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9 ROBERT ZAHAU, deceased,  
ESTATE OF REBECCA ZAHAU,  
10 ESTATE OF ROBERT ZAHAU,  
MARY ZAHAU-LOEHNER,  
11 and PARI Z. ZAHAU

12  
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **FOR THE COUNTY OF SAN DIEGO**

15 REBECCA ZAHAU, deceased, through her )  
personal representative, MARY )  
16 ZAHAU-LOEHNER; ROBERT ZAHAU, )  
deceased, through his personal representative, )  
17 MARY ZAHAU-LOEHNER; ESTATE OF )  
REBECCA ZAHAU; ESTATE OF ROBERT )  
18 ZAHAU; both estates represented by MARY )  
ZAHAU-LOEHNER, an individual; and PARI )  
19 Z. ZAHAU, an individual, )

20 Plaintiffs, )

21 vs. )

22 ADAM SHACKNAI, an individual, and DOES )  
23 1 through 50, inclusive, )

24 Defendants. )  
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(Space below for filing stamp only)

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Superior Court of California,  
County of San Diego

**01/22/2018** at 08:00:00 AM

Clerk of the Superior Court  
By Lee McAlister, Deputy Clerk

Case No. 37-2013-00075418-CU-PO-CTL

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION OF DEFENDANT ADAM  
SHACKNAI'S MOTION FOR SUMMARY  
JUDGMENT, OR IN THE  
ALTERNATIVE, MOTION FOR  
SUMMARY ADJUDICATION**

**IMAGED FILE**

Date: February 16, 2018

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Complaint Filed: 11/13/2013

Trial Date: 2/23/18

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Setting aside the hyperbole and attempted vilification of the plaintiffs and their counsel,  
4 it appears that Defendant Adam Shacknai is arguing three points in his motion for summary  
5 judgment. On the merits he argues that because the San Diego Medical Examiner opined that  
6 Rebecca committed suicide, it must be suicide. As fully set forth below, based on testimony from  
7 a neighbor who heard screams for help from a woman coming from the direction where Rebecca  
8 Zahau was assaulted the evening of July 11, 2013, and expert testimony that Rebecca was  
9 knocked unconscious by four blows to her head, raped with a knife handle, strangled and then  
10 thrown off the balcony with a noose around her neck, Plaintiffs respectfully submit that there are  
11 questions of fact on the issue of whether she was murdered.

12 Defendant next argues that even if Rebecca was murdered, there is nothing tying him to  
13 the murder. In response, Plaintiffs submit expert testimony that the characteristics of Defendant's  
14 handwriting have similarities to the phrase written on the door, "SHE SAVED HIM CAN YOU  
15 SAVE HER," particularly the unique way that Defendant writes the letters A and M. In addition,  
16 Plaintiff's forensic kinesiology expert opines that the height at which the phrase was painted on  
17 the door is consistent with a person the height of the Defendant, i.e., between 5'10" and 6 feet,  
18 not 5'3" Rebecca Zahau. Plaintiffs' forensic knot expert opines that the bindings and knots used to  
19 restrain and hang Rebecca are nautical knots and exhibit knotting techniques and knowledge that  
20 would be expected of a tug boat pilot, such as the defendant. Lastly, Plaintiffs submit that  
21 Defendant's bizarre behavior after the murder creates further suspicion.

22 Lastly, Defendant argues that certain claims are time barred and otherwise can not be  
23 brought in the forum. For the reason set forth below, Plaintiffs asserts that both arguments lack  
24 merit.

25 **II. LEGAL STANDARD**

26 The moving party has the burden of proof and persuasion in a summary judgment  
27 motion. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4<sup>th</sup> 826, 850. When a defendant moves  
28 for summary judgment or summary adjudication, that party bears the burden of persuasion that

1 one of more elements of the cause of action in question “cannot be established,” or that there is a  
2 “complete defense thereto.” *Id.* at 850; C.C.P. Section 437c(p)(2). The party opposing the  
3 motion has to only show there is a triable issue of material fact as to the cause of action or  
4 defenses. *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4<sup>th</sup> 1076, 1092. The  
5 party opposing the summary judgment must controvert the facts offered by the moving party.  
6 C.C.P. Section 347(c)(e). The declarations of the party opposing summary judgment, however,  
7 are liberally construed to determine the existence of triable issues of fact. *Sosinsky v. Grant*  
8 (1992) 6 Cal.App.4<sup>th</sup> 1548, 1556. All doubts as to whether any material, triable issues of fact exist  
9 are to be resolved in favor of the party opposing summary judgment. *Id.*

### 10 **III. ARGUMENT**

#### 11 **A. Substantial evidence rebuts the coroner’s “suicide” opinion.**

12 Although San Diego Deputy Medical Examiner Jonathan Lucas, M.D. admits in his  
13 autopsy report that, “The circumstances of this death are unusual and were initially considered  
14 suspicious,” he opines that Rebecca committed suicide because: (1) there were no signs of  
15 struggle or other footprints on the balcony; (2) there was no sign of a struggle at the scene; (3)  
16 there was no toxicology evidence that she was sedated; and a “complete and thorough  
17 investigation” by the San Diego Sheriff’s Office “found *no clear evidence* that the death was a  
18 homicide.” (Declaration of Krista Enns, Exhibit G, Lucas Report, pg. 3).

19 Plaintiffs respectfully submit that the Dr. Lucas’s report is a classic example of  
20 “confirmation bias,” i.e., when information that supports a predetermined conclusion is given  
21 priority over information that does not support the conclusion, and facts and opinions that don’t  
22 coincide with the conclusion are filtered out. Moreover, an unbiased review of all the facts shows  
23 that this was very clearly murder, and the reason there were minimal signs of a struggle are that  
24 Rebecca was rendered unconscious by four blows to her head by a blunt object, and she was then  
25 strangled in the mansion before she was thrown off the balcony.

#### 26 **1. Blows to Rebecca’s head were sufficient to incapacitate her.**

27 In their autopsy reports, both Dr. Lucas and Dr. Wecht identified four separate traumas to  
28 right side and upper right side of her head, identified as “subgaleal hemorrhages.” (Enns Decl.

1 Ex.G, Lucas Report at pg. 15; Greer Decl. Ex. A, Wecht Depo., Ex. 6, Wecht Report at 000875).

2 Dr. Lucas admitted that these blows could have been sufficient to render Rebecca unconscious:

3 "Q. To clarify a comment you made earlier, if you have a blow to the head sufficient to  
4 cause the type of subgaleal hemorrhages that you have in this case, are you saying  
5 that if you – since you didn't find any injury to the brain itself, that those blows  
6 could not have led to Rebecca being unconscious?

7 A. I didn't say that.

8 Q. Okay, 'Cause you can – a person can be knocked unconscious without an injury – a  
9 clinically identifiable injury to the brain, correct?

10 A. Yes."

11 (Greer Decl. Ex. E, Lucas Depo. at 161:15-25) When asked about the cause of the injuries to  
12 Rebecca's head, Dr. Lucas side stepped his lack of a reasonable explanation, stating "I think that  
13 –like I said before, I think going over the balcony, her interaction with the balcony could have  
14 caused *some* of those, maybe secondarily hitting something when she was swinging. Those are  
15 possibilities for me. But, again, just because I can't provide a definitive explanation, in my  
16 opinion, doesn't take it out of the suicide category." (Greer Decl., Ex. E, Lucas Depo. at 201:25-  
17 202:6)(emphasis added).

18 Dr. Wecht, on the other hand, was more definitive, opining that: "it is my opinion that  
19 these four separate areas of subscapular subgaleal hemorrhage were caused by four separately  
20 inflicted blows to the head by what I've said before as a smooth, rounded blunt force type of  
21 instrument producing those injuries." (Greer Decl., Ex. A, Wecht Depo. at 44:6-12). Dr. Wecht  
22 further testified that: "In my opinion, based upon the fact that there are four such subscapular  
23 hemorrhages in four discrete locations, I believe, within a reasonable degree of medical  
24 probability, that the totality of the effect of four blows would have led to at least some diminution  
25 of full consciousness that would have produced some disruption of the neuronal – the reflex and  
26 so on, and I – yes, with a reasonable medical probability, I believe that. (*Id.*, Wecht Depo. at  
27 238:11-20).

## 28 **2. Rebecca was strangled before being hanged.**

Both Dr. Lucas and Dr. Wecht determined that the cricoid cartilage in Rebecca's neck,  
well below the furrows left on Rebecca's neck from the noose, had been fractured, and both  
agreed that this type of injury is consistent with manual strangulation. Dr. Lucas testified:

1 "Q. I want to read this to you and ask your opinion on it. It says, "Rebecca sustained a  
2 left cricoid" - - c-r-i-c-o-i-d - "fracture, a fracture of the left arm of the hyoid bone"  
3 - h-y-o-i-d - "and a fracture of the base of the left superior horn of the thyroid  
4 cartilage, all injuries which typically occur with strangulation and is unlikely to  
occur with a hanging." Do you agree with that?

4 A. Yes, I agree with that statement."

5 (Enns Decl., Ex. G, Lucas Depo. at 47:24-48:7).

6 Dr. Wecht, after further discussing the basis for his opinion (Greer Decl. Ex.A, Wecht  
7 Depo. at 88:5-89:23), testified:

8 "Q. And do you have an opinion as to the cause of death?

9 A. I believe that the cause of death, with reasonable medical probability, would have  
10 been strangulation based upon the fracture of the cricoid to a great extent, based  
11 upon other findings which have been discussed, and maybe some which we have  
12 not touched upon in full, I'm not sure, I can't speak for Mr. Greer, but I believe  
13 that she was more likely than not dead or in the process of dying, what we call  
perimortem period, when the body was then hurled off the balcony. So, I believe  
14 that, rather than she was fully conscious and everything was okay from a physical  
15 standpoint and that she managed to do all the binding, get herself up on the railing,  
16 and then hurled herself off in a fully conscious state and died then from  
17 asphyxiation due to hanging. That's my opinion."

14 (Greer Decl., Ex. A, Wecht Depo. at 137:12-138:7).

15 **3. Rebecca screamed for help before being incapacitated.**

16 Marsha Allison has lived at 1057 Ocean Blvd., just two houses down from the Spreckels  
17 mansion, for 17 years. (Greer Decl., Ex. F, Allison Depo. at 11:20-24). At approximately 11:30  
18 PM on the night of the murder, she was sitting in her TV room, which faced the street, with the  
19 window open, and she heard a woman scream very loudly "help me, help me." (*Id.*, at 25:17-20,  
20 26:22-27:11, 48:24-49:6). She placed her hand on the phone in case she needed to call 911, but  
21 the screams stopped. (*Id.*). She recalls the screams "coming from up high" and sounding like they  
22 came "over the Finches house towards hers." (*Id.*, at 50:25-51:1). The Finche's house is between  
23 her house and the Spreckels mansion. (*Id.* at 14:4-9). She presumed the woman was screaming  
24 from "up on the porch" of the Spreckles mansion. (*Id.* at 15-18). Plaintiffs contend that Rebecca  
25 was the woman screaming for help, just prior to being struck on the head four times and being  
26 temporarily incapacitated. This fact, which is consistent with a struggle, does not appear in Dr.  
27 Lucas's report.

28 ///

1                   **4. Rebecca was not given bad news that evening.**

2                   Dr. Lucas states in his report that: “despite no history of depression, the decedent was  
3 found the morning after she apparently learned that her boyfriend’s son – who was under her care  
4 when his fall occurred two days prior – would likely not survive.” (Enns Decl. Ex. G, Lucas  
5 Report at pg. 3). However, the tests that had been performed on six-year-old Max Shacknai prior  
6 to Rebecca’s death showed that he was not getting any worse, and in fact there was slight  
7 improvement in his condition. (Greer Decl. Ex. M, Medical Records pg. 505). Dina Shacknai,  
8 Max’s mother, was at the hospital with Max from the afternoon of July 12th through midmorning  
9 on July 13th, and testified that the doctors confirmed to her on the evening of July 12<sup>th</sup> that  
10 cautious optimism was still appropriate regarding Max, and they would not know if there was any  
11 change in his condition until tests were performed the following day. (Greer Decl. Ex. G, Dina  
12 Shacknai Depo. at 102:17-19). Thus, there is substantial evidence refuting the existence of the  
13 single fact that the Sheriff’s Department and Dr. Lucas relied upon in opining that Rebecca had a  
14 motivation for suicide, i.e., that prior to her death she was told Max was going to die.

15                   It should also be noted that the emotional bond between Jonah Shacknai and Rebecca had  
16 already deteriorated by the time she was murdered to the point where she was considering leaving  
17 him and he was already dating the woman he would eventually marry. (Greer Decl., Ex. I, Mary  
18 Zahau-Loehner Depo. at pgs. 62:24-63:24; Ex. G, Dina Shacknai Depo. at 154:20-155:22). This  
19 information, which tends to undermine the perception that Rebecca and Jonah were still madly in  
20 love and the injury to Max was therefore so painful Rebecca was compelled to end her life, was  
21 not shared with the Sheriff’s Department or the Medical Examiner.

22                   **5. Suicidal hanging is not supported by the forensic evidence.**

23                   Dr. Lucas based his conclusion of suicide in part on the lack of other footprints on the  
24 balcony. However, Forensic Kinesiologist James G. Kent, Ph.D. analyzed the decedent’s injuries  
25 and the alleged mechanism of injuries asserted by Dr. Lucas and the San Diego Sheriff’s  
26 Department and determined that had Rebecca been bound the way she was found, and her feet  
27 were placed on the balcony deck in the manner Dr. Lucas concluded, she would not have been  
28 able to propel herself over the railing as is alleged. Moreover, he found that the damage patterns

1 on her body are inconsistent with the mechanics of the decedent voluntarily going forward over  
2 the rail. He further opined that it is more likely than not that the decedent could not have had her  
3 hands bound behind her and voluntarily been able to flex forward over the rail due to the  
4 relationship between the height of the rail and her approximate center of gravity with the binding  
5 of her hands in that position, as this would've placed her center of gravity on the balcony side and  
6 below the level of the rail. Thus he opined it is more likely than not that an outside force, most  
7 probably another person, applied the extra force necessary to propel her over the railing.

8 (Declaration of James G. Kent, Ph.D, pg. 4, Section A).

9 Dr. Kent also opined that had Rebecca fallen uninhibited for 9 feet with a rope around  
10 her neck, as stated by Dr. Lucas, her injuries would've been much greater than those found on her  
11 body, including the probability that she would have been at least partially decapitated. (Id., pg. 5,  
12 Section B).

13 Dr. Kent also analyzed whether the force resulting from a nine-foot fall would pull the  
14 bed that the noose was tied to a mere seven inches as shown in crime scene photograph. He  
15 determined that if Rebecca had fallen unimpeded for nine feet, the bed would have moved at least  
16 several feet, and because the bed only moved approximately seven inches, it is more likely than  
17 not that some outside force slowed her fall, such as an individual restraining the rope and/or the  
18 bed as she fell. (Id. pg. 6, Section C).

19 **6. The lack of DNA and fingerprints is consistent with the**  
20 **crime scene being wiped down.**

21 Dr. Lucas and the Sheriff based their suicide conclusion on the fact that only Rebecca's  
22 DNA and fingerprints were found at the scene. This is true. However, what they didn't give  
23 reasonable consideration to was the fact that there was no DNA or finger prints found in a  
24 substantial number of the places, most of which you would expect to find such evidence, like the  
25 door knob to the bedroom and to the balcony, the paint brush that was used to paint the phrase on  
26 the door and the large tube of black paint that was clearly handled by Rebecca prior to that  
27 evening and by the murderer that night. DNA expert Susan Ryan and Forensic Specialist Lisa  
28 DiMeo found this to be surprising, and consistent with the crime scene being wiped down. (Greer

1 Decl., Ex. O, DiMeo Depo. at 75:1-76:14; 212:3-214:18; Greer Decl., Ex. C, Ryan Depo., at  
2 78:11-79:23, 196:17-197:3; 237:8-21; 254:19-255:1; 259:13-260:2) Ms. Ryan prepared an  
3 instructive chart that identifies the number of items that were sampled that were capable of being  
4 wiped down, and determined that more than half of them had no DNA detected, including the  
5 knife, the paint brush, the door knobs into and out of the bedroom and black paint tube. (Greer  
6 Decl., Ex. C, Ryan Depo., 163:8-24; 250:6-252:8 79:23).

7 **7. The murderer raped Rebecca with a knife handle**

8 One of the most morbid and obscene pieces of evidence in this case, as identified by  
9 Forensic Specialist Lisa A. DiMeo, is that a steak knife at the scene was covered with blood on all  
10 four sides of the handle, a few inches up, and the only source of blood sufficient to coat all four  
11 sides of the knife handle was the decedent's vagina. (Greer Decl., Ex. O, DiMeo Depo. at 169:25-  
12 170:10; see photos at Exhibit 11). Ms. Dimeo further opined that the stripe of blood on Rebecca's  
13 left inner thigh was a transfer stain from the knife handle being rubbed against her leg (Id., pg.  
14 188-190:9; see phot at Ex. 43). Plaintiffs respectfully submit that this is not the type of act that a  
15 woman who was allegedly committing an "honor suicide" would do.

16 **B. Substantial evidence establishes Adam Shacknai as the murderer.**

17 **1. The painted phrase on the door was written by someone with intimate**  
18 **knowledge of Max's condition.**

19 The phrase "SHE SAVED HIM CAN YOU SAVE HER" was painted on the door to the  
20 bedroom where Rebecca was bound, gagged and hanged. It is a reasonable inference to presume  
21 that the "she" is Rebecca, since "she" is clearly the "her" who can be saved. It is also reasonable  
22 to assume that the "she saved him" portion of the message refers to Rebecca saving Max, since, as  
23 discussed above, at the time of Rebecca's death, Max's condition remained stable, and both  
24 Max's mother and father, Dina Shacknai and Jonah Shacknai, were thankful that Rebecca was  
25 able to give Max CPR so quickly and save his life. (Greer Decl., Ex. G, Dina Shacknai Depo. at  
26 103:6-14).

27 The other portion of the message "can you save her," may be directed to Adam's brother  
28 Jonah or to anyone who could intervene. There are only a handful of people who were following

1 Max's condition closely enough on the evening of the murder to know his current prognosis. And  
2 only one of them was in proximity to Rebecca the evening of the murder, i.e., Adam Shacknai.

3 **2. Writing on the door has similarities to Adam Shacknai's handwriting**

4 Forensic document examiner Michael Wakshull, analyzed the handwritten statement on  
5 the bedroom door "SHE SAVED HIM CAN YOU SAVER HER," and compared it with samples  
6 of handwriting from Rebecca and from Adam Shacknai. His very detailed report, which includes  
7 handwriting samples he analyzed. (Greer Decl., Exhibit D, Wackshul Depo, Ex. 8, report re:  
8 "Examination of handwriting on door"). He opines that "there are indications Adam wrote the  
9 words on the door." (Id., pg. 6 of 65). "Indications" is defined as "evidence to suggest." (Id., at pg.  
10 7 of 45.) Some of the key factors are that the Defendant's handwriting and the handwriting on the  
11 door tend to slant left, and Rebecca's handwriting slants to the right, and there are similarities  
12 between the Defendant's letter A and very unique letter M and the same letters on the door. (Id.)

13 **3. Height of the writing matches Adam Shacknai, not Rebecca.**

14 Forensic Kinesiologist James G. Kent, Ph.D. analyzed physiological and biomechanical  
15 components which tend to determine the height at which a person comfortably paints on a vertical  
16 surface. He determined that the phrase "SHE SAVED HIM CAN YOU SAVE HER" that is  
17 painted on the door of the bedroom where Rebecca was strangled, is consistent with the height of  
18 an individual between 5 foot 10 inches. Rebecca is approximately 5 foot three inches. (Kent Decl.  
19 Pg. 6, Section D). Whereas Adam is 5'11". (Greer Decl., Ex. N).

20 **4. The knots and bindings are tied to Adam Shacknai.**

21 Plaintiffs retained a forensic knotting analyst, Lindsey Philpott, to analyze the knots that  
22 were used to bind and hang Rebecca. (Greer Decl., Ex. B, Lindsey Philpott depo., at 40-41, and  
23 Ex. 3, Philpott C.V. He opined that it would be virtually impossible for any individual to bind  
24 there own hands behind their back using the type of knots found on the decedent. (Id., Ex. B,  
25 Philpott Depo. at 76:22-77:7 and 204:12-205:13). He also opined that the type of knots that were  
26 involved had "nautical qualities," including the figure-eight construction around the wrists and  
27 ankles, the use of a clove hitch as the final securing element around the neck and wrists." (Id.,  
28 Philpott Depo. at 211:11-22, 249:5-249:20, 267:14-22; 272:18-21). He further opined that: "the

1 knot attaching around the base of the bedpost is a -- an eye splice that is formed in the end of a  
2 piece of line. Eye splices are regularly and consistently used nautical applications.” (*Id.*, Philpott  
3 Depo. at 241:15-22, 244:23-245:17). The knots also showed a level of sophistication and  
4 understanding in the use of rope and knots. (Philpott Depo. 242:1-242:17; 257:15-25).

5 These findings and opinions are significant because defendant Adam Shacknai is a  
6 tugboat captain, who uses nautical knots as part of his profession (Greer Decl., Ex. H, Shacknai  
7 Depo. at 8:3-5, 8:23-9:21; Greer Decl. Ex. B, Philpott Depo., at 214:15-15).

8 **5. Adam Shacknai didn't try to save Rebecca**

9 As noted on the recording of Adam Shacknai's call to 911, when he saw Rebecca  
10 hanging from the balcony that morning, he did not at first attempt to see if she was still alive or  
11 help her. Rather he called 911, and when asked if she was alive, he claimed he did not know.  
12 (Greer Decl., Ex.I, 911 Transcript at 1:28-30). In response to the question, he the cut her down.  
13 (*Id.*, 911 Transcript at 4:138). Plaintiffs content that the reason he didn't attempt to help her is that  
14 he already knew she was dead.

15 **6. Adam Shacknai's comments and mannerisms are suspicious.**

16 It is well settled that a witness's demeanor is always relevant to his or her credibility.  
17 (Evid.Code, § 780, subd. (a); *People v. Lopez* (2013) 56 Cal.4th 1028, 1064; *People v. Scott*  
18 (2011) 52 Cal.4th 452, 493; and *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358.) In other  
19 words “[T]he weight and credibility of testimony is affected not only by other evidence which is  
20 directly contradictory, but also by pertinent circumstances and the demeanor of witnesses.  
21 (*Kilstrom v. Bronnenberg* (1952) 110 Cal.App.2d 62, 65.) Thus inferences may be drawn not only  
22 from the evidence but from the demeanor of the witness and his manner of testifying.” (*Berger v.*  
23 *Steiner* (1945) 72 Cal.App.2d 208, 214–215.)

24 Plaintiffs have lodged with the Court the complete video recording of Adam Shacknai's  
25 polygraph interview (Exhibit P), a transcript of the interview (Exhibit R) and the audio recording  
26 of Adam Shacknai's 911 call the morning of July 11, 2013. These records provide additional  
27 evidence of Mr. Shacknai's demeanor and mannerisms that undermine his feigned concern over  
28

1 the horrible death suffered by his Rebecca Zahau which can only be appreciated by reviewing the  
2 recordings.

3 By way of example, when asked whether he is going to lie or not to any of the questions  
4 being asked, he responds quote but it still obviously fallible because everyone's heard about it, but  
5 okay." (Greer Decl. Ex. I, Polygraph Interview at 26:8-11. He asks the interviewer: "I mean, have  
6 you ever had someone like cry during these and tell the truth?" (Id. at 56:45-5). He later proceeds  
7 to tell the interviewer about how he pleased himself that morning. (Id. at 80:10-81:9). When  
8 asked "what do you think should happen to someone who would do something like this," he  
9 responds "I'm gonna tell you now I'd be scared shitless first of all for my God damn self." (Id. at  
10 113:3-7). When asked again what he thinks should happen to someone who murdered Rebecca, he  
11 responded: "I haven't pictured, you know, till, like I said, till I started talking to the cops." (Id.  
12 114:1-11). And very peculiarly, when asked if Rebecca ever flirted with him, Mr. Shacknai said:  
13 "No, no – no. Like no. Other than, you know, you know, she's a decent looking girl, whatever.  
14 I'm probably not the worst looking guy. Just but, no, not flirting." (Id. at 151:3-8).

15 Plaintiffs submit that the evasiveness and equivocation of his responses creates a strong  
16 suspicion that he is not telling the truth.

17 **7. Plaintiffs can establish a claim for battery.**

18 As discussed above, a neighbor heard a woman screaming for help, coming from the  
19 direction of where Rebecca was attacked. Clearly being attacked and being hit on the head to the  
20 point of losing consciousness is battery.

21 **8. Plaintiffs can establish a conversion claim**

22 Rebecca's sister, Mary Zahau-Loehner testified that the clothes that Rebecca was  
23 wearing the day she was killed have never been found. (Greer Decl., Ex. J., Mary Zahau-Loehner  
24 Depo., at 124:1-25. This supports a claim for conversion.

25 **B. Defendant's standing argument is misplaced and untimely**

26 It is well settled that: "Since the estate is not a legal entity [*Dorland v. Dorland* (1960,  
27 2nd Dist.) 178 Cal. App. 2d 664], it can neither maintain nor defend an action [*Estate of Bright v.*  
28 *Western Air Lines, Inc.* (1951) 104 Cal. App. 2d 827]. Rather, it is the executor or administrator,

1 *in his or her representative capacity*, who must file suit on estate matters. [*Golden Gate*  
2 *Undertaking Co. v. Taylor* (1914) 168 Cal. 94]” Cal. Civ. Prac. Probate and Trust Proceedings  
3 (Judge Arnold H. Gold, Monica Dell’osso, Mary F. Gillick, Jeremiah Moffit) Nov. 2016 Update §  
4 14:4.

5 Defendants admit, and submit probate papers to confirm, that Mary Zahau-Loehner  
6 currently has standing to bring the present action. Defendant also admits that it is appropriate to  
7 substitute in proper representatives. However, Defendant argues that Mary didn’t have the  
8 authority to initiate the action. What Defendant’s overlook, is that the original law suit brought in  
9 this matter, which this Court previously ruled that this case relates back to, was filed with co-  
10 representatives, Pari Zahau, as the successor in interest to both Rebecca’s and Robert’s estates,  
11 and Mary acting as the executor of both estates. (See Enns Decl., Exhibit J, 7/12/13 Federal  
12 Complaint, at paragraph 4). This was done because Pari had immediate statutory authority and  
13 Mary was working toward becoming the appointed executor. It should also be noted that because  
14 Mary Zahau-Loehner at all times relevant had the power of attorney for Pari Zahau, the successor  
15 in interest to both estates, Mary was an appropriate representative even prior to formal  
16 confirmation by the court. (See Exhibit A, General Power of Attorney).

17 Defendant claims that Plaintiff lacks capacity to sue because of her appointment as  
18 personal representative in sister state proceedings. Lack of capacity is not jurisdictional and may  
19 be waived if not raised properly. *Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal.App.3d 1033,  
20 1041 (“If want of capacity appears by the complaint, the defect should be raised by demurrer,  
21 otherwise by answer. If not raised by demurrer, answer or in some other suitable manner, the  
22 defect is waived”); *Klopstock v Superior Court* (1941) 17 Cal.2d 13, 17 (the defect of lack of  
23 capacity of representative to bring an action is waived if not promptly brought by special  
24 demurrer). Given the lengthy procedural history of this case, having not properly and promptly  
25 raised this issue years ago, Defendant has waived the lack of capacity defense.

26  
27 However, even if the lack of capacity has not been waived, a foreign representative may  
28 bring an action as a personal representative in a wrongful death action. *Wallan v. Rankin* (9th  
Cir.1949) 173 F.2d 488, 493 [foreign representative may bring wrongful death action in Cal.

1 federal court under a sister state statute as intermediary for decedent's widow and children); *Ruiz v*  
2 *Santa Barbara Gas & Elec. Co.* (1912) 164 Cal. 188, 191–92 (It is settled by the decisions that an  
3 action of the character authorized by section 377 [wrongful death] of the Code of Civil Procedure  
4 is one solely for the benefit of the heirs, and that an administrator has the right to bring the action  
5 only because the statute authorizes him to do so, and that he is simply made a statutory trustee to  
6 recover damages for the benefit of the heirs.”)

7 As noted in the case Defendant is relying upon for the argument that Plaintiffs can not  
8 bring an action in this forum, the exception to the general rule applies where, as here, the suit is in  
9 the interest of the estate, and it will not prejudice local creditors. *Smith v Cimmel* (2011) 199  
10 Cal.App.4th 1381, 1391. The Defendant is domiciled in Tennessee, and there are no California  
11 assets being threatened. This case also meets the requirement in *Smith* that no other forum is  
12 available. *Id.* At the time the case was filed there was no other forum available, since the  
13 Defendants were citizens of Arizona, California and Tennessee. Thus, Plaintiffs were forced to  
14 file the action where the wrongful act occurred.

15 Finally, even if this Court should determine that a Petition for Ancillary Administration  
16 is required, the representative must be given leave to amend to permit her to bring any required  
17 Petition for Ancillary Administration in this jurisdiction. *Smith v. Cimmel* (2011) 199  
18 Cal.App.4th 1381, 1394 (“ Plaintiff should be given an opportunity to cure the deficiency by  
19 petitioning for ancillary administration and then amending the complaint to allege capacity to sue  
20 as the ancillary representative.”)

#### 21 **IV. CONCLUSION**

22 For the reasons set forth above, Plaintiffs respectfully submit that Defendants motion for  
23 summary judgment or summary adjudication of issues should be denied.

24 DATED: January 19, 2018

**GREER & ASSOCIATES, A.P.C.**

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28 C. Keith Greer  
Attorney for Plaintiffs

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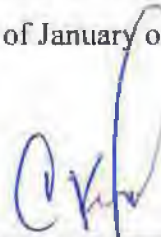
# EXHIBIT A

## DECLARATION OF C. KEITH GREER

I, C. Keith Greer, hereby state and declare that I am an attorney at law duly licensed to practice before all courts of the State of California and I am the trial attorney and lead counsel, at the law offices of Greer & Associates, A.P.C., attorneys of record for Plaintiffs in this action. If called as a witness, I could and would competently testify as to the facts set forth herein as I know each to be true based upon my own personal knowledge.

Attached hereto as Exhibit "A" is a true and correct copy of the GENERAL DURABLE POWER OF ATTORNEY granted to Mary Zauau-Loehner and Doug P. Loehner, by Pari J. Zahau on November 1, 2012.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19<sup>th</sup> day of January of 2018 in the City San Diego, State of California.



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C. Keith Greer, Esq.

## GENERAL DURABLE POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS: That I, Pari Z. Zahau, (SSN: 729-10-2201, DOB 08-18-59 ) of 2514 N. 22<sup>nd</sup> Street, St. Joseph, Buchanan County, Missouri, have made, constituted and appointed, and by these presents do make, constitute and appoint, Doug P. Loehner and Mary S. Zahau-Loehner, of 14157 Millstone Blvd., St. Joseph, Buchanan County, Missouri, my true and lawful attorneys-in-fact, for me and in my name, place and stead to EXERCISE GENERAL POWERS IN A FIDUCIARY CAPACITY ON MY BEHALF WITH RESPECT TO ALL LAWFUL SUBJECTS AND PURPOSES.

GENERAL POWERS GRANTED: This Durable Power of Attorney is hereby constituted as a Durable Power of Attorney with GENERAL POWERS in reliance upon and in accordance with the provisions of the Durable Power of Attorney Law of Missouri, enacted in 1989, and particularly in accordance with Section 404.710. A true, correct and complete copy of Section 404.710 is hereto attached, made a part hereof and incorporated herein by reference as fully as though set out at this point verbatim. THE AUTHORITY OF MY ATTORNEYS-IN-FACT ACTING UNDER THIS POWER OF ATTORNEY SHALL EXTEND TO AND INCLUDE EACH AND EVERY ACTION OR POWER THAT AN ADULT (WHO IS NONDISABLED AND NONINCAPACITATED) MAY CARRY OUT THROUGH AN AGENT SPECIFICALLY AUTHORIZED IN THE PREMISES, WITH RESPECT TO ANY AND ALL MATTERS WHATSOEVER (except as provided in subsections 6 and 7 of Section 404.710).

GENERAL POWERS STATED: It is my specific intention and direction that this Durable Power of Attorney grant to my attorneys-in-fact general powers for all subjects and purposes. Nevertheless, in order that there be no doubt as to certain of the powers granted to my attorneys-in-fact, without limiting the generality of the powers granted to my attorneys-in-fact, and without detracting from the fact that this General Power of Attorney grants to my attorneys-in-fact the power to exercise general powers on my behalf with respect to all lawful subjects and purposes (notwithstanding the fact that this Power of Attorney mentions certain specific subjects or purposes), I hereby state that the general powers granted by this General Durable Power of Attorney specifically include, but are not limited to, each and all of the powers and authorization hereinafter set out:

TO HANDLE FINANCIAL MATTERS: This general durable power of attorney specifically authorizes my attorneys-in-fact to act for me in every way with respect to my personal financial, business, property and tax-related affairs and the authority of my attorneys-in-fact acting under this power of attorney shall extend to and include each and every action or power (other than to act with respect to matters excluded by §§ 404.710.6 and .7, RSMO) which an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever. Without in any way limiting the generality of the foregoing authority, my attorneys-in-fact acting under this power of attorney are specifically authorized to write checks upon or otherwise withdraw funds from any account or certificate in any financial institution on which I am named as the owner or signatory or one of the owners or signatories, and notwithstanding the fact that such withdrawal may in effect change survivorship interests in any property in which I may have an interest, my attorneys-in-fact are authorized to make such withdrawal, even to the extent of withdrawing the

entire balance.

**SPECIFIC POWERS GRANTED:** By provisions of this Durable General Power of Attorney, of my attorneys-in-fact, pursuant to subsection 6 of Section 404.710, are specifically authorized, in addition to all other actions hereby authorized, to carry out the following actions for me and in my behalf:

- (1) To execute, amend or revoke any trust agreement;
- (2) To fund with my assets any trust regardless of whether created by me;
- (3) While it is my express wish and hope that no court will ever appoint a guardian or conservator for me, if, nevertheless, a court of competent jurisdiction determines that a guardian or conservator (full or limited) should be appointed for me, my attorneys-in-fact are authorized and requested to nominate a guardian or conservator for me, and are authorized to nominate themselves as such guardian and/or conservator;
- (4) To give consent, after my death to an autopsy or postmortem examination as specifically authorized in Section 194.115.1(2), RSMO Supp. 1993,

**POWER WITH RESPECT TO SAFE DEPOSIT BOXES:** This General Durable Power of Attorney specifically constitutes authorization to my said attorneys-in-fact to enter any safe deposit box rented in my name (whether in my sole name or whether jointly with one or more other persons) and/or to terminate the rental of any safe deposit box rented in my name (whether in my sole name or whether jointly with one or more other persons). This authorization shall be in effect regardless of whether I may have signed any type of contract or other document provided to me by any institution operating any such safe deposit vaults which purports to restrict my right to have access to, or control over, any such safe deposit box through an attorneys-in-fact. This paragraph specifically relies upon the provisions of § 404.710.9 of the Durable Power of Attorney Act of Missouri (1989) and it is my intention and direction that my said attorneys-in-fact shall be accorded the same rights and privileges with respect to my business interests and specifically with respect to any such safe deposit box as if I, myself, were personally present (and not disabled or incapacitated) and acting or seeking to act.

**DISCLAIMER OF POWERS:** In the event that any person named herein (or designated here under) as attorney-in-fact or as contingent or successor attorney-in-fact shall conclude (after consulting legal counsel, if so desired) that the existence of any power herein granted will or may cause adverse legal or tax consequences, whether to me, or to any member of any family, or to any person designated as attorney-in-fact (including any successor attorney-in-fact), then such person shall have power, by written instrument, acknowledged before an appropriate officer, to disclaim any part or all of such power, or to impose limitations on its exercise. Any such instrument shall be effective in accordance with its terms as soon as an executed counterpart thereof is filed with the law firm hereinafter mentioned, and in any other office where an executed counterpart or copy of this power of attorney may have been filed.

**ALL ACTS RATIFIED:** I hereby give and grant to my said attorneys-in-fact full power and authority to do and perform all and every act and thing whatsoever necessary to be done in the premises, in order fully to carry out and effectuate the authority herein granted, as fully to all intents and purposes as I might or could do if personally present and personally acting, and I hereby ratify and confirm all that my said attorneys-in-fact may do pursuant to this power.

**APPOINTMENT OF SUBSTITUTE ATTORNEY-IN-FACT:** I hereby further authorize and empower my said attorneys-in-fact to substitute and appoint in the place and stead of my said attorney-in-fact one or more attorney-in-fact or attorneys-in-fact to exercise for me as my attorney-in-fact or attorneys-in-fact any or all of the powers and authorities hereby conferred (except as otherwise specifically herein provided); and to revoke such appointment or appointments from time to time, and to substitute or appoint any other or others in the place of such attorney-in-fact or attorneys-in-fact as my said attorney-in-fact herein named shall from time to time think fit.

**DEFINITIONS:** All references in this document to "my attorneys in fact" or "my said attorney-in-fact" or "my true and lawful attorney-in-fact," or similar designations shall refer not only to each and every person designated by name in this instrument, but also to each and every substitute or successor attorney-in-fact appointed under the terms of this instrument as herein provided.

**COMPENSATION:** Any/successor/attorney-in-fact duly acting hereunder who at the time of so acting is an attorney-at-law, certified public accountant, or professional financial advisor then engaged in the practice of such profession is specifically authorized to pay reasonable compensation to himself/herself and/or to persons assisting said attorney-in-fact, including reimbursement for expenses paid or incurred by my said attorneys-in-fact. Such payments shall be made out of any of my funds which are under the control of my said attorneys-in-fact.

**COMPENSATION DENIED:** The named attorneys-in-fact shall not be entitled to any compensation for services or expenses for acting under the authority of this Power of Attorney.

**POWER OF ATTORNEY TO BE DURABLE: THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEYS-IN-FACT SHALL NOT TERMINATE IF I BECOME DISABLED OR INCAPACITATED.** I hereby direct that, to the extent authorized or permitted by applicable law, this Power of Attorney shall not be affected by my subsequent disability or incapacity, or by the lapse of time, or in the event I disappear or it may be uncertain as to whether I am alive or dead. It is my intent that the authority conferred hereby shall be exercisable notwithstanding my subsequent disability or incapacity, or by the lapse of time and that this Power of Attorney shall be what is sometimes referred to as a "Durable" Power of Attorney, and shall be a General Durable Power of Attorney, as that term is defined in the Durable Power of Attorney of Missouri. I hereby direct that the laws of the State of Missouri, specifically including the Durable Power of Attorney Law of Missouri, shall apply to this General Durable Power of Attorney and that the interpretation, validity, durability and/or operation of same shall be governed by said law, regardless of any subsequent change in my legal residence.

**AUTHORITY GRANTED TO MY ATTORNEYS AT LAW:** An original counterpart of this instrument may be lodged with Mark H. Wisschr, P.C., Attorneys at Law, St. Joseph, Missouri (the term "Law Firm" as used in this Power of Attorney shall include the said Law Firm just mentioned and/or its successors); but if at any time said Law Firm or its successors) are then out of existence, said term shall refer to the senior attorney last associated with said Law Firm or its successors who is still then engaged in the active practice of law in the State of Missouri), and this instrument shall remain in full force and effect until I notify said Law Firm in writing of my revocation thereof. All persons dealing with my said attorneys-in-fact shall be protected in relying upon a copy of this instrument certified by said Law Firm to be a true copy hereof and shall be protected in relying upon the written certificate of said Law Firm that said Law Firm has not at such time received a written

revocation of this instrument from me, and/or as to the identity and authority of any substitute or successor appointed pursuant to the terms hereof, and/or as to whether any of the persons authorized to act hereunder is unavailable so to act, so as to authorize some other person to act hereunder, and/or as to whether any conditions herein specified are then prevailing so as to authorize or permit any attorneys-in-fact to act hereunder, and I hereby declare that as against me and all persons claiming under me everything which my attorneys-in-fact shall do or cause to be done pursuant hereto shall be valid and effectual in favor of any person claiming the benefit thereof who at the time of the doing thereof shall have relied upon any such certification made by said Law Firm. Said Law Firm is authorized to provide such certification upon my request alone or upon the request of my attorneys-in-fact acting alone. In the event that applicable law requires that a Power of Attorney be filed in the office of the recorder of deeds or any other public or governmental office, then I direct that an executed counterpart of this Power of Attorney shall be so filed for record. I authorize the attorneys-in-fact (or either or any of them) herein designated to make such filing. I also authorize said Law Firm to make such filing; and I further direct that if such filing has not been made by any attorneys-in-fact hereunder within the time required by law, then said Law Firm shall promptly make such filing. In the event that said Law Firm shall hereafter receive from me a written revocation or modification of this instrument, then I hereby direct said Law Firm to file an executed counterpart of such written instrument in the same office in which shall have been filed this original instrument.

**ATTORNEYS EXONERATED:** I hereby agree, for myself, my estate, my heirs, successors, executors, administrators and/or assigns, to indemnify said Law Firm, and exonerate the same from any or all liability, with respect to any claim that may be made or any action or cause of action that may be brought against such Law Firm, whether directly or indirectly, arising out of any action or withholding of action which said Law Firm may take or refrain from taking under or with respect to the authorizations and/or directions set out in this paragraph with respect to said Law Firm; and if any such claim is made or action or cause of action is filed, I agree to reimburse said Law Firm and agree that it shall be reimbursed out of my assets, or, after my death, out of my estate, for any and all costs or expenses which it shall bear or incur in resisting or defending against any such claim or cause of action and, further, for the amount of any judgment rendered against such Law Firm or the amount of any settlement that it may, in its sole discretion, pay in compromise settlement of any such claim or cause of action. The term "Law Firm," as used herein, shall include any and all persons associated with said Law Firm, against whom any claim may be made on account of actions or inactions on behalf of, or as an agent of, said Law Firm.

**ACCOUNTINGS WAIVED:** In the event applicable law requires my attorneys-in-fact to make and file or deliver an accounting of any or all actions or transactions carried out under the authority of this instrument (whether such accounting is to be filed in court or delivered to some designated party), I hereby waive all such requirements and excuse my said attorney-in-fact from so making, filing or delivering same unless such action is requested in a writing delivered to said attorneys-in-fact or to the court or other party which would otherwise be entitled to receive same, if such written request is delivered by or on behalf of one or more of the following:

(a) If I am alive at such time, by a person who would be an heir-at-law of mine if I were then deceased; or

(b) If I am then deceased and no document purporting to be my last Will has then been filed for probate, by any of my heirs-at-law, except that if a document purporting to be my last Will is filed and admitted to probate within thirty days after such request is delivered, said request shall thereupon be null and void unless it qualifies under Item (c) hereof; or

(c) If I am then deceased and a document has then been admitted to probate as my last Will, by any person entitled to a share of my residuary estate or by any person who at any time during the probate administration of my estate it appears will not receive full distribution of any pre-residuary devise or bequest under my last Will by reason of the fact that my estate will be insufficient to satisfy all pre-residuary devises and bequests. Any person designated to receive a devise or bequest of a specific piece of real or personal property shall not be entitled to make such request unless such request includes a verified statement that it appears that the estate will be insufficient to satisfy such bequest in full or that some part or all of such property is believed to have been disposed of by my attorneys-in-fact.

ATTORNEYS-IN-FACT PROTECTED: I hereby agree, for myself, my estate, my heirs, successors, executors, administrators and/or assigns, to indemnify each and every person who may at any time act as attorneys-in-fact under this power of attorney, and exonerate each and every such person from any or all liability with respect to any claim that may be made or any action or cause of action that may be brought against any such person, whether directly or indirectly, arising out of any action or withholding of action which any such person may take or refrain from taking under or with respect to the authorizations and/or directions set out in this power of attorney, so long as any such person shall have acted in good faith; and if any such claim is made or action or cause of action is filed, and if it shall be determined that any such person was, in fact, acting in good faith with respect to the matters set out in said claim or cause of action, I agree to reimburse said person and agree that such person shall be reimbursed out of my assets, or, after my death, out of my estate, for any and all costs or expenses which any such person shall bear or incur in resisting or defending against or settling any such claim or cause of action, and, further, for the amount of any such judgment rendered against any such person or the amount of any settlement that any such person may, in the sole discretion of such person, pay in compromise settlement of any such claim or cause of action. The foregoing shall include any and all persons associated with any such attorneys-in-fact against whom any claim may be made on account of actions or inactions on behalf of, or as an agent of, any such person.

PRIOR DESIGNATIONS REVOKED: I hereby revoke all prior Powers of Attorney which I may have executed, except that if any prior Durable Power of Attorney covers health care decisions, the authority vested in any attorneys-in-fact under the provisions of that prior document to make health care decisions is not revoked by this instrument.

EXECUTION: This instrument may be executed in any number of counterparts, and all of said counterparts shall constitute but one and the same instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1<sup>st</sup> day of <sup>November</sup> ~~October~~, 2012.

Rick Zahra

The foregoing document General Durable Power of Attorney was signed in our presence on the day last above written and each of the undersigned are signing as witnesses at the request of Pari Z. Zahau.

*[Handwritten Signature]*  
Witness  
*[Handwritten Signature]*  
Witness

STATE OF MISSOURI )  
 ) ss.  
COUNTY OF Buchanan )

On this 1st day of ~~October~~ <sup>November</sup>, 2012, before me the undersigned, a Notary Public, in and for the County and State aforesaid, personally appeared Pari Z. Zahau, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the day and year last above written.

*[Handwritten Signature]*  
Notary Public in and for said  
County and State

My commission expires:



SUSAN M. SEALS  
My Commission Expires  
November 11, 2015  
Buchanan County  
Commission #11445141