

ATTACHMENT C
RESPONDENTS' ARGUMENT

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 10 **BEFORE THE**
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

11
 12 In the Matter of the Application for Death Benefits
 Payable on Account of Catherine Atkinson:

Case No. 2013-0458
 OAH No. 2013070202

13 JAMES C. ATKINSON,
 14 DANIEL W. ATKINSON, and
 AMANDA S. SCHMITT,

15 Respondents,

16 and

17 CHARLENE MOTA,

18 Respondent.

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 21 **I. RESPONDENTS' ARGUMENT**

22 Respondents DANIEL W. ATKINSON and AMANDA S. SCHMITT hereby submit
 23 the following argument in connection with Proposed Decision by the Office of Administrative
 24 Hearings dated May 22, 2014 ("Proposed Decision").

25 The entire crux of the Proposed Decision hinges upon finding that a writing by
 26 decedent, Catherine Atkinson, that was found in her night stand is clear evidence of her intent
 27 to name Charlene Mota ("Mota") as the beneficiary of her CalPERS benefits. This finding is
 28 flawed, is without legal support, and creates a dangerous precedent should the Proposed

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1 Decision be adopted.

2 As discussed more fully herein, the *only* time California courts have dispensed with the
3 requirement that the proper forms be filed with CalPERS or the relevant retirement board in
4 order to effect a beneficiary designation is when there is a clear manifestation of intent to
5 effect a beneficiary designation which must be evidenced by some overt affirmative conduct.
6 Here, there was no clear manifestation of intent or overt affirmative conduct. The Proposed
7 Decision to designate Mota as the beneficiary is erroneously based upon: (1) a writing that was
8 not complete, that continued to be changed as recently as a month before the Decedent's death,
9 and remained in the custody and control of the Decedent until her death; and (2) the self
10 serving testimony of Mota and her daughter that the Decedent had desired to name Mota as the
11 beneficiary. Neither of these alleged facts is sufficient to effect a beneficiary designation. The
12 Proposed Decision should not be adopted, and it should be found that the Decedent's CalPERS
13 benefits pass to her statutory beneficiaries (her children and Respondents herein) in
14 accordance with the section 21493 of the Government Code.

15 **A. The Writing Is Not Affirmative Evidence of Intent To Designate Mota As**
16 **the Beneficiary As it Never Left the Custody and Control of the Decedent.**

17 The Proposed Decision relies heavily, if not entirely, on the *Watenpaugh* decision in
18 finding that the writing left by the Decedent in her nightstand can qualify as clear evidence of
19 her intent to designate Mota as her CalPERS beneficiary. (*See generally* Proposed Decision at
20 ¶ 28-32.) The Proposed Decision's reliance on *Watenpaugh* is flawed as that case is materially
21 different than the case at bar.

22 In *Watenpaugh* the issue was whether or not strict compliance with beneficiary
23 designation forms needed to be complied with or whether or not a designation form executed
24 by the decedent but not mailed to the retirement department could qualify as effecting a
25 change in beneficiaries for retirement benefits. (*Watenpaugh v. State Teachers' Retirement*
26 *System* (1959) 51 Cal.2d 675.) The *Watenpaugh* Court found that the designation form was
27 sufficient to effect a change in beneficiaries. The Court found persuasive the fact that the form
28 was in the possession, custody, and control of the intended beneficiary, and therefore because

1 it was in the intended beneficiary's possession and control there was no question about the
2 decedent's intent to effect a change in beneficiaries. The Court reasoned:

3 It was further found that by bringing the designation home [to his wife] he
4 placed it under Plaintiff's [the wife's] control and in her possession, thereby
5 permitting and authorizing her to do whatever else might be necessary to carry
6 out his intention, including the filing of the designation with the retirement
7 system either during his life or after his death, and that he thus effected a present
8 revocation of the prior designation and a present nomination of plaintiff as
9 beneficiary." (*Id.* at 679.)

10 *Watenpaugh* was later followed in *Wicktor v. County of Los Angeles* (1960) 177 Cal.
11 App. 2d 390 where the court again found a change in beneficiary designation to be valid
12 where, although not received by the retirement board, there was evidence that the change in
13 beneficiary form was mailed to the board and lost, thereby providing clear evidence of the
14 decedent's intent to effectuate the change by disposing himself of possession and custody of
15 the form. (*Id.* at 406.). Ultimately, it is only after a decedent has relinquished possession and
16 custody of a writing purporting to effect a change in beneficiaries can it be clearly shown that
17 the decedent intended to, unconditionally, designate a new beneficiary.

18 Here, unlike *Watenpaugh* and *Wicktor*, the writing here was neither given by the
19 Decedent to Mota, nor was it mailed to CalPERS. As it was never in the possession, custody,
20 or control of Mota or any other third party, the Decedent retained the right to alter the writing,
21 and nominate another beneficiary as she saw fit. In fact, what we do know is that the same
22 writing that allegedly attempts to designate Mota as the beneficiary also designated another
23 third party as a beneficiary of other assets of the Decedent and that designation was revoked
24 by the Decedent just a month prior to the Decedent's death. (*See Proposed Decision* ¶ 21, 22.)
25 The writing shows, if anything, that it was not a final expression of her intent to distribute her
26 property but was instead in constant flux. Had the Decedent intended to affirmatively and
27 completely effect a change in her beneficiary designation she would have mailed it or given it
28 to Mota, but she did not.

29 If the Proposed Decision were to be adopted then this board would set a dangerous
30 precedent of allowing any writing in any form to qualify as a writing sufficient to constitute a
31 beneficiary designation form: If an individual wrote a purported change in beneficiary on a

1 napkin after a couple of cocktails at a dinner party, put the napkin in his pocket and died that
2 night the napkin would qualify; if an individual was at work and got a promotion and in a
3 moment of affirmation for her boss wrote a note on her computer designating her boss as the
4 beneficiary and then died on the way home from work in a car accident the note on the
5 computer would qualify; or, in our case, if the Decedent wrote a note one night and left it her
6 night stand and later died without ever taking any other action with respect to the note, it too
7 would qualify. This would be a dangerous precedent indeed, and would fly in the face of
8 *Watenpaugh* and its progeny which have only found writings to effect a change in beneficiary
9 form when there is some affirmative overt act in furtherance of the writing demonstrating the
10 decedent's intent to make the writing their final expression of intent, such as relinquishing
11 possession and custody of the writing to a third party. The rationale for this rule is sound; as
12 long as a person maintains custody and control over a document there always exists the
13 potential that the writing was not intended to be an individual's final expression of his or her
14 intent. People reserve the right to change their minds, and the rule established in *Watenpaugh*
15 is in accord with this principle and reality. Absent such affirmative and overt evidence of
16 intent, the formal requirements that a beneficiary designation be effected by a "writing filed
17 with the board" cannot be dispensed with. (*Watenpaugh*, supra.)

18 The writing at issue here is not sufficient to effect a change in beneficiary, and for that
19 reason the Proposed Decision should not be adopted.

20 **B. The Only Other Evidence of the Decedent's Alleged Intent to Name Mota as**
21 **the Beneficiary is Self-Serving Testimony and Is Insufficient to Establish**
22 **The Intent Required to Dispense With the Formal Requirement That A**
Writing Be Filed With the Board.

23 In addition to the writing, the Proposed Decision also relies upon statements made by
24 Mota and her daughter that the Decedent told them that she intended to name Mota as her
25 beneficiary for the CalPERS benefits. (Proposed Decision at ¶ 30.) Such evidence is nothing
26 more than self-serving testimony of Mota and her daughter, and California Courts have
27 cautioned that such evidence should not be heavily relied upon and that without more such
28 evidence is insufficient to effect a change in beneficiaries. As was stated in *Gallaher v. State*

1 *Teachers Retirement System* (1965) 237 Cal. App. 2d 510, 518:

2 Courts have unanimously held that a mere intention to change the beneficiary,
3 without any acts by which the insured shows his intention is insufficient to
4 effect such change...the **testimony of**, or letters written to, the **substituted**
5 **beneficiary is the weakest form of evidence that the insured attempted a**
6 **change of beneficiary**, since such evidence **lends itself easily to fraud** and the
insured may also, for one reason or another, inform such person that he
attempted a change of beneficiary when he actually never contemplated any
such change.

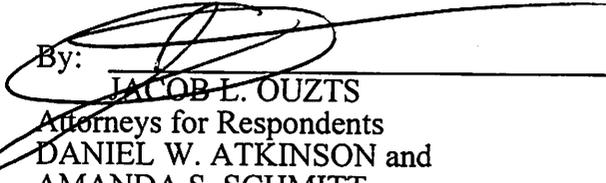
7 The testimony of Mota and her daughter is not sufficient to prove the Decedent's intent
8 as made clear by *Gallaher, Watenpaugh*, and every other case that has previously decided
9 such issues. This Board should avoid setting a dangerous precedent to the contrary.

10 **II. CONCLUSION**

11 Because the evidence submitted (the writing and the testimony of Mota and her
12 daughter) is insufficient to show clear evidence of intent and an overt act in furtherance of the
13 intent to effect a change in beneficiaries, the Proposed Decision should not be adopted, and the
14 Board should adopt its own decision that the Decedent's CalPERS benefits are to be
15 distributed to the Decedent's statutory heirs, the Respondents.

16
17 DATED: August 6, 2014

WAGNER KIRKMAN BLAINE
KLOMPARENS & YOUMANS LLP

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19 By: 
20 JACOB L. OUZTS
21 Attorneys for Respondents
DANIEL W. ATKINSON and
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Case Name: Matter of Atkinson, et al.
Court: OFFICE OF ADMINISTRATIVE HEARINGS
Case No.: OAH Case No. 2013070202/Agency Case No. 2013-0458

I am a citizen of the United States, employed in the City of Mather and County of Sacramento. My business address is 10640 Mather Blvd., Suite 200, Mather, CA 95655. I am over the age of 18 years and not a party to the above-entitled action.

On August 6, 2014, I served the following: Letter to Cheree Swedensky and Respondents' Argument

BY FIRST CLASS MAIL on the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail. I am familiar with the ordinary business practices of Wagner Kirkman Blaine Klomprens & Youmans LLP for collection and processing of outgoing mail with the United States Postal Service at the aforementioned place of business and that the above-entitled document was placed in a sealed envelope and deposited for collection and mailing on the date stated above, following such ordinary practices and in such manner as to cause it to be deposited with the United States Postal Service that same day in the ordinary course of business, addressed as indicated below.

Addressed as follows:

Name of Counsel:	Attorneys for:
Preet Kaur Staff Attorney CalPERS P. O. Box 942707 Sacramento, CA 95380	Counsel for CalPERS

Executed on this August 6, 2014, at Mather, California.

(Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Dorothea E. Nesbitt



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Case Name: Matter of Atkinson, et al.
Court: OFFICE OF ADMINISTRATIVE HEARINGS
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Addressed as follows:

Name of Counsel:	Attorneys for:
James C. Atkinson	
Daniel W. Atkinson	
Charlene Mota	
Charlene Mota	
Amanda Schmitt	

Executed on this August 6, 2014, at Mather, California.
 (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Dorothea E. Nesbitt

