Mr. Young states:

> **Gabrielson's Procurement of Perjured Declarations.** After learning of the Althauser

> firm's voluntary release of the will of Robert Parman to Young, Gabrielson developed a scheme designed to prevent access to the contents of Robert Parman's will, put Young in a false light, attack Young's character, and create a conflict of interest between Young and his client by obtaining declarations from the Althauser firm. CP 329-330 at 9-10. Respondents knowingly and willingly participated in Gabrielson's scheme. CP 330-331 at 13-14.

Pet. Br. at 8-9.

These are flagrant misrepresentations of the record. The clerk's papers cited in support of these bald assertions are excerpts from the deposition transcript of Todd Rayan, and they say nothing of this sort. CP 329-331. Mr. Rayan testified that Mr. Gabirelson asked if Mr. Rayan could provide sworn statements as to the circumstances regarding the release of the will copy, and Mr. Rayan then asked Althauser employees who communicated with Mr. Young to provide accurate statements. *Id.* When asked whether Mr. Gabrielson made any threatening statements to Mr. Rayan regarding Althauser's release of the will copy, Mr. Rayan flatly stated: "No, I never perceived anything to be threatening at all." CP 330. Moreover, there is

no evidence in the record suggesting Mr. Gabrielson ever even communicated with either Mr. Wilkens or Ms. Rohr.

Mr. Young repeatedly claims that Mr. Gabrielson, who is not a party to this action, is the architect of some "scheme," but cites no supporting evidence. Unsurprisingly, the trial court in the present action found "the record is void of any admissible or non-speculative assertions" establishing the existence of a conspiracy between Mr. Gabrielson and Althauser. RP 37. In sum, the Court should disregard the plethora of unsupported statements that Mr. Young characterizes as facts.

B. The allegedly defamatory statements were made in the course of a judicial proceeding and bear some relation to the Underlying Action.

This defamation action arises out of two lawsuits filed in Thurston County Superior Court, Cause No. 18-2-03269 and Cause No. 21-2-01093 (collectively the "Underlying Action"). The Underlying Action concerns a dispute over the ownership interest in real property in Olympia. CP 33. Mr. Young represents plaintiff Elizabeth Bartlett, formerly Parman, in the

Underlying Action. *Id.* Ms. Bartlett's interests are adverse to the interests of the Estate of Robert Parman ("the Estate"), a defendant in the Underlying Action. CP 35. Mr. Young confirmed he never represented the Estate in the Underlying Action. CP 33.

Mr. Young purportedly sought to obtain a copy of the will of Robert Parman because the attorney for the Estate, Mr. Gabrielson, claimed Robert Parman never agreed to will anything to Mr. Young's client, Ms. Bartlett. CP 34. Mr. Young claims he suspected such a will existed based on attorney-client confidences. *Id.* A receptionist of Althauser, Ms. Rohr, and an Althauser associate, Mr. Wilkens, testified in declarations filed in the Underlying Action that Mr. Young called Althauser and represented that he was the attorney for the Estate and was in search of Robert Parman's will. CP 46. After a second phone call to Althauser, Mr. Young received a copy of the will from Althauser. *Id.* Mr. Young confirmed

being able to admit a copy of this will into evidence in the Underlying Action would benefit his client's interests. CP 35.

The way Mr. Young obtained a copy of the will of Robert Parman was disputed and litigated in the Underlying Action. CP 45-49. After Mr. Young submitted the will copy in the Underlying Action, an attorney from Mr. Gabrielson's law firm, Meghan Gross, contacted Althauser to determine the circumstances regarding how Mr. Young obtained the will copy from Althauser. CP 100. Mr. Gabrielson's firm then propounded a subpoena for the estate planning files of Robert and Ruth Parman. CP 328. Upon receipt of the subpoena from Mr. Gabrielson, Mr. Rayan had his assistant locate the file that was the subject of the subpoena and schedule a phone call with Mr. Gabrielson. *Id.* Mr. Gabirelson asked if Mr. Rayan could provide sworn statements as to the circumstances regarding the release of the will copy, and Mr. Rayan then asked Mr. Wilkens and Ms. Rohr to provide such statements. CP 329-331.

After obtaining a will copy from Althauser, Mr. Young issued a subpoena duces tecum to Althauser requesting, among other things, the production of the original estate planning files of Robert and Ruth Parman. CP 51-52. Mr. Rayan objected to the subpoena on the grounds that it sought information protected by the attorney client privilege and confidential information protected by RPC 1.6: "The prior disclosure and emailing of one document was based on a misrepresentation to my staff (see declarations attached) and was therefore obtained through fraudulent means." CP 52.

Mr. Young confirmed the three allegedly defamatory statements that form the basis for the present action are the declarations of Ms. Rohr and Mr. Wilkens filed in the Underlying Action, and the above-quoted language cited in Mr. Rayan's letter objecting to the subpoena duces tecum. CP 42-43.

C. The court in the Underlying Action found Mr. Young's actions were "improper" and "do not constitute a lawful way for him to obtain any document from the attorney file of Robert Parman."

The parties in the Underlying Action filed cross-motions; Mr. Young filed a motion to compel production of the documents sought in the subpoena propounded to Althauser, and the Estate filed a motion to strike and seal the will of Robert Parman. CP 59. In support of the Estate's motion to strike and seal, the declarations of Ms. Rohr and Mr. Wilkens were submitted. CP 98-122.

In the court's order granting the Estate's motion to strike and seal, it summarized Mr. Young's version of events as follows: "In his declaration, Mr. Young testified that he did not identify whom he represented as an attorney, that he just asked whether there was a will, and was never asked whom he represented, or his purpose for the request. In the briefing, Mr. Young characterized it as 'ask and you shall receive.'" CP 46. At oral argument, Mr. Young stated: "The will should be produced regardless of how I acquired a copy. I simply called and asked, and they said sure. They sent it to me. Ask and you shall receive." CP 66.

In denying plaintiff's motion to compel and granting the Estate's motion to strike and seal the will of Robert Parman, the court at oral argument cited Mr. Young's improper conduct as a basis for its decision:

> Given the adversarial nature of the person requesting in terms of the existing posture of the case and given how it was originally obtained, the copy of the will, the court is finding that at this point there is no justification and **it would be rewarding improper actions to order compelling of either the copy of the will or the broader file.**
>
> . . .
>
> I am concluding that whether the circumstances were as you (Mr. Young) described, without a representation but a call to ask for the document, or as Mr. Rayan's associate and staff person describes, with a misrepresentation of who you were, **in both cases I don't believe that that was a lawful way of asking for a document as a representative of an adverse party in these proceedings.**

CP 90-91, 93-94 (emphasis added).

In the written order memorializing its ruling, the court found "even under Mr. Young's version of events, his actions

do not constitute a lawful way for him to obtain any document from the attorney file of Robert Parman." CP 47.

D. Mr. Young's story as to how he obtained a copy of the will keeps changing.

Despite previously representing to the court in the Underlying Action that he asked for a copy of the will from Althauser, Mr. Young testified in the present action that he did not do so:

> Q: But you asked for a copy of this will, correct?
>
> A: No, I didn't ask for a copy of the will. I asked to talk to Samuel Wilkens, first John Turner and then Samuel Wilkens. I never got to talk to either one of them. And I never asked Penny Rohr to send me a copy of the will except, after she said she would mail me one, I asked her if she could e-mail it instead.
>
> Q: Oh, so it's your testimony then today that prior to Penny Rohr stating or asking if she would like to mail you a copy, you never asked for a copy of the will?
>
> A; I didn't ask in – she stated that she – I don't think I did specifically ask for a copy of the will.
>
> Q: She just sent it to you without you asking?

A: I believe that's true, yes. I asked to talk to Samuel Wilkens.

. . .

Q: So you're telling – it's your testimony that, neither in the first conversation nor the second conversation, you never explicitly asked for a copy of the will?

A: That's correct, because I was going to ask the attorney for one, not her [Ms. Rohr]. That's why I didn't explain who I represented or anything of that nature because I was not dealing with her on that. I called to speak to an attorney, first John Turner and then Sam Wilkens. And I never got to talk to either one. All I got to talk to was Penny Rohr – presumably that's her name – and she made a lot of assumptions, apparently, none of which were borne out by anything I said.

CP 36-38.

This is not only contrary to what Mr. Young represented to the court in the Underlying Action, but also conflicts with what Detective Timothy B. O'Dell stated in his Incident Report: "Dan [Mr. Young] advised that he simply called Althauser, Rayan, Abarno, LLP, and simply asked Penny [Ms. Rohr] for the Will." CP 423. Based on his investigation,

Detective O'Dell concluded that there was probable cause to arrest Mr. Young for criminal impersonation in the first degree. CP 424.

E. Mr. Young admits he has no evidence that Althauser conspired against him.

On January 12, 2022, Mr. Young submitted a bar grievance against Mr. Wilkens. CP 124. In this grievance, Mr. Young stated Mr. Wilkens "was facing criticism, and undoubtedly threats of litigation or criminal repercussions" from the attorneys representing defendants in the Underlying Action. *Id*. However, Mr. Young admitted he has no direct knowledge of this, but instead based this statement on "inferences." CP 38-39. Mr. Young also stated in the bar grievance that Mr. Rayan "applied pressure on Mr. Wilkens to sign Mr. Wilkens' declaration." CP 125. Yet Mr. Young admitted he has no direct knowledge Mr. Rayan did so, but instead bases this statement on "certain assumptions" and thinks it is a "reasonable inference." CP 41.

Yet Mr. Young's "inferences" are based on nothing more than rank speculation; when asked whether Mr. Gabrielson made any threatening statements to Mr. Rayan regarding Althauser's release of the will, Mr. Rayan flatly testified: "No, I never perceived anything to be threatening at all." CP 330. Moreover, Mr. Young points to no evidence showing Mr. Gabrielson ever even communicated with either Mr. Wilkens or Ms. Rohr.

F. The superior court found Mr. Young offered no admissible evidence in support of any exception to the litigation privilege and granted Althauser's Motion for Summary Judgment.

On August 23, 2022, Judge Phelps granted Althauser's Motion for Summary Judgment and dismissed Mr. Young's complaint with prejudice. CP 427-428. The trial court framed the inquiry of determining whether the statements at issue were protected under the litigation privilege as follows:

> The first issue in this case is whether or not the declarations given by Ms. Rohr and Mr. Wilkens fall under the civil litigation privilege. And to answer that question really has very little to do with whether or not they are truthful or not, but much to do with the test that's been put forth for

> the Court, which is whether or not they have to do with the underlying – the under – the underlying case and **if any of the exceptions apply.**

RP 35 (Emphasis added).

The court reasoned that the statements at issue are protected under the litigation privilege, because the statements at issue were made in the course of a judicial proceeding and plainly bear some relation to the Underlying Action. RP 36. The court noted Mr. Young conceded as much in his deposition. *Id.* Judge Phelps rejected Mr. Young's argument that the "larger actionable conspiracy" exception to the litigation privilege applies, finding "the record is void of any admissible or non-speculative assertions" establishing the existence of a conspiracy. RP 37.

G. Division I affirmed summary judgment dismissal of Mr. Young's claims.

Mr. Young appealed, and on July 24, 2023, Division I affirmed summary judgment dismissal of Mr. Young's claims. Pet. Br., Appx. A. Division I declined to recognize any

exceptions to the litigation privilege doctrine and found the privilege applied to the three statements at issue:

> We conclude that the defendants are immune to any claim for liability based on these statements. We reach this conclusion regardless of the dispute over precisely what was said during Young's phone call to the law firm, because exactly what was said that day is not material to whether litigation privilege applies. The first two statements are sworn declarations providing testimony on the penalty of perjury. The third, though it is not sworn, sits squarely within the type of communication contemplated by the rules of civil procedure as part of a court proceeding. . . . The statements are all pertinent to the subject matter of the litigation, since they concerned arguments about the admissibility of a copy of a will in actions about the disposition of the decedent's property. And any falsity in the statements was subject to checks by the trial court, such as sanctions, or even by the Washington State Bar Association through a disciplinary action. As statements made in the course of court proceedings, pertinent to the subject matter of the litigation, the defendants cannot be civilly liable for any harm the statements caused.

Id. at 17-18.

V. ARGUMENT

A. Mr. Young does not argue that grounds for review exist under RAP 13.4(b)(1) or (3).

Mr. Young has asserted grounds for Supreme Court

review under RAP 13.4(b)(2) and (4) only. He does not offer any argument in support of any other basis for this court to accept review. Mr. Young therefore concedes that review is not warranted under either RAP 13.4(1) or RAP 13.4(3).

B. Review is not warranted under any of the grounds in RAP 13.4.

Pursuant to RAP 13.4, this Court will grant a petition for review only:

> (1) if the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with the decision of another division of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.
>
> RAP 13.4(b).

Mr. Young claims – wrongly – that grounds for review exist under RAP 13.4(b)(2) and (4). However, this Petition should be denied because it fails to satisfy any basis for Supreme Court review.

Furthermore, nothing in RAP 13.4 or in Washington law entitles Mr. Young to review by this Court simply because he disagrees with the Court of Appeals' decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

Mr. Young suggests Division I erred when it "looked cursorily at Young's claims . . . and determined that the

statements in those claims were 'pertinent' to the court proceeding." Petition for Review at 24. This is untrue. Yet even if it was, none of RAP 13.4(b)'s four enumerated grounds permits Supreme Court review merely to correct errors by the Court of Appeals. Rather, Mr. Young must show that this case is sufficiently exceptional to "transcend the particular application of the law in question." Wash. Appellate Prac. Deskbook § 27.11. He shows nothing of the sort.

C. This Court should not accept review, because doing so would result in the issuance of an advisory opinion.

Mr. Young contends this Court should accept review principally because Division One declined to follow the public policy exception to the litigation doctrine recognized in *Mason v. Mason*, 19 Wn. App.2d 803, 831, 497 P.3d 431 (2021). The public policy exception outlined in *Mason* is as follows:

> In *Mason*, we noted that litigation privilege does not apply when the facts are such that application of the privilege would defeat the public policy considerations justifying the privilege. This exception applies in a narrow set of circumstances where any attorney "misappropriates a judicial

> proceeding to achieve an improper and extrinsic end," immunity "neither preserves 'integrity of the judicial process,' nor 'further[s] the administration of justice.'"

Scott v. Am. Express Nat.Bank, 22 Wn. App. 2d 258, 267-68, 514 P.3d 695 (2022) (citations omitted).

Mason concerned abuse of process and intentional infliction of emotional distress claims made by a former wife against her former husband and his attorney for their conduct during the underlying dissolution proceedings. *Mason*, 19 Wn. App. 2d at 830. The former husband was sanctioned for, among other things, misrepresenting the existence of a key document, an I-864 affidavit, promising the United States government that he would provide continual financial support to his then wife. *Id.* at 813. Division II reversed the trial court's dismissal of a claim of abuse of process, finding "the traditional public policy considerations that justify application of litigation privilege to bar other tort claims filed against attorneys do not apply in the narrow context of abuse of process." *Id.* at 834. In addition, the *Mason* Court declined to

apply the litigation privilege to the intentional infliction of emotional distress claim due to abusive litigation tactics. *Id.* at 843.

The Court identified inconsistencies between the goals of the judicial system and the intent of an abuse of process tortfeasor, then concluded an attorney would not be shielded by the litigation privilege where the attorney "intentionally employed legal process for an inappropriate and extrinsic end." *Id.* at 835. A more recent Division II case articulated the *Mason* holding as follows: "we apply litigation privilege where the conduct bears some relation to a judicial proceeding and where compelling public policy justifications support its application." *Scott*, 22 Wn. App. 2d 265-66.

In the present action, Division I declined to follow Mason's public policy exception to the litigation privilege doctrine on the following grounds: (1) a tortfeasor's intent in making a statement is not necessarily related to whether the statement was pertinent to the proceeding to the judicial

proceeding at issue; (2) the broad purpose of the litigation privilege is to prevent the threat of litigation so as to avoid chilling testimony, and the case-by-case application of *Mason*'s standard, which looks to a defendant's actual intent, will result in protracted discovery and litigation; and (3) *Mason* does not root its analysis in relevant case law, and the litigation privilege doctrine fundamentally serves a compelling public policy by ensuring participants in litigation may speak freely and openly in court proceedings without fear of ensuing litigation. *Young*, Slp. Opn. at 14-15.

Because Division I elected not to follow *Mason*, Mr. Young claims this Court should accept review. Mr. Young is mistaken.

This Court should not accept review, because doing so would result in an advisory opinion. "Issuing an advisory opinion is allowable "only 'on those rare occasions where the interest of the public in the resolution of an issue is overwhelming.'" *Bloome v. Haverly*, 154 Wn. App. 129, 141,

225 P.3d 330 (2010) (citation omitted). No such circumstances remotely exist here.

Here, while Division I declined to follow Mason's recognition of a public policy exception to the litigation privilege doctrine, the trial court considered the exceptions to the litigation privilege discussed in *Mason* and *Scott* then determined Mr. Young had no admissible evidence to support the application of these exceptions. RP 35-37. Specifically, the trial court found "**the record is void of any admissible or non-speculative assertions**" establishing the existence of a conspiracy. RP 37 (Emphasis added). Indeed, Mr. Young does not have a shred of admissible evidence whatsoever suggesting Althauser "intentionally employed legal process for an inappropriate and extrinsic end."

Because the trial court determined Mr. Young lacked admissible evidence to support the application of any exceptions to the litigation privilege, accepting review would lead to the issuance of an advisory opinion. If this Court

accepts review and affirms Division I's ruling, Mr. Young's claims remain dismissed. If this Court accepts review and determines Division I should have followed the exceptions to the privilege outlined in *Mason* and its progeny, then Mr. Young's claims still fail because he has no admissible evidence in support of these exceptions. Either way, Mr. Young loses.

This Petition for Review does not assert the trial court erred in dismissing Mr. Young's claims under *Mason*. Mr. Young's claims are futile, because they fail as matter of law regardless of whether *Mason* applies. Thus, this Court should decline to accept review to avoid the issuance of an advisory opinion. Mr. Young's Petition for Review must be denied.

D. This case presents no issues of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

This petition plainly does not concern an issue of substantial public interest that should be determined by this Court. This Court has addressed what constitutes an issue of public interest:

> The criteria to be considered in determining whether sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; (3) the likelihood that the question will reoccur.

Dep't of Ecology v. Adsit, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *Sorensen v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Case law shows that a question that meets these criteria will almost always implicate constitutional principles or the validity of statutes or other legislative enactments. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *Gen. Tel. Co. of the Northwest, Inc. v. City of Bothell*, 105 Wn.2d 597, 716 P.2d 879 (1986); *State ex rel. Chapman v. Superior Court*, 15 Wn.2d 637, 642-43, 131 P.2d 958 (1942); *State ex rel. Yakima Amusement Co. v. Yakima County*, 192 Wn. 179, 73 P.2d 759 (1937).

Here, this petition does not present a question that is public in nature, impact the conduct of governmental officers, or pose a constitutional or statutory challenge. It is a dispute

between private parties concerning the manner in which an attorney unlawfully obtained a copy of a will from a law firm.

The petitioner suggests that a desire to expand the scope of redress for those purportedly harmed by privileged statements constitutes an issue of substantial public importance that should be determined by this Court under RAP 13.4(b)(4). Pet. Br. at 26-29. Tellingly, the petitioner cites no authority in support of this proposition. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Inexplicably, Mr. Young cites Proverbs and an article claiming the "Christian majority" in this country is dwindling to somehow support his baseless argument that this matter presents an issue of substantial public importance that should be determined by this Court. As detailed above, this Court has spelled out criteria to be considered in determining what

constitutes an issue of substantial public interest, and this case plainly does not meet any of these criteria. Thus, the petition does not involve an issue of substantial public interest, and this Court should deny review.

VI. CONCLUSION

Mr. Young has not presented grounds under RAP 13.4(b) on which this Court should grant review. Accordingly, Althauser respectfully requests that Mr. Young's Petition for Review be denied.

Respectfully submitted this 7th day of September, 2023.

I certify that this memorandum contains 4,472 words, in compliance with RAP 18.7.

LEE SMART, P.S., INC.

By: s/ Andrew H. Gustafson
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 7, 2023, I caused service of the foregoing pleading on each and every attorney of record herein VIA E-MAIL and COA E-Filing Portal:

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DATED this 7th day of September, 2023, at Seattle, Washington.

s/ Jessica Leonard
Jessica Leonard, Legal Assistant

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