SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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Case Number: PTR-15-299196

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TRUST ORDER

IN THE MATTER OF THE IRENE LIEBERMAN REVOCABLE TRUST

001P05626577

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

In the matter of: The Irene M. Lieberman Revocable Trust, dated June 16, 2000 and Amended and Restated on October 1, 2010	Case Nos. PTR-15-299196 **ORDER GRANTING CROSS-PETITION TO ASCERTAIN BENEFICIARIES AND INSTRUCT TRUSTEE** Date: October 18, 2016 Time: 9:00 a.m. Dept: Probate Judge: Hon. Peter J. Busch

Michael Lieberman's Cross-Petition To Ascertain Beneficiaries And Instruct Trustee (the "Cross-Petition") came on regularly for hearing on October 18, 2016, at 9:00 a.m., in Department 204 of the above-entitled Court, the Hon. Peter J. Busch, presiding. The matter was heard together with Michael Lieberman's Cross-Petition For Finding That Petitioners, David And Paula Lieberman Filed Their Will Contest Without Probable Cause, filed in Case No. PES-15-298949. (The Court refers to the two cross-petitions as the "Cross-Petitions.") David and Paula Lieberman appeared through their counsel Steven E. Formaker of Freedman + Taitelman, LLP. Michael Lieberman appeared through his counsel Andrew Zabronsky and Naznin Bomi Challa of Evans, Latham & Campisi.

Having reviewed and considered the papers filed in support of and in opposition to the

Cross-Petition, as well as the argument of counsel at the hearing, and for the reasons set forth herein and in the papers filed in support of the Cross-Petition,

The Court finds and orders as follows:

1. The contests filed by David and Paula Lieberman of (1) the instrument creating the Irene M. Lieberman Revocable Living Trust dated June 16, 2000 (the "Trust"), and (2) the complete restatement of the Trust dated October 1, 2010 (the "2010 Restatement") were brought without probable cause within the meaning of Probate Code section 21311, subdivision (a)(1) (all unspecified statutory references are to the Probate Code); and

2. Accordingly, the Cross-Petition is GRANTED.

PROCEDURAL BACKGROUND

On October 8, 2015, David and Paula Lieberman ("David and Paula") filed a petition (the "Trust Contest") that, among other things, contested the instrument creating the Irene M. Lieberman Revocable Living Trust dated June 16, 2000 (the "Trust") and the complete restatement of the Trust dated October 1, 2010 (the "2010 Restatement"). On January 20, 2016, Michael Lieberman ("Michael") filed a cross-petition seeking a determination that the Trust Contest was filed without probable cause. On December 2, 2015, David and Paula filed a petition that, among other things, contested the Will (the "Will Contest"). The Court refers to the Trust Contest and Will Contest collectively as the "Contests." On January 20, 2016, Michael filed the Cross-Petition, seeking a determination that the Will Contest was filed without probable cause.

At a hearing on June 7, 2016, the parties reported that they had reached a partial settlement pursuant to which the Contests and a companion civil action for elder abuse would be dismissed. The settlement did not resolve the Cross-Petitions. The parties stipulated at the June 7 hearing to submit the Cross-Petitions, and the question whether the Contests were filed with probable cause, for determination by the Court on papers and oral argument, pursuant to an agreed briefing schedule. The parties then did so and, as indicated, the Court heard the matter on October 18, 2016.

DISCUSSION

A.

The longstanding general rule is, "No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator." (*Burch v. George* (1994) 7 Cal.4th 246, 254.) In proposing and recommending adoption of the current No Contest Clause Law (§§ 21310, et seq.) (the "Law"), the California Law Revision Commission explained that this "general policy of existing law would remain unchanged." (37 Cal. L. Revision. Comm'n Reports (2007) 359, 392.) "As under existing law, a no contest clause should be enforceable unless it conflicts with public policy." (*Id.* at 391) The Commission, however, recommended certain "improvements" to the Law, including that "[t]he probable cause exception that [already] applies to many direct contests should be extended to all direct contests." (*Id.* at 392.) Accordingly, the Law now provides that a "no contest clause shall ... be enforced" if it is determined that a contest was "brought without probable cause." (§ 21311(a).)

Section 21311, subdivision (b) states that, for purposes of section 21311, "probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery."

Because probable cause requires "a reasonable likelihood that *the requested relief will be granted*," the Court must make the probable cause determination in light of the requirements for invalidating an instrument on grounds of undue influence. "[T]he right to testamentary disposition of one's property is a fundamental one," "most solemnly assured by law." (*Estate of Fritschi* (1963) 60 Cal.2d 367, 373.) Our Supreme Court has thus stressed "the stringency with which [the courts] protect the testamentary disposition against the attack of undue influence." (*Ibid.*) Given "the strength of the presumption in favor of the will" (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182), the law imposes a "heavy burden of proof" on a contestant (*Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 545-546). "[U]ndue influence must be proven by clear and convincing evidence" (*ibid.*), that is, by evidence "sufficiently strong to command the unhesitating assent of every reasonable mind" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919).

In addition, what the contestant must prove is also exacting. "The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of a pressure which overpowered the mind and bore down on the volition of the testator *at the very time the will was made*." (*Hagen v. Hickenbottom, supra*, 41 Cal.App.4th at p. 182 [citations and internal quotations omitted, emphasis added]; see also *Rice v. Clark* (2002) 28 Cal.4th 89, 96 ["Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency"].)

Accordingly, the parties' submissions require this Court to determine whether the facts known to David and Paula at the time they filed the Contests would cause a reasonable person to believe they were reasonably likely to be able, after an opportunity for further investigation and discovery, to meet the stringent requirements of proving undue influence.

B.

The physical and mental status of Irene Lieberman ("Irene") is a key indicator of the likelihood of the Contests succeeding. In cases where the decedent was in a weakened condition mentally or physically, it may take "but little" to unduly influence her. (*Estate of Bucher* (1941) 48 Cal.App.2d 465, 474.) But as our Supreme Court has said, "It is no easy thing to overpower the mind of a normal person in full possession of his senses .... [¶]This can happen *but rarely* in cases of persons of normal strength of mind in the full possession of their faculties, unimpaired by infirmity. The evidence which would justify the conclusion that it had occurred in any particular case of that character would have to be *very strong indeed*." (*In re Anderson's Estate* (1921) 185 Cal. 700, 707[emphasis added.])

All the people who knew Irene best described her as an intelligent woman, in full possession of her faculties, and in good health in both 2000 and in 2010, and, indeed, up until her final illness in 2015. (Dr. Gendelman Decl., ¶9; Compendium of Declarations ("COD") pp. 2, 4, 7, 17, 37-38, 47, 54, 60, 65, 71-72, 74 [Hon. Young, ¶¶6, 14; Copsey, ¶¶4-5; Deklaita, ¶6; Centurion, ¶15; Wise, ¶13; Mack, ¶4; Clements, ¶4; Joo, ¶7; Chenault, ¶9; Marcelle Lieberman, ¶5]). And they all describe a woman who, though always kind, was unusually strong willed, and could not be

pushed around by anyone. (COD pp. 2, 7, 17, 20-21, 23, 26-27, 32, 37-38, 41-42, 44-45, 54, 60, 64, 67-68, 71-72, 74 [Hon. Young, ¶¶6-7; Copsey, ¶4; Deklaita, ¶5; Yeager, ¶¶6-7; Prado, ¶3; Martin, ¶4; Sternberg, ¶3; Centurion, ¶15; Dr. Botti, ¶¶12, 14; Wise, ¶3; Mack, ¶4; Clements, ¶4; Joo, ¶3; Henle, ¶¶6, 10; Chenault, ¶9; Marcelle Lieberman, ¶5]; Montana Decl., ¶6). Margaret Roisman, Irene's attorney for 15 years, summed up the sentiments of all the declarants when she described Irene as "a vivacious and intelligent woman who knew and spoke her mind, and who had *none* of the meekness of personality or weakness of body or mind that makes some people susceptible to undue influence." (Roisman Decl., ¶5.)

The perceptions of those who knew Irene best are relevant because David and Paula knew the same Irene as everyone else. The facts they knew at the time they filed the Contests contradict the allegation in their Contests that Irene's "physical and mental weakness" made her susceptible to undue influence. (11/20/2015 Trust Contest, ¶15 and 22(a).) David and Paula knew that, at a minimum, Irene was a "normal person in full possession of [her] senses" (*In re Anderson's Estate*, *supra*, 185 Cal. at 707) when she executed the instruments that they contest. They knew that she was fully capable of resisting their own efforts to influence her donative and testamentary plans through their withholding of affection and visits and repeated insistence on her giving them what they incorrectly viewed as their rightful share of her wealth. Because it is generally difficult to overpower the mind of such a person, the falsity of their allegation about Irene's supposed "physical and mental weakness" substantially undermines David and Paula's claim of probable cause. That is, it is not reasonably likely that they would be able to substantiate their undue influence claim.

C.

The nature of David and Paula's relationship with their mother also greatly undermines their claim of probable cause. As David and Paula have acknowledged, over the last 28 years of her life, Irene's relationship with David and Paula became more and more estranged. In 1996, Paula told Irene that their "poor relationship" "gets worse" "every year" and had become "intolerable to [Paula]." (Exh. 18.) Paula acknowledged that this estrangement continued through the creation of the Trust in 2000, writing shortly thereafter that, as "the years pass," she and Irene

have only become "further and further estranged." (Exh. 19.) Likewise, around the time of the 2010 Restatement, Paula acknowledged her "estrangement" from her mother, lamented "waiting *so many years* to have a relationship with [Irene]" only to realize that "nothing has changed," and told Irene, "David and I talk frequently about how much we have lost [ ] not being able to spend time with you." (Exh. 21, emphasis added.) David suggested that his "estrange[ment]" from his mother was so deep that "[i]t is not indicative of proper thinking for my mother to expect a mother's day blessing from me." (Exh. 26.) In 2013, David said that he and his mother had been estranged for "20 years," though according to Irene it was more like "26 years." (Exh. 27.)

The estrangement between Irene and David and Paula was often punctuated by what Irene, in a model of understatement, described in the 2010 Restatement as their "poor treatment" of her. (Exh. 1, p. 3.) David and Paula nevertheless insist that they "never" treated their mother poorly "as [they] understand the term" (Exh. 78, pp. 31-32.) This however, reflects, a worldview that is irrelevant to the Court's probable cause analysis which, as noted, focuses exclusively on what a "*reasonable person*" would make of the "*facts*" known to David and Paula (§ 21311(b).) Here, a reasonable person would conclude that the things David and Paula said and did to their mother—which they haven't denied, and which, for the most part, were established through their own words—create a picture of a tremendously destructive relationship.

In any event, David and Paula do not dispute that they were fully aware of how hurt and disappointed Irene was in what *she* saw as the poor way they treated her. (See e.g., Exh. 33, p. 9 [after complaining of Paula's poor treatment of her, Irene said: "You make me so very unhappy. Stop please!!!"]; see also, Exh. 1, p. 3; Exh. 33, pp. 15-16, 18, 19, 22, 24-25; Exh. 7; Exh. 8; Exh. 9; Exh. 23; Exh. 37; and, Exh. 40) They also do not dispute that their poor treatment of Irene was a basis for her decision to plan her estate in the way she ultimately did. (Exh. 1 p. 3; Exh. 8; Exh. 73) In addition David and Paula were aware how disappointed Irene was that (1) they felt so entitled to her money, and (2) despite their multiple degrees from elite universities, Irene had to support them throughout their adult lives. (Exh. 7 ["Your father would be horrified by your behavior. He never expected you to sit around waiting to have the world take care of you.... He <u>didn't</u> expect you to not <u>work</u>. <u>Work</u>!!"] emphasis in orig.; see also, e.g., Exhs. 23, 30, 40, 73.)

David and Paula's hurtful behavior toward their mother was in part a deliberate attempt to manipulate her feelings for their financial ends. For example, both David and Paula told Irene that, although they were "saddened" to supposedly "have to" do so, they refused to attend family functions such as the 70th birthday celebration for Irene's live-in housekeeper (who was like a second mother to them) until, with the assistance of "external advisors," Irene transferred to them an acceptable share of what they called "family assets," but which were really all Irene's assets. (Exh. 12.)

"'Undue influence' means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will *and results in inequity*." (Welf. & Inst. Code § 15610.70, emphasis added; Prob. Code, § 86.) Between the Trust and a $1 million irrevocable trust she established for them in 2012, Irene left some $10 million to David and Paula despite her estrangement from them and their poor treatment of her. A reasonable person would likely conclude that this amount was substantially more than a reasonable mother would have left them at that point in their relationship. Such a reasonable person would not believe it reasonably likely that David and Paula could establish that their gift was inequitable.

David and Paula argue that that whatever hurt and disappointment Irene felt at their behavior, Irene stated that she loved all her children. But as they knew when they filed the Contests, Irene made that statement in the context of explaining why she was leaving them substantially less than Michael. (Exh. 1, p. 3.) And David and Paula were privy to many similar statements showing that Irene separated her love for them from her disappointment and hurt in how they treated her. (See, e.g., Exh. 37 ["I love you but I think you don't know how a daughter should treat a mother.... Enough after all these years. Go live and abuse someone else"]; Exh. 33.p. 18 ["my love is for all my children except 2 give me a bitch o[f] a time"].) David and Paula also argue that they were on a better footing with their mother by the time she died, evidenced in part by their spending time with her in her final illness. Even if that were true, however, it is irrelevant to the validity of her earlier testamentary plans, which were completed prior to any arguable thaw in relations. In short, David and Paula's arguments do not persuade the Court to a different conclusion.

D.

David and Paula claim they knew numerous facts that, taken together, strongly suggest that undue influence occurred. The Court addresses many of these alleged facts in the sections that follow. As discussed here, however, because the estrangement and extreme poor treatment that the Court has found explain Irene's estate-planning choices so well, it is unlikely if not impossible that any combination of circumstances could negate the presumption that Irene's estate plan represented the free choice of an intelligent mind.

Although a contestant may attempt to prove undue influence with circumstantial evidence, "proof of circumstances consistent with undue influence is insufficient—the proof must be of circumstances inconsistent with voluntary action." (*Estate of Mann* (1986) 184 Cal.App.3d 593, 607, citations omitted.) This means that even where "[c]ircumstances have been proven which accord with the theory of undue influence," "[t]his does not amount to proof [of undue influence]" unless the proven circumstances are "inconsistent with the hypothesis that the will was the free act of an intelligent mind." (*Estate of Hopkins* (1934) 136 Cal.App. 590, 606 [italics omitted]; see, e.g., *David v. Hermann* (2005) 129 Cal.App.4th 672, 686 ["There is no rational explanation for this sudden shift in attitude ... other than Wendy's falsely poisoning Jane's mind"].)

Here, the facts David and Paula knew when they filed the Contests include all the stomach-churning facts relating to their estrangement from and mistreatment of Irene. These facts are consistent with Irene's explanation—both in the 2010 Restatement and to David and Paula—as to the reasons for her estate plan. (Exh. 1, p. 3; Exh. 8 ["At this point your behavior toward me as your mother is the factor influencing your inheritance and any further allocations to you"].) Thus, even if *other* facts David and Paula knew were in "accord with the theory of undue influence," the Court does not believe it reasonably likely that David and Paula knew facts that would lead a reasonable person to conclude they could establish that the *overall* circumstances are "inconsistent with the hypothesis that the will was the free act of an intelligent mind." (*Hopkins, supra*, 136 Cal.App. at p. 606.) That is because these other facts would not negate the hypothesis that Irene designed her estate plan in the way she did for precisely the reason she said she did: David and Paula's poor treatment of her.

E.

David and Paula argue they had probable cause on the issue of Irene's vulnerability because she was "elderly," "had only a high school education," "had been taking anti-depressants," and had her "truly independent sources of advice," "such as her former accountant, her long-time attorney, and her brother Stanley," "stripped away" from her by Michael. (Opposition Brief ("Opp."), 10:12-20.) The facts they knew when they filed the Contests, however, do not support this claim.

When she executed the 2000 Trust, Irene was 68 years old and mentally and physically strong; she was not so "elderly" as to raise the suspicions of a reasonable person. Nor is it true that her accountant, brother, and attorney had been "stripped away" from her by Michael. As of the time she created the Trust, both her accountant and her brother were still working for her. And although her former attorney had resigned, Irene retained attorney Sidney Rudy, name partner of the former Hanson, Bridgett, Marcus, Vlahos & Rudy (now Hanson, Bridgett LLP), in his place. Moreover, in connection with the Trust, Irene retained Margaret Roisman, a partner at Crosby, Heafey, Roach & May, who had extensive estate-planning experience and a reputation that even David and Paula acknowledge was top notch. (Exh. 20.) And before Irene executed the 2010 Restatement, she added James Brosnahan of Morrison Forrester to her roster. Although David and Paula claim that each of these attorneys was or is a co-conspirator with Michael and betrayed his or her client, it is simply not credible that these distinguished independent attorneys would risk their careers by doing so, no evidence whatsoever supports the claim, and a reasonable person could not so conclude. "A will cannot be overturned on the mere speculation or suspicion that undue influence may have been used to procure it." *Estate of Niquette* (1968) 264 Cal.App.2d 976, 980. In addition, Irene had trusted advisors from all quarters, including counselors, psychiatrists, psychologists, priests, and many close friends.

David and Paula's claim that Irene had "only a high school education" is also contradicted by the facts they knew. Indeed, Irene attended business school after graduating from high school. (Michael's Reply Decl., ¶4.) In any event, susceptibility to undue influence is not measured by educational degrees, but by mental and physical fitness, wits, and strength of personality. As David and Paula knew when they filed the Contests, Irene had those attributes.

Along the same lines, the Court finds that Paula's bare statement that "my mother was taking anti-depressants"—without specifying what she was allegedly taking, in what dose, how regularly or intermittently, over what period, and, what effects, if any, the medication purportedly had on Irene that left her susceptible to undue influence—is insufficient to arouse the suspicions of a reasonable person. It does not suggest anything more than what Irene's doctor testified to—that "[i]ntermittently, Irene took low doses of anti-depressants ... [that] do not cause cognitive decline" (Dr. Gendelman Decl., ¶5).

In sum, a reasonable person would not think it reasonably likely that David and Paula would be able to prove that Irene was vulnerable to undue influence.

F.

David and Paula claim that Michael's status as Irene's son and business manager gave him the ability to control Irene because he was "an authority figure to Irene," "Irene was, by many accounts, afraid of him," and he "limited her ability to spend her own money." (Opp., 10:21-11:2.)

Although Irene and Michael executed a Management Agreement that gave Michael broad authority to run Irene's business, neither it nor she gave him authority over her personal life or spending. She had credit cards, a checkbook, and millions of dollars in the bank, and did—and spent—as she pleased. Irene was not, "by many accounts, afraid of [Michael]." To the contrary, all the "accounts" contained in the evidence presented showed that Irene was not afraid of or controlled by Michael. (8/5/2016 COD p. 2, 20, 21, 32, 67 [Hon. Young, ¶¶6-7; Yeager, ¶¶7-8; Sternberg, ¶3; Henle, ¶4].) Although David and Paula claim that unnamed "people" *told* Paula that Michael dominated Irene and that Irene feared him (Paula's Decl., ¶31), the Court rejects that claim for the reasons discussed below.

Immediately upon the filing of the Contests, Michael propounded discovery that, separately for each material allegation of the Contests, required David and Paula to set forth each fact, identify each witness, and produce each document that supported each allegation. (Exhs. 77-80.) In effect, the discovery required David and Paula to set forth all "facts known to the contestant" "at the time of filing a contest" (§ 21311(b)) that supported any of their allegations. If someone told David and Paula that Michael controlled Irene and/or she was afraid of him, the discovery required them to

disclose that fact, identify the witness and set forth the details of what the person told them. Their responses did none of that. (Exh. 78.) Their failure to identify the "people" at issue or provide the details of what they allegedly said—either in their discovery responses or in their evidence on this petition—severely limits the evidentiary value of their hearsay (if not double or triple hearsay) statements. The Court cannot determine whether the *facts* they might testify to (not their beliefs or conclusions) would lead a *reasonable person* to conclude that David and Paula were reasonably likely to prevail at trial. A reasonable person would give negligible weight to such vague statements of unnamed sources.

David and Paula also submit letters (Paula's Exh. N) from two women on the periphery of Irene's circle of friends. Roberta Benvenuto acknowledges that "Irene never discussed her family business with us much at all." (Even so, she knew that "Paula and David were not around for so many years" and "were estranged for so long," whereas "Irene was close to Michael.") Likewise, Carolyn Carr was but a casual friend in whom Irene did not confide. (Michael's Reply Decl., ¶46; Copsey Reply Decl., ¶14.) A reasonable person would not attribute significant weight to their statements.

Under the circumstances known to David and Paula when they filed the Contests, a reasonable person would not believe that that they were reasonably likely to be able to demonstrate at trial that Michael's position as son and business manager rendered Irene a vulnerable victim.

G.

David and Paula claim they had probable cause to believe that Michael actively participated in Irene's estate planning because "Entries on Irene's calendars … indicate that meetings with Roisman were planned to involve Michael and/or take place at his office," "the will and trust were executed at Michael's office," and "Michael had drafts of the will on his computer." (Opp., 12: 3-19.)

David and Paula submitted two entries from Irene's calendar in support of this argument. (Paula's Exhs. H and I.) One shows a meeting between Irene and her attorney, and Michael and his attorney, scheduled for October 5, 2010. (Paula's Exh. I.) But that date was after Irene had already completed her estate plan: her final will and trust instrument were executed on October 1, 2010, as

David and Paula knew when they filed the Contests. (Exhs. 1 and 46.) Thus, as David and Paula knew, the meeting could not have concerned Irene's estate planning. David and Paula knew that Michael runs a large and organizationally complex business for Irene. A reasonable person would understand that such a business often encounters legal issues that the business's owner, manager, and counsel need to discuss. Such a person would not believe that such a meeting, after Irene's estate planning was completed, meant that Michael was actively participating in Irene's estate planning.

The other calendar entry, dated September 16, 2008, shows a meeting between Irene and Roisman at the "Broadmoor" (Paula's Exh. H), one of the residential hotels that Irene owns, which is located next door to the main office of her business. Although Michael works in that office, Irene considered it to be her office. Even assuming the meeting with Roisman took place in the office rather than at the Broadmoor, there is nothing inherently suspicious about Irene meeting with her attorney at Irene's office, which has a conference room where the two can meet privately. (Michael's Reply Decl., ¶42.) There is no evidence that Michael was present for, let alone participated in, that meeting. Accordingly, a reasonable person would not consider the calendar entry to be suggestive of active participation by Michael in Irene's estate plan.

Similarly, the mere fact that Irene executed the 2010 Trust in the private conference room of her office does not suggest that Michael was present at the execution, much less that he was involved in the prior estate planning. A reasonable person would likely conclude the location was simply more convenient for Irene than Ms. Roisman's Oakland office. Similarly, the fact that people who worked at the office acted as witnesses to the Will—which, as a pourover will, discloses nothing about Irene's distributive scheme (Exh. 46)—would likely suggest to a reasonable person that the choice of witnesses was one of convenience. And in any event, the very limited involvement of the witnesses in Irene's estate plan does not suggest any involvement by Michael. The location of meetings and choice of witnesses depend entirely on impermissible speculation and suspicion to suggest anything at all about undue influence.

David and Paula claim that, shortly after their mother died, their cousin Drew Axelrod told them that, in 1997, he had seen multiple drafts of a will and trust for Irene on Michael's computer.

(Paula's Decl., ¶24.) They proffered a purported email from Drew dated September 18, 2015, shortly before they filed the Contests, in which he claimed he read the draft will and trust and recalled that he was not a beneficiary, but Irene's friend Carol Copsey and some cousins on the other side of the family were; he disclaimed recalling anything else about the terms of the trust. (Exh. 42.) They further claim, however, that when they showed Axelrod the 2000 Trust, he told them that its terms matched exactly the terms of the draft trust he had seen on Michael's computer. (Paula's Decl., ¶24; Axelrod Decl, ¶¶7-8.) David and Paula claim this shows they had probable cause on the issue of Michael's alleged active participation in Irene's estate plan.

Even assuming Axelrod's email and testimony were admissible, the Court finds that David and Paula knew he lacked credibility. As David and Paula knew, Axelrod harbors a deep bias against Irene and Michael. He blames Irene for ruining his mother's life and stealing his rightful inheritance. And he has a longstanding vendetta against Michael, whose reputation he has threatened to destroy. Second, David and Paula have referred to Axelrod as a "nutball" (Exh. 67), lacking credibility, and prone to inventing stories to, as they put it, "start shit" (Exh. 70). Third, no facts corroborate Axelrod's story. Fourth, his story shifted between his purported email, in which he disclaimed all but a cursory recollection of the alleged draft trust, and his declaration, in which he purported to have near perfect recall of the smallest details of a document he claims to have read almost 20 years earlier and never mentioned since. Fifth, his story is implausible. To be true, Ms. Roisman would have had to have been "in" on the fraud: she would have had to take a will and trust pre-drafted by the primary beneficiary and pass it off as one accurately reflecting Irene's wishes. A reasonable person would not credit Axelrod's story or think it reasonably likely that a trier of fact would credit it.

Even assuming Axelrod's email and testimony are admissible and credited, they do not assist David and Paula's claim to probable cause. The email—which Paula says "summariz[ed]" an earlier conversation they had had (Paula's Decl., ¶24)—states only that the draft instrument "left some [unspecified amount of] money to Carol Copsey and your Zukowski cousins," and that Axelrod "was not mentioned." (Paula's Exh. F.) It does not state anything about what David and Paula were to receive, nor even suggest their gifts were less than what Michael was receiving. The

email thus does not support David and Paula's argument that Ms. Roisman merely "mimicked the documents Michael had drafted in 1997." (Opp., 7:4.) There is no evidence that Ms. Roisman ever received whatever was on Michael's computer, let alone that Michael ever even talked to Ms. Roisman about his mother's estate plan or had any ability to influence the outcome of the private, attorney-client discussions between Ms. Roisman and her client.

Paula's declaration goes on to assert, "I *later* showed Drew the [2000 Trust instrument]" ... [and] Drew told me that it matched what he recalled seeing on Michael's computer in 1997." (Paula's Decl., ¶24; see also, Axelrod Decl., ¶8.) Paula does not say this occurred before she and David filed the Contests, and since she did not have the 2000 Trust instrument when she filed the Contests (Zabronsky Decl., ¶10), it could not have. Whatever Axelrod told Paula after being shown the 2000 Trust could therefore have nothing to do with "the facts known to the contestant" "at the time of filing the contest," and is irrelevant to the question before the Court. Moreover, having said that he remembered nothing about the terms of what he saw on the computer concerning David and Paula's shares of any estate, Axelrod's later contrary statement would have no credibility to a reasonable person (especially in light of the credibility issues discussed below.

In sum, a reasonable person would not believe, based on the facts David and Paula knew when they filed the Contests, that they were reasonably likely to prove, after an opportunity for further investigation and discovery, that Michael actively participated in Irene's estate planning.

H.

David and Paula claim that Michael's "tactics" would make a reasonable person believe they could prove undue influence because he purportedly took "control of Irene's financial life, and through his old girlfriend Carol Copsey, controlled Irene's interactions with others," "regularly used intimidation as a tactic," had "draft wills and trusts [] on his computer," "received fractional interests in four of the properties," and received generous benefits under the Management Agreement. (Opp., 11:3-12.)

The Court has already indicated that although Michael ran Irene's business, he did not "control" her personal financial decisions. Likewise, the Court has explained that the facts known to David and Paula do not support the conclusion that Michael intimidated his mother or had input

into the content of her estate planning documents. Nor would a reasonable person believe that Michael's receipt of small "fractional interests" in some of Irene's properties suggests he employed inappropriate "tactics" to unduly influence Irene; indeed, here, that common estate-planning technique (Price Decl., ¶6) was used 12 years *after* Irene created the Trust and two years *after* she executed the 2010 Restatement, and so does not credibly suggest that these instruments were not the product of Irene's wishes.

David and Paula claim that one of Michael's tactics involved Carol Copsey, who Michael dated for a couple of years in the 1980's. Because Irene was recently widowed when Michael and Copsey broke up, Copsey invited her to lunch to console her. The two became friends, and remained so for 27 years. (Copsey Reply Decl., ¶3.) David and Paula claim "[t]hey knew that Michael had installed his former girlfriend as Irene's 'new best buddy,' giving him the ability to keep control over his mother's interactions with other family members." (Opp., 2:18-19.) The Court rejects the claim. At the time they filed the Contests, David and Paula knew that Irene was an extremely social woman with many friends that *she* chose; she was hardly a lonely woman who could be manipulated into taking on a new best friend. They also knew that for many years after Michael and Copsey broke up—while Irene and Copsey were developing a close relationship—Michael and Copsey weren't speaking to each other. (Michael's Reply Decl., ¶29.) No reasonable person—not under the spell of David and Paula's warped world view—would suspect that Copsey, a partner at the Gordon & Rees law firm, would dedicate 27 years of her life to pretending to be Irene's friend in order to promote the interests of the man who had just broken up with her, to whom she wasn't talking, who went on to have a long-term relationship with one woman, and, after that, went on to meet, marry, and have children with his wife.

David and Paula also claim that Copsey, a busy professional, was with Irene so often that they could not meet with her alone. That claim is not plausible. It is in any event contradicted by Paula's assertion that she regularly stayed with Irene at her vacation homes in Palm Desert and Lake Tahoe, for as long as a month at a time. (3/10/16 Paula Decl., ¶5; Exh. 78, p. 31). Copsey had never been to Irene's Palm Desert home before Irene's estate planning was complete. She visited the Lake Tahoe home only sporadically, for a weekend at most (Copsey's Reply Decl., ¶8).

David and Paula cut short the time they had alone with Irene, and they have only themselves to blame for not having more of it.

David and Paula complain the Management Agreement was too generous to Michael in that it provided he would receive a potentially large termination bonus after Irene's death. (Opp., 2:21-23 and 5:16-20.) At the time they filed the Contests, however, they had every reason to think that Irene was satisfied with the Management Agreement. First, they knew attorney Sidney Rudy, and not Michael (as they alleged (10/8/15 Pet., ¶10)), represented Irene in negotiating that Agreement. (See, e.g., David's Decl., ¶11). A reasonable person would not assume that an attorney would permit his client to sign an agreement she did not approve. Second, they knew Irene consulted with Ms. Roisman about the Agreement and that at Ms. Roisman's request, one of her Crosby, Heafey business partners reviewed it for commercial reasonableness; indeed, when they filed the Contests, David and Paula were in possession of (and produced in discovery) a copy of the Crosby, Heafey business partner's memo to Irene, which concluded it was "commercially reasonable." (Exh. 54.) David and Paula thus knew that Irene had consulted with independent attorneys about the Management Agreement, and had been informed it was reasonable. Third, as David and Paula acknowledge, the 2000 Trust and the 2010 Restatement left Michael a "far larger" share than David and Paula *even after* the termination bonus. (Paula's Decl., 2:1-4; Opp., 6:26-27.) If Irene believed the Management Agreement was too generous or if she was otherwise dissatisfied with it, she could have called upon Ms. Roisman to assist her in giving Michael the minimum required; it is unlikely she would have given him so much more.

David and Paula claim that the Management Agreement's scheduled values were set artificially low so as to inflate Michael's termination bonus. The facts they knew when they filed the Contests contradict this claim. One estate planning document David and Paula had (and produced) when they filed the Contests was a document Ms. Roisman prepared comparing the "Basis," "Management Agreement Value," and "2008 Appraised Value" of Irene's business properties. (Exh. 4.) That document shows that the scheduled values as of January 1, 1989, the Management Agreement's effective date, were more than 70% higher than the appraised values as of only 18 months earlier, on July 17, 1987, when Irene's husband died. David and Paula thus

knew at the time they filed the Contests that there was no reason to think that the Management Agreement values were understated; to the contrary, a reasonable person would not have concluded that those values were slanted to Michael's advantage, let alone that they did not reflect Irene's own, independent decision to agree to the arrangement.

I.

David and Paula claim Irene's estate plan was inequitable because they received so little of her estate. But the facts they knew at the time they filed the Contests suggest that their combined share might represent almost 40% of the estate. Further, percentages are not determinative. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 609 ["unless it shall be said that the claims of blood dominate and control the testamentary right (in which case the laws of wills should be swept from our statute books and all property pass under the laws of succession), the will in question was natural in its recognition of the claims of gratitude, affection, and love"].) Rather, undue influence "clearly entails a qualitative assessment" in which the factfinder must evaluate "the respective relative standings of the beneficiary and the contestant ... [to] determine which party would be the more obvious object of the decedent's testamentary disposition." (*Id.* at 607.) Here, as in *Estate of Sarabia*, "this is not the case of an 'unnatural will' where dependents and those who had grown accustomed to lean upon the bounty of one are, at the death of that person, without apparent reason, deprived by his will of that bounty." (*Id.* at 608.) Rather, David and Paula were to receive $10 million, far more than the support they "had grown accustomed to lean upon," and the dispositions in favor of Michael are hardly "without apparent reason." "Nor is [Irene's] a will where relations, intimate in fact as well as in blood, who have had a reasonable basis for their 'expectations' have been disappointed at the expression of the testator." (*Id.* at 608-609.) Rather, Michael's relationship with his mother was far more intimate than the abusive relations she had with David and Paula. Given all of Irene's, David's, and Paula's communications with each other over the years and David and Paula's knowledge of her similar estate plan from 10 years earlier, no reasonable person would conclude that the 2010 Restatement came as a surprise.

This is not a case of a business manager or lawyer who made off with his client's estate. Michael was Irene's son, whom she loved, respected, and appreciated for managing her business

and freeing her to live the life she wanted to live, who did not alternate between estrangement and abusiveness, and who did not make his mother miserable. No reasonable person would conclude there was anything unnatural in the fact that Irene intended Michael would own and continue to operate the business he had managed for 30 years, free from his siblings' harassment.

In short, a reasonable person could not conclude that David and Paula were reasonably likely to be able to prove at trial that Michael unduly profited from the 2010 Restatement or the 2000 Trust.

J.

On September 15, 2015, some two weeks before David and Paula understood they had to file a contest, their counsel sent Michael's counsel a letter request seeking 20 categories of documents, including every document relating to the Trust, Irene's medical records, and Ms. Roisman's entire estate planning file. David and Paula argue that Michael's counsel failed to respond properly, which they claim shows that Michael had something to hide. (Paula's Decl., ¶56.) The Court rejects this claim. Michael's counsel fully explained the basis for his response (Paula's Exh. M), and David and Paula have not argued, much less shown, the response was deficient.

Further, the claim is irrelevant to the probable cause analysis because the standard for probable cause presupposes—and is designed to accommodate—the reality that a contestant cannot begin discovery until after the contest is filed. The Law Revision Commission's initial proposed standard for probable cause would have required a contestant, at the outset, to have sufficient "evidence" to prevail. When it was pointed out that before filing a contest, a contestant would have no way to obtain medical records, the estate-planning file or other "evidence" (Law Rev. Comm. Staff Mem. 2007-29, pp. 29-30), the standard was revised. The revised standard turns not on whether the contestant had enough evidence at the time of filing to prevail, but on whether, "at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted *after an opportunity for further investigation or discovery.*" (§ 21311(b), emphasis added.) The Legislature thus considered the fact that a contestant could not obtain evidence before filing a contest and

incorporated an appropriate accommodation into the probable cause standard. Because the probable cause standard presupposes a contestant's lack of access to evidence, David and Paula's claim that they were unable to obtain documents does not entitle them to special dispensation from having to comply with that standard. What is relevant is the absence of facts supporting David and Paula's speculation and suspicion at the time of filing that would lead a reasonable person to conclude that facts later found would support a conclusion of undue influence by clear and convincing evidence.

CONCLUSION

Based on the foregoing factual findings, the Court concludes that the Trust Contest was brought without probable cause within the meaning of section 21311, subdivision (a)(1). Accordingly, the Court grants the Cross-Petition.

IT IS SO ORDERED.

Dated: November 9, 2016

Hon. Peter J. Busch
Judge San Francisco County Superior Court

The Irene M. Lieberman Revocable Trust, dated June 16, 2000 and Amended and Restated on October 1, 2010

Case No. PTR-15-299196

CERTIFICATE OF SERVICE BY MAIL (C.C.P. §1013)

The undersigned certifies, under penalty of perjury, that I am over the age of 18 years, employed in the County of San Francisco, and not a party to the within action. I served the attached **Order Granting Cross-Petition to Ascertain Beneficiaries and Instruct Trustee** by enclosing a true copy thereof in an envelope(s) addressed as shown below and placing the envelope(s) for collection and mailing on **November 9, 2016** in San Francisco, California following the Court's ordinary practices. I am readily familiar with the Court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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Dated: November 9, 2016

By: _____
Leslie Gomez
Deputy Court Clerk