No. 10-2027

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KAREN K. CAPATO, o/b/o B.N.C., K.N.C.,

Plaintiff-Appellant,

– v. –

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey

PLAINTIFF-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Bernard A. Kuttner
KUTTNER LAW OFFICES
24 Lackawanna Plaza
Milburn, New York 07041
(973) 467-8300

Thomas P. Wolf
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Charles A. Rothfeld
Paul W. Hughes
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Plaintiff-Appellant

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INTRODUCTION

The ALJ erred twice: both in finding that Nick Capato ("Nick") was domiciled in Florida at the time of his death, and in concluding that Florida intestacy law would bar recovery for the Capato twins.

The government defends the first holding by inventing a wholly new "test" for the intent prong of domicile. Supp. Br. for the Appellee ("Gov't Br.") at 23-31. The government contends that an individual intends to remain in a place "indefinitely" if he has no "fixed and definite plan" to leave. *Id.* But this purported test—for which the government fails to cite any authority—is wrong. Properly considered, Nick lacked the intent to remain indefinitely in Florida, and he therefore never became a domiciliary there.

Separately, the government is wrong in contending that Florida law would hold the Capato twins ineligible to take in intestacy. Paying only lip service to Florida's Probate Code, the government focuses almost solely on a provision of the Domestic Relations Code, Fla. Stat. Ann. § 742.17(4). Gov't Br. 31-36. Although that provision should not be understood to control intestacy rights at all, the conclusion that the government attempts to draw from it is incorrect. If that provision is relevant, it makes posthumously conceived children eligible for inheritance rights *if* they are pro-

vided for in the decedent's will. Because Nick did provide for the twins in his will (a fact which is confirmed by extrinsic evidence, including the Capatos' in vitro fertilization agreement), the twins would thus qualify to inherit through intestacy.

I. Nick's Status As A Washington Domiciliary Resolves This Appeal.

A. The ALJ erred in concluding that Nick's domicile was Florida.

1. The government makes several critical errors with respect to the law of domicile. To begin with, the government invents out of whole cloth a new test—the purported inquiry as to whether Nick arrived in Florida "without fixed and definite plans" to leave. In other words, the government contends that an individual acquires a new domicile upon arriving in a new location unless that individual has a time-certain date of departure. The government cites this test repeatedly (no fewer than ten times, *see*, *e.g.*, Gov't Br. 18, 23, 24, 25, 25-26, 27, 28, 28 n.4, 29, 30)—but "[a] bad argument does not improve with repetition." *Carr v. United States*, 130 S. Ct. 2229, 2244 (2010) (Alito, J., dissenting). In fact, despite forming the centerpiece of the government's argument on domicile, the government fails to cite *any* precedent whatsoever for its "without fixed and definite plans" test. This is for good reason: that test is flatly wrong.

The critical inquiry for domicile is whether "physical presence" has merged with "one's intent to remain there." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). The intent must be to remain "indefinite[ly];" domicile is not acquired if one intends to live in a place for only a "finite" period of time. *Frett-Smith v. Vanterpool*, 511 F.3d 396, 402 (3d Cir. 2008). The distinction between intention to reside "indefinitely" and intention to reside for a "finite" period does not, as the government would have it, turn on whether an individual has a time-certain date of departure.

Rather, a person establishes an intent to reside "indefinitely" when he or she arrives at a place and has "no present intent to move to another state." *Greenblatt v. Gluck*, 265 F. Supp. 2d 346, 351 (S.D.N.Y. 2003).[1] As the Supreme Court has put it, "[t]he requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." *Gilbert v. David*, 235 U.S. 561, 569

[1] Courts routinely define "indefiniteness" as turning on whether the individual has a "present intent" to move elsewhere. *See*, *e.g.*, *Brinkman v. Schweizer Aircraft Corp.*, 2011 WL 863499, at *3 (N.D. Cal. 2011); *Apace Commc'ns, Ltd. v. Burke*, 2009 WL 1748711, at *3 (W.D.N.Y. 2009); *Hicks v. Brophy*, 839 F. Supp. 948, 950 (D. Conn. 1993); *Nat'l Artists Mgmt. Co. v. Weaving*, 769 F. Supp. 1224, 1227 (S.D.N.Y. 1991).

(1915) (quotation omitted). If a person moves to a location with a "present intent" to move elsewhere, he or she has *not* acquired a new domicile. So long as the individual maintains the "present intent" to relocate, he or she lacks the requisite intention to remain "indefinitely."

This is the teaching of *Fisher v. Fisher (In re Fisher's Will)*, 80 A.2d 227 (N.J. Super. Ct. App. Div. 1951)—a case that the government ignores. As we showed (Supp. Br. 23-24), an individual's move did not establish a new domicile when, at the time of the move, he intended to later move elsewhere. That the individual did not have a time-certain date for the future move was irrelevant; the critical concern was that the individual moved with the present intent to relocate.

Other courts have confirmed that an individual does not intend to reside "indefinitely" simply because the individual lacks "fixed and definite plans" to leave. In *Johnson v. Gibson*, 2011 WL 3359974, at *3 (D. Or. 2011), an individual had not acquired a new domicile when she moved from Oregon to Washington to live with her mother while recovering from a "temporary" injury. Although the individual did not have a fixed date for returning to Oregon, the court found she lacked the intent to stay in Washington "indefinitely" because she "hoped and believed" that the injury that brought her to Oregon would only be "temporary" and that she

would ultimately be able to return to work. *Id*. *See also Bakhtiari v. Phillips*, 2009 WL 3711979, at *2 (E.D. Mo. 2009) (identifying a "narrow category of individuals who have abandoned their past domicile but have not arrived at a new one or have arrived without formulating the intent to stay").

In addition to creating its central test out of thin air, the government gets the presumptions backward. The government, like the ALJ (*see* Supp. Br. 19-20), ignores the "presumption favoring an established domicile over a new one." *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286-87 (3d Cir. 2006). The government instead points to the notion that one is presumptively domiciled where one resides. Gov't Br. 23. From there, the government asserts that Karen must "rebut the presumption of domicile raised by [Nick's] residence in Florida." *Id*. at 26-27. The burden, however, is exactly the opposite: it is the government's burden to demonstrate that Nick changed his domicile away from his established one.

It is "axiomatic" that "[a] domicile once acquired is presumed to continue until it is shown to have been changed." *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 353 (1874); *see also Korn v. Korn*, 398 F.2d 689, 691 n.4 (3d Cir. 1968) (quoting *Mitchell*). If an individual has no established domicile (i.e., at birth), the place of residence is the presumptive default.

See Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 448 (5th Cir. 2003) ("A person acquires a 'domicile of origin' at birth, and this domicile is presumed to continue absent sufficient evidence of change."). But when—as is the case here (*see* Supp. Br. 20-22)—a domicile has *already* been established, that domicile is presumed to continue. Thus, the burden is precisely the opposite of what the government suggests: "Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation." *Mitchell*, 88 U.S. at 353; *see also Desmare v. United States*, 93 U.S. (3 Otto) 605, 608 (1876) ("because this domicile was not proved to have been changed, it must be presumed to have continued"). And to "constitute the new domicile" there must be proof of *both* "residence in the new locality" *and* "the intention to remain there." *Mitchell*, 88 U.S. at 353. Because it is the government's contention that Nick changed his domicile from Washington to Florida, it is the government's burden of proof.

2. The record adduced in this case makes clear that the ALJ erred as a matter of law in concluding that Nick was domiciled in Florida.[2] When

[2] The government is wrong to suggest that this is a question of fact to which the "substantial evidence" standard attaches. *See* Gov't Br. 21-22, 25-26. There is no dispute as to the historical facts or the ALJ's construction of the factual record; indeed, the ALJ credited all evidence and testi-

Nick moved to Florida, he had a "present intent" to move to New Jersey. And because he never surrendered that "present intent," he never formed an intent to remain in Florida "indefinitely." The government repeatedly contends that there is no evidence Nick had a "fixed and definite plan to leave" at the time he "arrived in Florida" (Gov't Br. 28, 29, 30), but, as we explained, that is not the test.

There can be little doubt, though, that Nick *did* possess a then-"present intent" to leave Florida. In record testimony that the ALJ explicitly credited (*see* A.6), Karen described the plan that motivated the Capatos' move: "We were en route to opening businesses; and then, our final destination was going to be back in New Jersey so we could be around family." RA.64. As Karen further explained, Florida "was just a temporary spot, which is why we didn't invest, or buy property, or . . . buy anything, really." *Id*. The government, for its part, does not challenge the truth of

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mony at issue as factually accurate. A.6-7; *see also* Supp. Br. 5 n.2. The issue here is thus the *legal* significance of those historical facts. As we explained in our supplementary brief (at 14-15), *that* question is a legal one, subject to *de novo* review. *Washington v. Hovensa LLC*, 652 F.3d 340, 341 (3d Cir. 2011) (the Court reviews "*de novo*" "the applicable legal principles and the court's conclusions of law"). The government's authority (Gov't Br. 26), is not to the contrary, as it explains that "[h]istorical or chronological data * * * underlin[ing] a court's determination of diversity jurisdiction are factual in nature"—issues which are separate from the "controlling legal principles." *Krasnov v. Dinan*, 465 F.2d 1298, 1299 (3d Cir. 1972).

Karen's statements or the correctness of the ALJ's decision crediting those statements. Far from establishing that moving was a "vague possibility" (*Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 546 (3d Cir. 1951)),[3] this showed that Nick had "present intention" to leave the state.

The only apparent fact in the record to which the government points to substantiate its argument is Karen's testimony that, after the birth of their son in August 2001, the Capatos continued their efforts to move to New Jersey. Gov't Br. 29 (citing SA.52). But that testimony simply confirmed the plan that Karen and Nick had all along—there was no testimony, as the government would suggest, that this was the *first* time Nick and Karen formed an intent to move.

Moreover, the record offers no suggestion that, during his time in Florida, Nick's intent to move to New Jersey ever dissipated. Nick maintained only a short-term lease on an apartment before moving into his

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[3] Later, the government selectively quotes *Gallagher*, 185 F.2d at 546, stating: "'[I]t is the intention at the time of arrival which is important. The fact that the plaintiff may later have acquired doubts about remaining in her new home or may have been called upon to leave it is not relevant . . . .'" Gov't Br. 30. But, as we previously explained (Supp. Br. 22 n.4), the balance of that sentence is quite important: "so long as the subsequent doubt or the circumstance of the leaving does not indicate that the intention to make the place the plaintiff's home never existed." *Gallagher*, 185 F.2d at 546. That is exactly what happened here: Nick and Karen's efforts to leave Florida confirm that they *never* had the intention of making Florida their home.

wife's grandparents' house. RA.59 (Testimony of Karen). Furthermore, Nick took affirmative steps to move his business to New Jersey, incorporating a business there in June 2001. A.41-42. And in 2001, after Nick learned his cancer had recurred, he took further measures to secure a business location or locations and develop investor support for his venture. SA.47 (Testimony of Cappola), RA.68 (Testimony of Karen). The upshot of this conduct is evident: Nick maintained a "present intent" to leave Florida for New Jersey prior to his arrival, and that intent lasted until the day he died. Nick thus never possessed the requisite intent to become a Florida domiciliary.

The government also challenges whether Nick was a Washington domiciliary prior to his move to Florida. Gov't Br. 27-28. As we will demonstrate below (*infra*, at 10), he plainly was. Regardless, the government's point is irrelevant in determining whether the ALJ erred in his conclusion that Nick's domicile was Florida. There can be no doubt that, prior to his move to Florida, Nick held a domicile *other* than Florida. In deciding whether Nick established a new domicile that displaced his old one, the identity of the old domicile is entirely beside the point.

B. The Court should determine that the twins qualify to take in intestacy under Washington law.

The record is sufficient to conclude that Nick's domicile was Washington and that the twins qualify for benefits under Washington law. The Court accordingly can and should resolve the issue now. To the extent any doubt remains, remand could be appropriate.

1. Nick was domiciled in Washington prior to his move to Florida. *See* Supp. Br. 21. Prior to their departure from Washington, Nick resided in Seattle. RA.59. His intention to leave Washington and ultimately move to New Jersey arose only by virtue of his marriage to Karen, who grew up in and had family there. RA.58-64. Prior to marrying Karen, Nick lived in Washington and held no present intent to leave.

2. The government does not dispute our showing that, under Washington law, the twins are entitled to benefits. Supp. Br. 24-28. Instead, the government contends that a remand to the agency would be necessary to determine the twins' status under Washington's intestacy law. Gov't Br. 37 n.9. But, because remand would simply be for an application of *state* law to fact—review of which is *de novo* in this Court—there is no purpose for such a remand. *Cf. United Food & Commercial Workers Int'l Union Local 400, AFL-CIO v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000) (federal agencies have no "special expertise" in interpreting state law). Because it

is not clear that "further administrative proceedings would serve a useful purpose" and "the record has been fully developed," there is no need for "additional investigation or explanation." *See, e.g.*, *Sierra Club v. U.S. EPA*, 346 F.3d 955, 963 (9th Cir. 2003). The government suggests there could be inquiry as to whether Nick intended to parent posthumously (Gov't Br. 37 n.9), but that fact is established in the present record. *See* Supp. Br. 28, 34.

3. If the Court believes that the status of Nick's domicile prior to his move to Florida is unclear on the face of the record (indeed, the government alternatively suggests it could have been Washington, California, *or* Colorado, *see* Gov't Br. 28 & n.4), Karen concurs with the government that a remand for further factual development would be appropriate. *See* Gov't Br. 36-37.

II. The Capato Twins Are Eligible For Benefits Under Florida Law.

Even if Nick were domiciled in Florida at the time of his death, the twins would still take in intestacy under the laws of that State, thus qualifying them for benefits. The government does not challenge our central contention—that Florida's intestacy laws are very broad and, literally read, provide intestacy rights to the twins. *See* Supp. Br. 28-30. Instead, the government claims that Florida law limits inheritance rights to heirs

born at the time of a decedent's death, and that Florida Statute Section 742.17(4) bars intestacy rights for posthumously conceived children. Both contentions are demonstrably wrong.[4]

1. The government's claim that the twins may not inherit in intestacy because "intestate inheritance rights vest at the time of death" (Gov't Br. 31), is incorrect. No doubt, Florida law does provide that "[t]he decedent's death is the event that vests the heirs' right to the decedent's intestate property." Fla. Stat. § 732.101. But that provision says nothing about whether later-born individuals may also assert a right to inherit. And *Williams v. Williams*, 6 So. 2d 275, 279 (Fla. 1942), offers no support to the government, as it simply notes that "[t]he word heir is *ordinarily* used to designate those persons who answer the description at the death of the testator." (emphasis added) (quotation omitted). An after-conceived child, like an after-born child, is admittedly not an ordinary situation.

Indeed, it clearly cannot be the case that Section 732.101 bars posthumously born children from inheriting: as the government admits, children who are conceived before but born after a decedent's death qualify for inheritance rights. Gov't Br. 32 (citing Fla. Stat. Ann. § 732.106). Section

[4] Notably, the government abandons the approach taken by the district court, which turned on reading a negative pregnant into Fla. Stat. § 732.106. *See* Supp. Br. 35-36.

732.106's after-born provision does not carve an exception to Section 732.101; it simply states that such individuals may "inherit intestate property as if they had been born in the decedent's lifetime." Fla. Stat. Ann. § 732.106. Nothing in Florida law precludes that same approach from applying to children, like the Capato twins, who are both conceived and born after a decedent's death.

In fact, there is good reason to think that a Florida court would do exactly that. The intestacy statute is designed to provide "justice and equity with the object of making such a will for the intestate as he would probably make," which is "to follow the lead of the natural affections and to consider as most worthy the claims of those nearest the heart of him who might have been the testator." *Sorrels v. McNally*, 105 So. 106, 112-13 (Fla. 1925). And Florida's probate provisions for pretermitted children echo this legislative design. "[I]f the will is silent as to after-born children the law will presume that failure to provide for them was through inadvertence or mistake rather than from design," and thus will provide rights to that child "by reason of the natural ties of blood and affection." *In re Hatfield's Estate*, 16 So. 2d 57, 59 (Fla. 1943).[5] These same considerations ap-

[5] These principles of Florida probate law, in turn, are aligned with commitments elsewhere in Florida law "to protect the interest and the welfare

ply here, indicating a Florida court would construe the broad language of the intestacy statute to encompass the Capato twins. There is little doubt that Nick's affections would lie with the children he sought to bear with Karen. *See* Supp. Br. 34.

2. The government cannot find support in the Domestic Relations Title, Fla. Stat. § 742.17. As we explained (Supp. Br. 31-32), the Probate Code and the parentage provisions of the Domestic Relations Title exist to regulate two very different subject matters: the passage of property and the legal recognition of the parent-child relationship, respectively. This provision should not be interpreted as controlling the issue of intestacy. *See id.*[6]

But even taking the government's contention at face value—that this "provision reflects a clear legislative intent that posthumously conceived children have neither inheritance rights nor any other claim on the paren-

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of the child." *Contino v. Estate of Contino*, 714 So. 2d 1210, 1213 (Fla. Dist. Ct. App. 1998) (per curiam) (quotation omitted).

[6] It is curious the government, on one hand, suggests that this provision of the Domestic Relations Title modifies the Probate Code, but on the other, rejects applying the Probate Code's definition of terms. Gov't Br. 33-34. Moreover, given that Section 742 does not define "claim" (*see* Fla. Stat. Ann. § 742.13), there is every reason to give that term the meaning that Florida has chosen. Doing so is far from "incongruous" with Section 742.17(4) (*see* Gov't Br. 34), as it explains precisely what "claims" are covered by the provision. It merely demonstrates that this section has no application to intestacy rights.

tal estate, unless provided for explicitly in a will" (Gov't Br. 33)—the Capato twins would still be entitled to take in intestacy. This is because they *actually were* provided for in Nick's will.

The government argues that because Section 742.17(4) requires a child be provided for in a will, it bars posthumously conceived children from inheriting intestate in all circumstances. *See* Gov't Br. 35. But that conclusion does not follow from the premise. That is because, in many circumstances, the intestacy law may be invoked even in the presence of a will. For example, if a will fails to dispose of the entirety of an estate, or if a will is somehow deemed inoperative, intestacy laws will be triggered. Indeed, Florida law makes clear that intestacy may coexist with a will: "Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed" by the intestacy law. Fla. Stat. § 732.101(1).

The best case for the government, then, is that Section 742.17(4) bars a posthumously conceived child from taking in intestacy *unless* there is a will to the contrary. Where there is a will that provides for the posthumously conceived child, Section 742.17(4) would render that child "eligible" to take for all purposes, including when circumstances require recourse to the intestacy laws.

Thus, as we explained (Supp. Br. 32-34), if the relevant question under Florida law is whether Nick provided for the twins in his will, then the twins plainly qualify to take in intestacy. Nick's will provided for children born "as a result of" his marriage to Karen, and extrinsic evidence confirms that his will must be read as providing for the twins. *Id.*

By footnote, the government quibbles that the Capato twins were not born "as a result of" Nick's marriage to Karen because he had died prior to their conception. Gov't Br. 35 n.7. This argument is trivial. The government does not dispute that the Capatos initiated the in vitro fertilization process before Nick died, nor does it dispute that the children resulted from those treatments. *See id.* at 9-11. And all evidence on record demonstrates that the Capatos initiated in vitro fertilization as a married couple, with the purpose of providing siblings to their naturally conceived son. *See, e.g.*, RA.65, 68, 79 (Testimony of Karen). The fact that Nick's death ended his marriage with Karen has no bearing on whether Karen's conception of the twins resulted from their marriage—it clearly did.

At most, the government's argument could indicate that the language of the will contains an ambiguity. But the government ignores our contention that, in construing the meaning of a will provision deemed ambiguous, a Florida court would look to extrinsic evidence. Supp. Br. 33-34.

And the extrinsic evidence is abundantly clear as to Nick's intent to provide the twins inheritance rights. *Id.* For example, through the IVF consent agreement, Nick stated that all children born from the process would be his "heirs" "in all respects and for all purposes (including, but not limited to descent of property)." RA.23. A Florida court would thus interpret his will as providing for the twins, satisfying any requirement under Section 742.17(4). The government's failure to engage on this point is telling.

III. Certification May Be Warranted.

Alternatively, certification may be warranted to either the Supreme Court of Washington or the Florida Supreme Court. Supp. Br. 37-38. Given the uniqueness of the state-law question at issue here, several courts have previously found certification appropriate in similar circumstances. *Id.*; *see also* Order Adopting Report and Recommendation, Mattison v. Comm'r of Soc. Sec., No. 05-cv-79 (W.D. Mich. Apr. 20, 2007) (ECF No. 16) (granting parties' Proposed Order and Stipulation Certifying Question of Law). The government does not disagree, at least with respect to Florida, concurring that if "the Court determines that the law is not clear, certification to the Florida Supreme Court might be appropriate." Gov't Br. 36.

CONCLUSION

For the reasons stated above, plaintiff-appellant requests that this Court (a) reverse the district court's decision below on the Capato twins' qualification as "children" for purposes of the Social Security Act, (b) vacate the SSA's decision below, and (c) remand for further proceedings consistent with this Court's determinations regarding domicile and the relevant state law. In the alternative, the Court should certify the state-law question to the appropriate state court.

Respectfully submitted,

/s/ Paul W. Hughes

Bernard A. Kuttner
KUTTNER LAW OFFICES
24 Lackawanna Plaza
Milburn, New York 07041
(973) 467-8300

Thomas P. Wolf
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Charles A. Rothfeld
Paul W. Hughes
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Plaintiff-Appellant

Dated: December 14, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Plaintiff-Appellant certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 4,100 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger;

(iii) is identical to the ten hard copies sent to the Clerk of the Court on December 14, 2012 via overnight courier service; and

(iv) has been scanned with Symantec Endpoint Protection and no virus was detected.

Dated: December 14, 2012

/s/ Thomas P. Wolf
Thomas P. Wolf
MAYER BROWN LLP

THIRD CIRCUIT RULE 28.3(d) CERTIFICATION

Pursuant to Third Circuit Rule 28.3(d), the undersigned counsel for Plaintiff-Appellant Karen K. Capato certifies that Charles A. Rothfeld and Paul W. Hughes are both members of the bar of this court.

Dated: December 14, 2012

/s/ Paul W. Hughes
Paul W. Hughes
MAYER BROWN LLP

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiff-Appellant certifies that the foregoing brief was served upon all counsel of record via the Court's electronic CM/ECF system on December 14, 2012.

The undersigned counsel further certifies that, on December 14, 2012, ten identical hard copies of the foregoing brief were provided to a third-party courier for overnight delivery to the Clerk of the Court.

Dated: December 14, 2012

/s/ Thomas P. Wolf
Thomas P. Wolf
MAYER BROWN LLP