No. S222329

IN THE SUPREME COURT OF CALIFORNIA

926 NORTH ARDMORE AVENUE, LLC,

Plaintiff and Appellant

v.

COUNTY OF LOS ANGELES,

Defendant and Respondent.

After A Decision By The Court Of Appeal,
Second Appellate District, Division Seven, Case No. B248356
Los Angeles County Superior Court, No. BC 476670
The Honorable Rita Miller, Judge Presiding

REPLY BRIEF ON THE MERITS

LEMOINE SKINNER III (SBN 55363)
LSkinner@fisherbroyles.com
FISHERBROYLES, LLP
1334 8th Avenue
San Francisco, CA 94122
Telephone: (415) 566-1365

*DANIEL M. KOLKEY (SBN 79102)
DKolkey@gibsondunn.com
JULIAN W. POON (SBN 219843)
JPoon@gibsondunn.com
LAUREN M. BLAS (SBN 296823)
LBlas@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-2933
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

Attorneys for Plaintiff and Appellant 926 North Ardmore Avenue, LLC

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LBlas@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-2933
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

Attorneys for Plaintiff and Appellant 926 North Ardmore Avenue, LLC

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Legis. Counsel's Dig., Sen. Bill No. 78 (1967-1968 Reg. Sess.) Stats. 1968 15
Scalia and Garner, Reading Law: The Interpretation of Legal Texts (2012) 3, 29
Westfall & Mair, Estate Planning Law and Taxation ¶17.02[1] (4th ed. 2001 & Supp. 2015-1) 5

I. INTRODUCTION

The County's response to the argument presented by plaintiff 926 North Ardmore Avenue, LLC ("Ardmore") boils down to its claim that a conveyance of "realty sold" under the Documentary Transfer Tax Act ("DTTA") should be interpreted the same as "change in ownership" under Proposition 13's statutory scheme. (County's Answer Brief on the Merits ("ABM") at p. 24.)

But the County never explains how the concepts underlying Proposition 13 and its implementing statutes can be properly imported into the interpretation of the DTTA when Proposition 13's statutory scheme uses different language ("change in ownership") for a different purpose (determining when to reappraise the value of property) in a different division of the code and was enacted over a decade later. In short, the different language and concepts embodied in Proposition 13's constitutional *restraint* on taxes cannot be used to *expand* the reach of a different tax enacted over a decade earlier under the DTTA.

Instead, as shown in Ardmore's Opening Brief on the Merits ("OBM"), the plain language and legislative history of section 11911[1] of the DTTA, and its federal antecedents, demonstrate that a documentary transfer tax should

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[1] All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

only be imposed on a writing "by which any lands, tenements, or other realty sold" is "conveyed" to "the purchaser." (§ 11911, subd. (a).) As a matter of its common meaning and common sense, "realty sold" under the DTTA must be, and has always been, a conveyance of real property.

The County's contrary argument that the Legislature intended section 11911 to extend to any transaction "that could indirectly result in the transfer of the *beneficial* ownership of property, such as . . . the transfer of the membership interests in a partnership" (ABM17, italics added) is based on three leaps of logic:

First, the County erroneously borrows the different concepts in Proposition 13 to ascertain the legislative intent underlying the earlier-enacted DTTA, as noted above.

Second, the County claims that because cases interpreting the former Federal Stamp Act (upon which the DTTA was patterned) applied the act to long-term leases and carved-out mineral-production payments, the DTTA extends beyond conveyances of realty. (County's Answer Brief ("ABM"), pp. 14-16, 20-21.) But those cases applied the former federal act to long-term leases and carved-out mineral-production payments only because they closely approximated a fee interest in real estate. (See Section IV(A)(2), *post.*)

Third, the County claims that section 11925 shows that "the Legislature intended partnerships, LLCs, and other entities" to bear a documentary transfer tax upon the transfer of a majority interest in those entities if they

control realty. (ABM16.) But section 11925 is *inconsistent* with the County's position: That statute *prohibits* the levy of the tax "by reason of any transfer of an interest in the partnership or other entity" that holds property – unless the partnership or other entity has been terminated for federal income tax purposes, in which case the partnership or other entity "shall be treated as having executed an instrument whereby there was conveyed . . . all realty held by the partnership or other entity . . . ." (§ 11925, subds. (a), (b).) Thus, section 11925 not only prohibits, as a general matter, the levy of the tax where an interest in a partnership is transferred, but the single exception to that prohibition is expressly characterized as the equivalent of an instrument conveying the "realty held by [the] partnership." This strongly evidences the DTTA's intent to reach only instruments that convey realty.

Finally, the County urges the Court to "look to the substance of a transaction to determine its DTT consequences." (ABM16.) But this is no more than an invitation to ignore the plain language and history of the DTTA. The DTTA's text limits its application to documents conveying realty, and "the limitations of text . . . are as much a part of its 'purpose' as its affirmative dispositions." (Scalia and Garner, Reading Law: The Interpretation of Legal Texts (2012), p. 57.)

Significantly, the County's brief never addresses Ardmore's invocation of the settled rule that any ambiguity in tax statutes should be resolved in favor of the taxpayer. (OBM5, citing *Agnew v. State Bd. of Equalization* (1999) 21

Cal.4th 310, 326, superseded by statute on other grounds.) This canon alone is dispositive that section 11911's plain language and its consistent past practice must govern, not Proposition 13 concepts that did not exist when the Legislature enacted the DTTA.

For the reasons set forth below, the County's arguments for applying section 11911 to changes in ownership of any *legal entities* that happen to hold realty—even several layers removed from the transferred interests as here—should be rejected.

II. CORRECTION TO THE COUNTY'S CHARACTERIZATION OF THE FACTS

The County argues that the transfer of interests in BA Realty LLLP ("BA Realty") to Allen's and Bruce's Trusts "reflected a sale of realty"—the underlying Apartment Building—even though its title remained held by plaintiff Ardmore at all relevant times. (ABM13.) Most of the County's brief is then devoted to arguing why section 11911 should cover this "sale of realty." But the County's factual assertion that the transaction here reflected a "sale of realty" is misleading.

The facts show that the transaction at issue was meant to *facilitate* the *eventual* disposition of assets from a mother to her two sons and grandchildren. As explained in Ardmore's opening brief, Gloria Averbook (the mother), whose Survivor's Trust transferred 65% of its share in BA Realty to Allen's and Bruce's Trusts, retained the right to reacquire any

property from those trusts and replace it with property of equivalent value. (OBM11-12.) Because Gloria retained this control, *she remained the owner* of Allen's and Bruce's Trusts for federal income-tax purposes. (26 U.S.C. § 675(4); OBM55-56; Rev. Rul. 85-13, 1985-1 C.B. 184; see also 26 C.F.R. § 1.1001-2(c), Ex. 5.)

This is an often-utilized technique in estate planning. (Westfall & Mair, Estate Planning Law and Taxation ¶ 17.02[1] (4th ed. 2001 & Supp. 2015-1) [explaining the application of the grantor-trust rules to estate planning].) The structure underlying this estate planning preserved control for the still-living grantor (the mother) over the assets, prevented any one heir from forcing a sale of the assets, reduced the value of the interests in BA Realty for estate and gift tax purposes, and ensured that the assets could *eventually* be distributed to the heirs with minimal court involvement. (3RT324:12-326:27.)

Moreover, this transaction was not an outright sale of the Apartment Building for another reason: BA Management, LLC, the general partner of BA Realty, retained a 1% interest and the Bypass Trust retained a 9.8% interest in BA Realty, which owned Ardmore, which retained title to the Apartment Building. (OBM8-9.)

What was transferred in both substance and form on January 8, 2009, were limited partnership interests in BA Realty—not realty.

III. STANDARD OF REVIEW

The County argues that under the applicable standard of review, "[a] taxpayer may recover a refund only if it shows that more has been exacted than in equity and good conscience should have been paid." (ABM9-10, citing *Sprint Communications Co. v. State Board of Equalization* (1995) 40 Cal.App.4th 1254, 1259 (*Sprint*).)

But that standard applies only where a taxpayer disputes the *amount* of the tax due or the fact of payment, not whether the law authorized the imposition of the tax. (E.g., *Sprint, supra*, 40 Cal.App.4th at p. 1259 [contesting only amount of tax paid]; *Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744 [burden of proof on taxpayer to establish that tax had been paid].)

Here, the question is not *how much* tax Ardmore should have paid, but whether section 11911 applies to the transaction at issue. That question is reviewed de novo (*Rain Bird Sprinkler Mfg. Corp. v. Franchise Tax Bd.* (1991) 229 Cal.App.3d 784, 794) and in "'favor [of] the taxpayer rather than the government, . . . [i]n case of doubt'" (*Edison v. Cal. Stores, Inc. v. McColgan* (1947) 30 Cal.2d 472, 476 (*Edison*)).

IV. ARGUMENT

A. Section 11911's Plain Language Only Authorizes A Tax On Documents That *Convey* "Realty Sold," Not On Shares In Legal Entities That *Hold* Realty.

Section 11911 authorizes the imposition of a documentary transfer tax on a "deed, instrument, or writing by which any lands, tenements, or other realty sold . . . shall be granted, assigned, transferred, or otherwise conveyed to . . . the purchaser . . . ." (§ 11911, subd. (a).) Even applying the plain meaning of the catchall word in each set of terms—a "writing" "conve[ying]" "realty sold"—it is plain that section 11911 covers only "writings" that "convey" real property that is sold. (OBM22-26.) "[C]ourts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used, nor enlarge upon their operation so as to embrace matters not specifically included." (*Edison*, *supra,* 30 Cal.2d at p. 476.)

1. The Cases Do Not Support The County's Claim That "Conveyance" Of "Realty" Under Section 11911 Includes A Change In Ownership Of A Legal Entity That Holds Realty.

Citing *United States v. Niagara Hudson Power Corp.* (S.D.N.Y. 1944) 53 F.Supp. 796 (*Niagara Hudson Power*), the County argues that "[t]he term conveyance is synonymous with transfer," which "'[i]n legal jargon'" is "'a change in ownership'" and thus "the change in ownership of BA Realty"—which owned Ardmore (which held realty)—"reflected a sale of realty for consideration requiring the payment of the DTT." (ABM13.)

First, the County's argument seeks to interpret a "convey[ance]" of "realty" to mean a conveyance that *has the effect of changing the ultimate ownership or control* of realty. The County's interpretation adds words to section 11911 and ignores the well-settled canon that tax statutes cannot be interpreted to "enlarge upon their operation so as to embrace matters not specifically included." (*Edison*, *supra*, 30 Cal.2d at p. 476.)

Second, *Niagara Hudson Power, supra*, does not support the County's claim that the conveyance of interests in an *entity* holding realty is the same as a conveyance of *realty* under the DTTA. There, the court held that the transfer of realty from one wholly-owned subsidiary to another wholly-owned subsidiary pursuant to a merger was *not* subject to the Federal Stamp Act because there was no "sale" of the realty nor a "deed containing the description of the realty." (*Niagara Hudson Power, supra*, 53 F.Supp. at p. 801.)

Indeed, the County derives its definition of "transfer" for its argument from *Niagara Hudson Power*'s citation of another case, *Niagara Hudson Power Corp. v. Hoey* (2d Cir. 1941) 117 F.2d 414, 416 (*Hoey*), which stated that "a change of ownership . . . is the essence of 'transfer'" in the context of the vesting of shares of stock in another corporation. But the court in *Niagara Hudson Power* observed that "[w]hether a transfer of realty should [also] be taxable as well as a transfer of a property consisting of securities is not for the court to say" because the federal Stamp Act, "as it now stands, expressly

confines taxable transfers to 'realty sold'" and there was "no conveyance of 'realty sold' . . . where a change of title to real estate is effected solely as a result of the filing of a Certificate of Consolidation" for a merger. (*Niagara Hudson Power, supra*, 53 F.Supp. at p. 801.)

Thus, *Niagara Hudson Power* and *Hoey* actually support Ardmore's position, not the County's: They establish that transfers of non-realty interests, such as corporate stock that accomplish a merger—even though realty is transferred as a result of the merger—are *not* the same as conveyances of "realty sold." Indeed, other cases interpreting the Federal Stamp Act confirm that the federal act did not apply absent an actual "writing" "conveying" "realty sold." (See, e.g., *United States v. Seattle-First Nat. Bank* (1944) 321 U.S. 583, 589-590 [declining to impose federal stamp tax where "there was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid"].)

2. The Phrase "Lands, Tenements, Or Other Realty" Has Not Been Applied To Conveyances Of Interests Other Than Realty.

The County argues that section 11911 can be interpreted broadly to cover transfers of membership interests in partnerships because the phrase "lands, tenements, or other realty" has been applied to interests other than realty. (ABM15-16.) This argument fails.

a. Long-Term Leases Are Realty Interests.

Citing *Auerbach v. Assessment Appeals Board No. 1* (2006) 39 Cal.4th 153, 162-163 (*Auerbach*), the County argues that the DTTA extends to the conveyance of non-realty interests, like interests in entities, because its federal predecessor was construed to extend to a long-term lease, which "[u]nder California law . . . is a chattel real, and not realty." (ABM15.)

However, *Auerbach*—which addressed whether the ownership of a building had changed for purposes of Proposition 13—did not address the DTTA. While *Auerbach, supra*, 39 Cal.4th at p. 162, stated that "an estate for years is not real property at all but rather a chattel real—a form of personalty," *Auerbach* also acknowledged that a longer-term lease—specifically, one for 35 years—*would be considered realty* because it has "the practical attributes of a conveyance in fee simple." (*Id.* at p. 165.)

This ruling regarding the treatment of long-term leases as "realty" conforms with other California cases. (E.g., *City of Cerritos v. Cerritos Taxpayers Assn.* (2010) 183 Cal.App.4th 1417, 1446 [describing a long-term lease as an "ownership interest *in [real] property*" itself, italics added]; *Evans v. Faught* (1965) 231 Cal.App.2d 698, 709 ["It is a settled principle that a leasehold is *an estate in land and an interest in real property*," italics added].) Those cases are also consistent with federal cases, such as *Jones v. Magruder* (D.Md. 1941) 42 F.Supp. 193, 198 (*Jones*), cited at ABM 15. *Jones* held that

the expression "lands, or other realty" included any "substantial ownership" of realty, including a 99-year lease. (*Ibid.*)

Because long-term leases are deemed the equivalent of "realty," applying section 11911 to such leases is consistent with Ardmore's interpretation that the DTTA applies only to conveyances of realty.

b. Mineral-Production Payments Also Constitute Realty Interests.

Citing *Texaco, Inc. v. United States* (5th Cir. 1980) 624 F.2d 20 (*Texaco*), the County next argues that the phrase "lands, tenements, or other realty sold" can be extended to reach interests in partnerships that indirectly hold realty because the former Federal Stamp Act applied to carved-out oil-production payments. (ABM15-16.) The County argues that this shows "a court will look to the substance of a transaction to determine its DTT consequences." (ABM16.)

But *Texaco* does not stand for this proposition. In *Texaco*, the Fifth Circuit concluded that a carved-out oil-production payment is fairly characterized as "realty" because it "convey[ed] an interest in 'land, tenements, or other realty'" by giving the holder "'the right to sever and remove for all time from the underlying mineral reserve all or a proportionate part of the mineral in place.'" (*Texaco, supra*, 624 F.2d at p. 22 & fn. 4, quoting *Chevron Oil Co. v. United States* (Ct. Cl. 1973) 471 F.2d 1373, 1380-1381.) *Texaco* therefore undermines, rather than supports, the County's

position, given the stark contrast between a "right to sever and remove for all time" the underlying mineral reserve (which is realty) and an interest in an entity that indirectly holds realty.

In sum, the common bond unifying *Texaco* and *Auerbach* is that both a long-term lease and a carved-out production payment (the right to permanently extract the minerals from the ground) are considered forms of realty, which is commonly defined as "[l]and and anything growing on, attached to, or erected on it, that cannot be removed without injury to the land." (Black's Law Dict. (10th ed. 2014) p. 1456; see Civ. Code, § 658 [defining "real property"].) These cases do not suggest that a documentary transfer tax was intended to apply to a writing conveying an interest other than "realty."

3. The DTTA's Federal Origins Also Rebut The County's Strained Interpretation Of The DTTA's Statutory Text.

Despite its misplaced reliance on the previously cited federal cases (which comport with Ardmore's position), the County inconsistently seeks to brush aside federal law, arguing that "California decisional law has varied from federal laws that have expired over 45 years ago." (ABM8-9.)

This cannot be squared with the reaffirmation in *Thrifty Corp. v. County of Los Angeles* (1989) 210 Cal.App.3d 881 (*Thrifty*) that because "section 11911 was patterned after the former federal [Stamp] [A]ct and employs virtually identical language as that act, [courts] must infer that the Legislature intended to perpetuate the federal administrative interpretations of

that federal act." (*Id.* at p. 884; accord, *Holmes v. McColgan* (1941) 17 Cal.2d 426, 430.) Until the Court of Appeal's decision in this case, no court had repudiated the critical role federal law plays in construing the DTTA.[2]

The County also acknowledges that the realty language in the DTTA dates back to at least 1862 when a federal stamp tax on the conveyance of realty was adopted. (ABM10.) At that time, the tax was imposed on the "vellum, parchment, or paper," upon which were written or printed the "deed[s], instrument[s], or writing[s]" that "granted, assigned, transferred, or otherwise conveyed" "any lands, tenements, or other realty sold." (Ardmore's Request for Judicial Notice in Support of Its Reply Brief on the Merits (RJN), Ex. A, Revenue Act, 12 Stat. 432.)[3]

These origins support relying on the plain meaning of the DTTA—which was patterned after the repealed Federal Stamp Act—to levy the tax only on documents that convey realty interests, not interests in entities that

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2 The County's other argument against reliance on federal authorities in this case is that LLCs did not exist at the time of the Federal Stamp Act. (ABM9.) But this contention is unpersuasive because *foreign* LLCs (and other legal entities) did exist then such that the absence of domestic LLCs does not suggest that its language should be given a meaning that extends it beyond conveyances of realty. (See, e.g., 26 C.F.R. § 301.7701-3(a) & (b).)

3 Before enacting that language, Congress changed the proposed definition of conveyance from "lands, tenements, or other *things* sold . . ." to the more limited "lands, tenements, or other *realty* sold." (RJN Ex. A, Revenue Act, 12 Stat. 432; RJN Ex. C, H.R. 312 at p. 104 (1862) as introduced Mar. 3, 1862, italics added.)

hold (directly or indirectly) realty. Indeed, since the Civil War, no authority has suggested that the federal stamp tax on "realty sold" applied to anything other than writings directly conveying realty that is sold to others. (OBM25-26.)

Moreover, California's enactment of its DTTA further evidenced the legislative intent *not to apply* it to the transfer of shares of legal entities that held realty. As the County acknowledges (ABM9), the Federal Stamp Act imposed a tax on *both* conveyances of realty (former 26 U.S.C. § 4361 [1CT93]) and the "sale or transfer of shares or certificates of stock, . . . issued by a corporation" (former 26 U.S.C. § 4321 [1CT88]). But California's enactment of the DTTA *omitted* the provisions regarding the sale or transfer of shares or certificates of stock. That omission strongly suggests that the California Legislature did not intend to have the DTTA cover the sale or transfer of shares in companies. "The omission of a provision contained in a foreign statute providing the model for action by the Legislature is a strong indication that the Legislature did not intend to import such provision into the state statute." (*J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union* (1989) 208 Cal.App.3d 430, 442; see also *People v. Drake* (1977) 19 Cal.3d 749, 755.)

Moreover, when California's DTTA was first enacted in 1967, former section 11931 required the Board of Equalization to "furnish, upon request of any recorder, adhesive stamps in suitable denominations to be affixed to the

deeds, instruments and writings subject to tax." (RJN Ex. B, Stats. 1967, Ch. 1332, at p. 3164, § 1, repealed by Stats. 1968, Ch. 17, at p. 161, § 7.) This again evidences that the writings subject to the DTTA were those intended to be suitable for recording the conveyance of realty. According to the legislative history, this provision was repealed only to "eliminate[] the use of stamps as a device for collecting the tax and, thus, relieve[] state and local government of a small amount of needless expenses." (RJN Ex. E [H.F. Freeman, Executive Secretary, California State Board of Equalization, letter to Governor Reagan re Sen. Bill No. 78 (1967-1968 Reg. Sess.) April 5, 1968]; RJN Ex. F [Legis. Counsel's Dig., Sen. Bill No. 78 (1967-1968 Reg. Sess.) Stats. 1968, at p. 1].)

Finally, the County's interpretation of section 11911 ignores many of the neighboring statutory provisions (discussed in the opening brief) that confirm the Legislature's intent to impose the tax on writings that convey title (§ 11922), that concern real property (§ 11911.1 [authorizing ordinances to require the writing to note the "tax roll parcel number"]), and that anticipate the recordation of the writing (§§ 11932, 11933). (OBM32-33.)

4. The County Misapplies Section 11925.

a. Section 11925 Reaffirms The Limited Reach Of Section 11911.

The County claims that section 11925 establishes that "the scope of the DTT extends to transactions beyond those directly resulting in the transfer of realty." (ABM17.) It argues that section 11925 makes it "apparent that the

Legislature intended partnerships, LLCs, and other entities to bear a DTT assessment upon transfer." (ABM16.)

To the contrary, section 11925 actually *reinforces* Ardmore's reading of section 11911 by providing that "in the case of any realty held by a partnership or other entity treated as a partnership for federal income tax purposes, *no levy shall be imposed* . . . by reason of any transfer of an interest in the partnership" as long as the partnership is not terminated and "continues to hold the realty concerned." (§ 11925, subd. (a), italics added; see OBM26-27.) Consistent with section 11911's plain meaning—which conditions the applicability of the DTTA upon the actual conveyance of realty—section 11925 expressly treats the termination of a partnership as the "[execution of] an instrument" conveying "all realty held by the partnership . . . at the time of termination" so as to trigger the tax. (OBM27, citing § 11925(b).)

The County argues that section 11925 nevertheless supports the imposition of a tax in this case under section 11911 because section 11925 was amended in 1999 to "make clear that it pertains to any partnership or *other entity* treated as a partnership," thus effectively extending the constructive-termination concept to LLCs. (ABM17, original italics.)

But the fact that some LLCs can be treated as partnerships under section 11925 does not mean that the documentary transfer tax can be imposed on the transfer of an interest in an LLC any more than it can be applied to a partnership that holds realty, which requires a termination for federal income

tax purposes. Moreover, section 11925, by its terms, applies only to "a partnership or other entity treated as a partnership *for federal income tax purposes*." (Italics added.) But single-member LLCs, like Ardmore, are not "treated as ... partnership[s] for federal income tax purposes."[4]

In short, section 11925 in no way suggests that section 11911 should be construed to levy a tax on documents that convey interests in entities, rather than realty, unless the partnership is terminated, which to be consistent with its other provisions, the DTTA treats as the execution of an instrument conveying the partnership's realty.

b. The Corporations Code Provisions Cited By The County Are Irrelevant.

Citing Corporations Code sections 16501 and 16502, the County makes a related argument regarding section 11925. Because those code provisions provide that "[a] partner is not a coowner of partnership property and has no interest in partnership property that can be transferred" (Corp. Code, § 16501), the County argues that section 11925's treatment of a partnership termination as an instrument conveying realty held by the partnership implies that "the DTT extends to transactions beyond those directly resulting in the transfer of realty." (ABM17.)

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4 See 26 C.F.R. § 301.7701-3(a).

But those sections of the Corporations Code cannot help construe the DTTA because they *postdated* the DTTA by nearly 30 years. Specifically, Corporations Code section 16501 (which provides that "[a] partner is not a coowner of partnership property . . . .") and Corporations Code section 16502 (which provides that "[t]he only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership . . .") were enacted in 1996. (Stats. 1996, Ch. 1003, § 2.) As noted in Ardmore's opening brief, they were part of California's adoption of the Revised Uniform Partnership Act, which adopted the "entity" approach for partnerships so that there would no longer be a need to convey title of property from an old partnership to a new one every time there was a change in partners. (OBM29-30, fn. 8.)

The relevant provisions of section 11925 here were enacted much earlier in 1967 (Stats. 1967, Ch. 1332 at p. 3162, § 1) and were patterned after the former federal provision, which had adopted the "entity" approach to partnerships to prevent every transfer of an interest in a partnership from dissolving the partnership and requiring a conveyance of property. (OBM28-30.) That is why section 11925 only creates one limited exception for levying a documentary transfer tax—a termination for federal income tax purposes, which the statute treats as the execution of "an instrument whereby there was conveyed . . . all realty held by the partnership . . . ." (§ 11925, subd. (b).)

The fact that in California since 1996, a partner has not been a co-owner of partnership property cannot imply that the earlier-enacted DTTA intended to impose a tax on anything other than an instrument that conveyed realty. That is precisely why it expressly treated the termination of a partnership as the execution of an instrument conveying all of the partnership's realty—a provision not enacted for any other circumstance.

B. The County's Reliance On *Thrifty* Is Misplaced.

1. *Thrifty* Supports Ardmore's Position That The DTTA Applies Only To Conveyances Of Realty.

The County argues that *Thrifty, supra*, 210 Cal.App.3d 881, "turned to the California property tax change[-]in[-]ownership statutes as legislative guidance" and therefore that those statutes should be used for construing what constitutes a conveyance of realty under the DTTA. (ABM19.) The County misapplies the ruling in *Thrifty*.

First, as noted, *Thrifty* reaffirmed that "[b]ecause section 11911 was patterned after the former [F]ederal [Stamp A]ct . . . , [courts] must infer that the Legislature intended to perpetuate the federal administrative interpretation of that federal act." (*Thrifty*, *supra*, 210 Cal.App.3d at p. 884.)

Second, *Thrifty*'s analysis largely followed the *federal* regulations, which called for courts to examine whether the interest in property (in that case, a 20-year lease with a 10-year renewal option) "was of sufficient duration to approximate an interest such as an estate in fee simple or a life estate." (*Thrifty*, *supra*, 210 Cal.App.3d at p. 885.) Where the interest

endured for a "fixed period of years," the regulation directed courts to analyze whether the interest "by reason of the length of the term or the grant of a right to extend the term by renewal or otherwise, consists of a bundle of rights approximating" an estate that endures in perpetuity. (Former 26 C.F.R. § 47.4631-1(a)(4)(i)(b).)

Thus, *Thrifty* first looked to "regulations interpreting the former federal act" to analyze whether the conveyance of the lease in that case could be considered "realty sold." Only because federal law did not answer the question whether that lease's length "approximated" an estate did *Thrifty* look to state law to determine whether such a lease might "approximate an 'ownership' right rather than a mere 'temporary right of possession.'" (*Thrifty*, *supra*, 210 Cal.App.3d at p. 885.)

Accordingly, the central flaw in the County's (and Court of Appeal's) reading of *Thrifty* lies in their failure to first inquire whether an interest in a partnership is sufficiently akin to a "'bundle of rights approximating' . . . an interest such as an estate in fee simple or life estate" (*Thrifty*, *supra*, 210 Cal.App.3d at p. 885) to qualify as "realty" under the DTTA's federal-law antecedents.

Instead, here, the County and Court of Appeal skipped the determination whether the *nature of the interest* approximated "realty" (it doesn't) and used the state property-law concept of "change in ownership" under Proposition 13, which instead determines the *owner, including the*

beneficial owner, of the interest. (Slip opn. at p. 22.) Reliance on a state *property*-law concept also ignores the origins, purpose, practice, and text of the DTTA's *excise* tax; it also relies on dissimilar language in a Proposition 13 statutory scheme enacted a decade later and favors the taxing agency over the taxpayer in violation of the applicable canons of statutory construction.

Had the Court of Appeal here first analyzed whether a partnership interest was a realty interest under federal law, there would have been no reason to look to state law at all. That is because, as even the County acknowledges, *Thrifty* "concerned a leasehold—a *property interest*," whereas the issue here "concerns a transfer of *partnership interests*" (ABM20, italics added). That dispositive difference defeats reliance on *Thrifty*.

2. The Legislature Has Not Endorsed The Use Of The "Change In Ownership" Concept For Interpreting The DTTA.

The County claims that "[t]he fact that the Legislature has acquiesced in the *Thrifty* decision . . . is a strong indication that it intended such transfers reflecting a change in ownership of realty to be assessed." (ABM21.)

To the contrary, the fact that the Legislature took no action after *Thrifty* does not mean that the Legislature endorsed the use of Proposition 13's "change in ownership" concept to construe what constituted a conveyance of "realty" under section 11911.

First, as discussed, *Thrifty* did not apply the "change in ownership" concept under Proposition 13 to determine whether there had been a change in

ownership of the transferred interest, but instead to determine whether the transferred interest itself was the type of real-property interest that constituted "realty" under the DTTA. It then ruled that the DTTA did not apply to the lease at issue in *Thrifty*. Thus, even if the Legislature could be deemed to have acquiesced in *Thrifty*'s decision, it acquiesced in *disallowing* the imposition of a documentary transfer tax on the transfer of interests that do not qualify as "realty" interests. It did not in any way endorse the application of the DTTA to the transfer of interests in a partnership indirectly holding realty.

Second, the doctrine of implied legislative ratification does not apply here. The presumption that the Legislature impliedly ratified a judicial construction of a statute typically applies when (1) the Legislature re-enacts the statute after it has been construed by the courts without changing the relevant language (*People v. Bonnetta* (2009) 46 Cal.4th 143, 151) or (2) the Legislature amends the statute at issue in *other* respects, but not the section said to have been impliedly ratified (*Ventura County Deputy Sheriffs' Assn. v. Bd. of Retirement* (1997) 16 Cal.4th 483, 505-506; *Cole v. Rush* (1955) 45 Cal.2d 345, 355). Neither occurred here. Section 11911 has not been amended since *Thrifty*.[5]

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[5] Indeed, a bill seeking to amend section 11911 to define "realty sold" to include "any acquisition or transfer of ownership interests in a legal entity" constituting "a change in ownership of that legal entity's real property" died in committee on January 31, 2014. That proposed bill's stated

[Footnote continued on next page]

3. "Change In Ownership" And "Realty Sold" Do Not Share The Same Meaning.

The County also claims that "[t]he DTTA's 'realty sold,' and Proposition 13's 'change in ownership' are substantially similar concepts" and thus "[i]t is reasonable to conclude that the Legislature intended that they be given the same construction." (ABM24; see also slip opn. at p. 22.) But there is no "substantially similar concepts" canon of statutory interpretation. (See OBM39.)

The relevant canon of construction is that "[i]n construing a statute, unless a contrary intent appears, [we] presume[] that the Legislature intended that similar phrases be accorded the same meaning. [Citation.]" (*People v. Wells* (1996) 12 Cal.4th 979, 986.) "Change in ownership" and "realty sold" are not similar phrases.

Estate of Griswold (2001) 25 Cal.4th 904, cited by the County (ABM24), does not suggest otherwise. There, this Court assigned the same meaning to the words "acknowledged" and "acknowledging" in deciding what types of acts were necessary for a parent to "acknowledge[] a child" born out

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[Footnote continued from previous page]

purpose was to "bring the Documentary Transfer Tax Act into conformance with the definition of 'realty sold' under California property tax law." (RJN Ex. D, Assem. Com. on Local Gov't, analysis of Assem. Bill No. 561 (2013-2014 Reg. Sess.), as amended Apr. 30, 2013; see also Bill History, AB-561 <http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140AB56> [as of Sept. 3, 2015].)

of wedlock in order to enable the child's half-siblings to inherit from him under the Probate Code. While the court concluded that an acknowledgment had occurred under the Probate Code, it also "in an abundance of caution" looked to a Civil Code provision that a father could legitimate a child born out of wedlock by "publicly acknowledging it as his own." (*Id.* at p. 914.)

Applying that canon makes no sense here. The phrases "change in ownership" and "realty sold" have no similarities, arise in different divisions of the Revenue and Taxation Code, and deal with different kinds of taxes—one of which is imposed on "mere ownership" of property (property taxes) and the other of which is imposed on a "separate incident of ownership, such as the sale or transfer of the property" (excise taxes). (*Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1086 (*Thomas*).) Further, the property-tax division of the Revenue and Taxation Code contains provisions and regulations permitting the taxation of entities "directly or indirectly owning realty" (e.g., Cal. Code Regs., tit. 18, § 462.180(d)(1)(C)), whereas the DTTA contains no such regulations or provisions. Finally, it is important to keep these two textual boundaries distinct because "municipalities have an obvious incentive to attempt to relabel their property taxes as excise taxes to evade [certain] provisions" of Proposition 13. (*Thomas, supra*, 53 Cal.App.4th at p. 1089.)

Nor is there any support in the law for the County's repeated assertions that the concepts underlying the DTTA and the property-tax statutes

implementing Proposition 13 are "analogous." (ABM11, 21, 25, 27.) Other than its misguided citation of *Thrifty*, the only support that the County offers for this proposition is: (i) one footnote "refer[ring] to 'separate entity theory'" from *Title Insurance Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 88, footnote 3 (*Title Insurance*), and (ii) an excerpt from House Report No. 481 on the federal Stamp Act (1CT150), cited for the same reason. Neither reference supports the County's argument. (ABM27.)

The footnote in *Title Insurance, supra*, 48 Cal.3d at p. 88, footnote 3, merely notes that corporations are treated as "separate entities" for purposes of section 64, subdivision (a), to avoid the unfairness and inefficiency of reassessing a tax every time a small change in the ownership of the corporation occurs. The footnote does not suggest that "change in ownership analysis" is "analogous to . . . the DTT." (ABM27.)

Likewise, the portion of the House Report cited by the County merely explains that federal authorities will tax a transfer of interests in partnerships under the Federal Stamp Act *only when the partnership terminates*. (1CT150.) It, too, does not suggest that "change in ownership" under Proposition 13 (which did not even exist at the time) is analogous to "realty sold" under the DTTA. Indeed, the portion of the House Report cited by the County is contrary to the County's position, as it endorses the Internal Revenue Service's position under the Federal Stamp Act that "no tax is to be imposed

until there is a change of legal title to the real property, irrespective of changes of interest in the partnership." (1CT150, italics added.)

C. Subsequent Legislative Enactments Cannot Extend The Reach Of The DTTA.

The County asserts, like the Court of Appeal, that because the Legislature "has provided tax administrators with enforcement tools to identify legal entity change in ownership transactions . . . [this] is a strong indication that it intended such transfers reflecting change in ownership of realty to be assessed." (ABM21; slip opn. at pp. 23-24.) The "enforcement tools" to which the County refers are sections 408 and 408.4, which provided county recorders and city finance officials with access to county assessors' records concerning changes in ownership.

Yet, the County fails to address Ardmore's point in its opening brief that these subsequently-enacted statutes cannot shed any light on the Legislature's intent in enacting the DTTA more than 40 years earlier. (OBM50-51.) It also fails to address Ardmore's point that these statutes cannot alter section 11911's legislative intent because they were not enacted with the supermajority vote required under Proposition 13 to impose a new tax, or expand the incidence of an existing tax, even assuming that Proposition 13 permits enactment of a new documentary transfer tax. (Cal. Const., art. XIIIA, § 3, subd. (a) ["no new . . . sales or transaction taxes on sales of real property may be imposed"]; OBM48-50.)

The County also fails to cite anything in the text or legislative history of sections 408 and 408.4 that suggests that those provisions were meant to enable county recorders and city finance officials to use the county assessor's information to expand the reach of section 11911. (ABM21.)

Instead, as noted in Ardmore's opening brief, these recent enactments merely grant access to the county assessor's records to enable local officials to enforce the DTTA's *existing* partnership provisions where the sale of 50% or more of the interest in the partnership's capital and profits terminates the partnership under section 11925 and authorizes the tax. (OBM51-52.)

D. The "Economic Substance" Of Ardmore's Transaction Cannot Justify A Departure From The Statute's Plain Language And Longstanding Practice.

In the County's view, "[t]he economic substance of plaintiff's transaction was a transfer of realty . . . by means of a writing[,] requiring the payment of a DTT." (ABM12.) The County argues that "[i]n every outward appearance, the BA Realty transaction resulted in a transfer of the beneficial ownership of its assets," which included Ardmore, which held the Apartment Building. (ABM18.) This argument is flawed for several reasons.

First, as noted in the opening brief and at Section II, *ante*, this was not a mere conveyance of realty. (OBM12 fn. 3, 55-56 fn. 19.) The mother did not transfer title to, or effectuate the sale of the entire "bundle of rights" associated with, the Apartment Building to her sons' trusts. (Former 26 C.F.R. § 47.4361(a)(4)(i)(b).) In both substance and form what was transferred on

January 8, 2009 were limited partnership interests in BA Realty. (Cf. *Linton v. United States* (9th Cir. 2011) 630 F.2d 1211, 1224.) She retained the right to reacquire Ardmore (along with other assets) at any time and replace it with assets of equivalent value. (See 3RT348:6-12, 349:2-9; Pl. Exs. 29[GWP000095], 30[GWP000032]; 26 U.S.C. § 675(4).)[6]

In any event, even if the transfer of limited partnership interests had the effect of selling the Apartment Building, this would not justify disregarding the language and purpose of the DTTA, which only levies a tax on an instrument that conveys the realty itself to the purchaser. As previously demonstrated, the DTTA's text and past practice demonstrate that section 11911 only taxes writings that convey realty, not writings that convey interests in entities that result in a change in ownership or control of the realty. "[N]o legislation pursues its purposes at all costs" and "[v]ague notions of statutory purpose provide no warrant for expanding [a statute] beyond the field to which it is unambiguously limited." (*Freeman v. Quicken Loans, Inc.*

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6 The County relies on a third-party appraisal conducted for Gloria Averbook for gift-tax purposes as evidence that BA Realty held the Apartment Building because its wholly owned subsidiaries were "'essentially pass-through entities and BA Realty has full control of their underlying properties.'" (ABM18.) But a third party's description of LLCs as pass-through entities does not govern the question whether BA Realty directly held realty *for purposes of the DTTA*. Moreover, the purpose of the third-party appraisal was to value the limited partnership interests of BA Realty and interests in BA Management. (Pl. Ex. 44.) It was not a legal evaluation.

(2012) 132 S.Ct. 2034, 2044.) "[T]he limitations of text . . . are as much a part of its 'purpose' as its affirmative dispositions." (Scalia, Reading Law, *supra*, at p. 57.) Indeed, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526.) Finally, as noted earlier, "courts, in interpreting statutes levying taxes, may not extend their provisions, by implication, beyond the clear import of the language used." (*Edison, supra*, 30 Cal.2d at p. 476.)

E. Limiting Section 11911 To Its Plain Meaning Would Not Foster Tax Avoidance.

The County also echoes the Court of Appeal's concern that adopting the plain meaning and purpose of the DTTA would allow taxpayers to utilize single-member LLCs to evade paying documentary transfer taxes. (ABM22, quoting slip opn. at p. 31.)

This plea to capture additional transactions cannot justify ignoring the DTTA's origins, plain language, and past practice. Public-policy considerations come into play only when a statute is ambiguous (*Hoechst Celanese Corp. v. Franchise Tax Board* (2001) 25 Cal.4th 508, 519), which section 11911, particularly given its federal interpretation, is not.

In any event, this tax-avoidance concern is unfounded. Several well-established tax-law doctrines guard against the risks of such tax evasion.

Those doctrines (which no one has suggested would apply to Ardmore)[7] provide that a sham transfer to an entity unsupported by any legitimate business purpose may be disregarded. (OBM53, citing *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 760; *Shuwa Investment Corp. v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1648.) In deciding whether a transaction is a sham, courts "consider whether appropriate business formalities are employed, industry customs and practices are followed, and there is compliance with relevant commercial norms." (*Fashion Valley Mall, LLC v. County of San Diego* (2009) 176 Cal.App.4th 871, 880.) The County fails to explain why these doctrines would not adequately address the Court of Appeal's concern.[8]

F. The County's Claim That Section 11925 Provides An Alternative Ground For Affirmance Has Been Waived.

In the final section of its brief, the County contends that "Section 11925 is certainly a relevant consideration in analyzing the DTTA, and provides an alternative basis for affirming the judgment." (ABM25.)

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7 It is undisputed that Ardmore was adequately capitalized and formed for legitimate purposes. (See OBM7, 53 fn. 18.)

8 The tax-avoidance concern raised by the Court of Appeal is further diminished by the costs of forming and maintaining limited liability companies and other non-partnership entities. Among other expenses, limited liability companies and corporations must pay annual franchise and income taxes, the total of which greatly exceeds the amount of the documentary transfer taxes these entities could avoid. (§§ 17941, 17942, 23151, 23153, 23501, 23802.)

Ardmore agrees that section 11925 is "relevant" *in interpreting section 11911*, since section 11925 evidences the legislative intent that section 11911 was not intended to apply to the transfer of an interest in a partnership holding realty—unless there is a termination, in which case it expressly treats that termination as the "execut[ion of] an instrument whereby there was conveyed . . . all realty held by the partnership." (§ 11925, subds. (a), (b).) As previously mentioned, this confirms that the DTTA intends only to tax an instrument conveying realty. (See OBM28-31; Section IV.A.4, *ante.*)

However, section 11925 cannot serve as an alternative basis for liability. The County neither sought review of the Court of Appeal's rejection of section 11925 as an alternative ground nor developed the argument in support of this ground in its Answer Brief. Accordingly, as shown below, the County has waived review of the issue whether section 11925 provides an alternative basis for affirmance. (*Scottsdale Insurance Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654, fn. 2 [a party "has failed to preserve [an] issue" for review where it "neither filed a petition for review nor asserted [the issue] in its answer"]; *People v. Villa* (2009) 45 Cal.4th 1063, 1076 [issue waived where respondent failed to seek review of issue or include it in answer brief]; *Tilbury Constructors, Inc. v. State Compensation Ins. Fund* (2006) 137 Cal.App.4th 466, 482 [issue waived where party merely raised claims in one conclusory sentence].)

1. The County's Brief Fails To Address Whether BA Realty Was Terminated As Required By Section 11925.

In order to show that section 11925 authorizes the imposition of a documentary transfer tax on the conveyance of realty, the County must show that (1) the realty in question was "*held by a partnership*" (here, BA Realty) and (2) the partnership terminated "for federal income tax purposes," in which case "the partnership . . . shall be treated as having executed an instrument whereby there was conveyed . . . all realty held by the partnership." (§ 11925, subds. (a), (b), italics added.)

The Court of Appeal declined to decide whether the partnership had terminated because it "agree[d] with Ardmore's argument that section 11925 is not applicable to this transaction" (slip opn. at pp. 31-32, fn. 12) since "BA Realty did not hold title to the realty . . ." (*id.* at p. 31).

The County has failed to develop any argument in its brief that BA Realty was terminated "for federal income tax purposes" (§ 11925, subd. (b)), *and* it failed to seek review of the Court of Appeal's application of section 11925. Therefore, this issue has been waived and is not properly before the Court.[9]

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[9] Were this Court inclined to reach this issue (despite its waiver), Ardmore would request the opportunity to submit supplemental briefing.

2. The County Waived Review Of Whether BA Realty "Held" "Realty" For Purposes of Section 11925.

To apply section 11925, the County was also required to show that BA Realty held realty. The Court of Appeal "'agree[d]'" with Ardmore that section 11925 "'[i]s inapplicable because BA Realty did not hold title to the realty; instead, it owned Ardmore, which held title to the realty.'" (Slip opn. at p. 31.)

The County did not seek review of this ruling either in its answer to Ardmore's petition for review or in any cross-petition for review.

The County does provide a cursory and flawed explanation of this requisite for authorizing a tax pursuant to section 11925. It contends that Ardmore "was a disregarded entity for income tax purposes and that the beneficial ownership of [Ardmore's] apartment house was reflected in the ownership of . . . BA Realty." (ABM25.)

But while Ardmore is disregarded for federal income tax purposes, it remains a separate entity for other purposes and is subject to other taxes, including excise taxes. (See, e.g., 26 C.F.R. § 301.7701-2(c)(iii), (iv), (v) [treating disregarded entities as corporations for employment and excise tax purposes]; Cal. Code Regs., tit. 18, § 23038(b)-2(c)(2) [recognizing disregarded status for state income taxes, but not for other taxes specific to LLCs].)

Furthermore, documentary transfer taxes are imposed on the "document" conveying the realty (*People ex rel. Dept. of Public Works v. County of Santa Clara* (1969) 275 Cal.App.2d 372, 375, fn. 6), and the person or entity who "makes, signs or issues" the instrument or uses it must pay, regardless of that person's status (§ 11912).[10]

The County suggests that Ardmore should be disregarded and that BA Realty holds the realty based on a federal regulation relating to terminations under section 708 of the Internal Revenue Code. That regulation provides that "if the sale or exchange of an interest in a partnership (upper-tier partnership) that holds an interest in another partnership (lower-tier partnership) results in a termination of the upper-tier partnership, the upper-tier partnership is treated as exchanging its entire interest in the capital and profits of the lower-tier partnership." (ABM26, citing 26 C.F.R. § 1.708-1(b)(2).) But this regulation, by definition, assumes that the upper-tier partnership (BA Realty) has been terminated—an issue which the County has not briefed and for which it has not sought review, and has thus waived. Further, the County assumes that Ardmore was "the lower-tier partnership,"

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10 One of the many errors in this case is that Ardmore was assessed the tax as if this were a Proposition 13 ad valorem tax on the property owner. However, the documentary transfer tax is imposed on the person who "makes, signs or issues any document or instrument subject to the tax, or for whose use or benefit the same is made, signed or issued." (§ 11912.) Ardmore is not such a person.

but a single-member LLC, like Ardmore, is not treated as a partnership. (*Ante*, p. 17.) Thus, the regulation is of no use to the County.

In sum, there is no reason for this Court to entertain the County's waived and undeveloped argument based on section 11925 as an alternative ground for affirmance.

V. CONCLUSION

For the reasons set forth herein and in Ardmore's opening brief, section 11911 does not authorize the imposition of a documentary transfer tax based on a change in ownership or control of a legal entity that directly or indirectly holds realty. The plain language, prior practice, and federal interpretation of section 11911 only authorizes the imposition of a tax on writings that directly convey realty itself.

Consequently, this Court should reverse the judgment, grant Ardmore's request for a refund, and remand to determine Ardmore's right to attorney's fees and costs.

Dated: September 4, 2015

Respectfully submitted,

FISHERBROYLES, LLP
GIBSON, DUNN & CRUTCHER LLP

By: 
Daniel M. Kolkey

Attorneys for Plaintiff and Appellant 926 North Ardmore Avenue, LLC

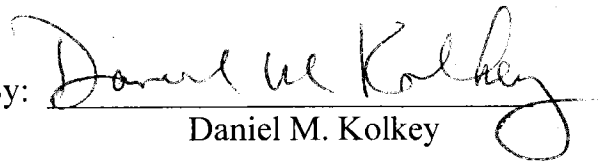
CERTIFICATE OF WORD COUNT

In accordance with rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that this Reply Brief on the Merits contains 8,310 words, as determined by the word processing system used to prepare this brief, excluding the cover information, the tables, the signature block, and this certificate.

Dated: September 4, 2015

FISHERBROYLES, LLP

GIBSON, DUNN & CRUTCHER LLP

By: 

Daniel M. Kolkey

Attorneys for Plaintiff and Appellant 926 North Ardmore Avenue, LLC

CERTIFICATE OF SERVICE

I, Sherry Tan, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105, in said County and State. On September 4, 2015, I served the within:

REPLY BRIEF ON THE MERITS

to each of the persons named below at the address(es) shown, in the manner described.

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed

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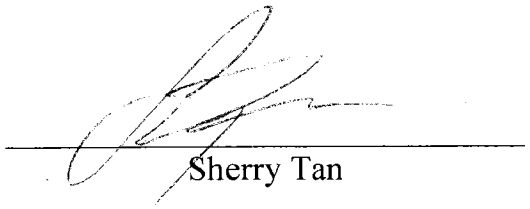

Sherry Tan

Service List

Mary C. Wickham, Interim County Counsel
Albert Ramseyer, Principal Deputy County Counsel
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713

Attorneys for Defendant/Respondent, County of Los Angeles

Clerk of the Court of Appeal
Second District, Division Seven
300 South Spring Street
Room 2217
North Tower
Los Angeles, CA 90013

Clerk of the Los Angeles County
Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012