

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

MICHAEL NI,

Appellant,

vs.

WARREN SLOCUM, in his official
capacity as Chief Elections Officer of San
Mateo County,

Respondent.

1st CIVIL NO. A128721

(Superior Court Case No. 492074)

Appeal from the Superior Court of California
County of San Mateo
Honorable George A. Miram, Judge

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE
BRIEF AND AMICUS CURIAE BRIEF OF THE ELECTRONIC
SIGNATURE AND RECORDS ASSOCIATION IN SUPPORT OF
APPELLANT

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Butler v. Goldetsky, 552 N.W.2d 226, 231 (Minn. 1996).

Clymer v. Summit Bancorp, 334 N.J. Super. 252, 758 A.2d 652, 653 (App. Div. 2000).

In re Estate of Dobert, 192 Ariz. 248, 963 P.2d 327, 331 (Ct. App. 1998).

In re Margaret Susan P., 169 Vt. 252, 733 A.2d 38, 47 (1999).

In re Nocita, 914 S.W.2d 358, 359 (Mo. 1996).

Kradel v. Piper Indus., Inc., 60 S.W.3d 744, 754 n. 6 (Tenn. 2001).

Layne-Minnesota Co. v. Regents of the Univ. of Minnesota, 266 Minn. 284, 290-91 n. 13, 123 N.W.2d 371, 376 n. 13 (1963).

Record v. Metropolitan Transit Comm'n, 284 N.W.2d 542 (1979).

Universal Motors, Inc. v. Neary, 984 P.2d 515, 517 (Alaska 1999).

CALIFORNIA STATUTES AND AUTHORITIES

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California Elections Code

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CAL. ELEC. CODE § 9020.

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California Civil Code
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CAL. CIV. CODE § 1633.3.
CAL. CIV. CODE § 1633.7.
CAL. CIV. CODE § 1633.17.

OTHER AUTHORITIES

David E. Ewan, John A. Richards, and Margo H.K. Tank, *It's the Message Not the Medium! Electronic Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments*, THE BUSINESS LAWYER, Vol. 60, No.4 (August 2005).

Jeremiah S. Buckley, Margo H.K. Tank, R. David Whitaker & John P. Kromer, THE LAW OF ELECTRONIC RECORDS AND SIGNATURES (2009).

Julian Epstein, *Cleaning Up A Mess On The Web: A Comparison Of Federal And State Digital Signature Laws*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 491 (2001/2002).

Lawmakers Seen As Working Through E-Sign, UETA Issues Before Taking Up Next Big Thing, E-COMMERCE & LAW REPORT, Vol. 6 No. 2 (Jan. 10, 2001).

Robert A. Wittie and Jane K. Winn, *E-Sign of the Times*, E-COMMERCE LAW REPORT (July, 2000).

Unif. Elec. Transactions Act (1999).

Unif. Elec. Transactions Act, Prefatory Note.

Unif. Elec. Transactions Act, Comments.

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OTHER STATE UETAs

Alabama (ALA. CODE § 8-1A-1 *et seq.*);

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Arkansas (ARK. CODE ANN. § 25-32-101 *et seq.*);

California (CAL. CIV. CODE § 1633.1 *et seq.*);

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Idaho (IDAHO CODE ANN. § 28-50-101 *et seq.*);

Indiana (IND. CODE ANN. § 26-2-8-101 *et seq.*);

Iowa (IOWA CODE ANN. § 554D.101 *et seq.*);

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Maine (ME. REV. STAT. ANN. tit 10, § 9401 *et seq.*);

Maryland (MD. CODE ANN., COM. LAW § 21-101 *et seq.*);

Massachusetts (MASS. GEN. LAWS ANN. ch. 110G, § 1 *et seq.*);

Michigan (MICH. COMP. LAWS ANN. § 450.831 *et seq.*);

Minnesota (MINN. STAT. ANN. § 325L.01 *et seq.*);

Mississippi (MISS. CODE ANN. § 75-12-1 *et seq.*);

Missouri (MO. ANN. STAT. § 432.200 *et seq.*);

Montana (MONT. CODE ANN. § 30-18-101 *et seq.*);

Nebraska (NEB. REV. STAT. § 86-612 *et seq.*);

Nevada (NEV. REV. STAT. § 719.010 *et seq.*);

New Hampshire (N.H. REV. STAT. ANN. § 294-E:1 *et seq.*);

New Jersey (N.J. STAT. ANN. § 12A:12-1 *et seq.*);

New Mexico (N.M. STAT. ANN. § 14-16-1 *et seq.*);

North Carolina (N.C. GEN. STAT. ANN. § 66-311 *et seq.*);

North Dakota (N.D. CENT. CODE ANN. § 9-16-01 *et seq.*);

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Pennsylvania (73 PA. CONS. STAT. ANN. § 2260.301 *et seq.*);

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Rhode Island (R.I. GEN. LAWS ANN. § 42-127.1-1 *et seq.*);

South Carolina (S.C. CODE ANN. § 26-6-10 *et seq.*);

South Dakota (S.D. CODIFIED LAWS § 53-12-1 *et seq.*);

Tennessee (TENN. CODE ANN. § 47-10-101 *et seq.*);

Texas (TEX. BUS. & COM. CODE ANN. § 322.001 *et seq.*);

U.S. Virgin Islands (11 V.I.C § 101 *et seq.*);

Utah (UTAH CODE ANN. § 46-4-101 *et seq.*);

Vermont (VT. STAT. ANN. tit. 9, § 270 *et seq.*);

Virginia (VA. CODE ANN. § 59.1-479 *et seq.*);

West Virginia (W. VA. CODE ANN. § 39A-1-1 *et seq.*);

Wisconsin (Wis. Stat. Ann. § 137.01.); and

Wyoming (WYO. STAT. ANN. § 40-21-101 *et seq.*).

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

INTRODUCTION

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the Electronic Signature and Records Association (“ESRA” or “The Amicus Curiae”) hereby applies for leave to file the accompanying Amicus Curiae Brief in support of Appellant Michael Ni.

INTEREST OF AMICUS CURIAE

The ESRA is a trade association focused on supporting the use and acceptance of electronic signatures and electronic records. Its membership comprises both technology-providers and “user” companies offering technology applications to their customers.¹

Education is ESRA’s primary mission. The association is a centralized educational resource for its members, the public and governmental agencies with respect to the legal, regulatory and operational issues relating to the use of electronic records and signatures. ESRA submits this brief because it believes there is widespread misunderstanding about the existing legal framework that governs the use of electronic records and signatures. In keeping with its mission, ESRA is applying to file this brief in order to provide the Court with some background on the

¹ Verafirma, Inc. is a member of ESRA. In addition to ESRA, DocuSign, Inc. and AssureSign, LLC (members of ESRA) individually contributed to the funding of this Amicus Curiae brief.

laws that support the use and acceptance of electronic records and signatures for dealings and transactions such as the one at issue in this case. In submitting this brief, ESRA does not take any position on the substance of the petition filed by the Appellant, nor does ESRA in any way otherwise support the initiative that Appellant signed. Further, ESRA's filing of this brief should not be construed as an endorsement or recommendation of the Appellant's company, technology or electronic signature process or application.

**AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT
MICHAEL NI**

**I. CALIFORNIA LAW AUTHORIZES THE USE OF
ELECTRONIC RECORDS AND SIGNATURES**

California Elections Code Sections 100 and 9020 require that “each signer shall at the time of signing the petition or paper personally affix his or her signature, printed name, and place of residence, giving street and number, and if no street or number exists, then a designation of the place of residence which will enable the location to be readily ascertained.”² The question presented to the court in the instant case is whether an electronic signature can used to meet among other requirements, the “personally affix” ... “by hand” and “signature” requirements of Sections 100 and 9020.

California’s Uniform Electronic Transactions Act (“CA UETA”)³ unequivocally answers this question affirmatively. As is discussed in detail below, the CA UETA enables an electronic signature to satisfy Sections 100 and 9020’s “personal affix” ... “by hand” and “signature” requirements. Respondent’s claim that there is “no support for the conclusion that the California legislature intended UETA to apply to the California Elections Code” is undermined by Section 1633.3 of the CA UETA which specifically identifies the sections of the California Code to

² CAL. ELEC. CODE §§ 100, 9020.

³ CAL. CIV. CODE § 1633.1 *et. seq.*

which it does not apply.⁴ The Elections Code is not among those areas of law specifically exempted from the CA UETA. This lack of express exemption is evidence of the legislature's intention that the CA UETA's scope extends far across the landscape of California law. As a result, no additional legislative action is required to establish the validity of an electronic signature under California law.⁵ While the CA UETA establishes the validity and enforceability of an electronic signature to meet "writing" and "signing" requirements, the CA UETA is not mandatory in that parties, including the government, in certain circumstances (such as when the government is a party to transaction) must agree to use electronic signatures in place of ink signatures. This brief does not address whether San Mateo County Chief Elections Officer Warren Slocum ("Chief of Elections") should have accepted the electronically signed petition. Rather, we contend only that an electronic signature could be used to sign the petition and meet the Elections Code requirements consistent with the CA

⁴ CAL. CIV. CODE § 1633.3.

⁵ Respondent contends that Governor Wilson's veto of Assembly Bill 44 ("A.B.44") in 1997 which would have superficially authorized the use of electronic signatures on ballot petitions and initiatives is conclusive evidence that the California law has rejected the use of electronic signatures in this context. Respondent ignores the fact that the CA UETA was passed and signed into law two years after the veto of A.B.44, and subsequently amended again in 2009. *See* A.B. 328 (2009). Under the well-accepted rule of statutory construction, *leges posteriores priores contrarias abrogant*, UETA must therefore be considered the most recent expression of the legislature's intent on the subject of electronic signatures and records, trumping any prior understanding on this subject.

UETA. The brief history and overview below of the Uniform Electronic Transactions Act (“UETA”) as promulgated by the National Conference of Commissioners on Uniform State Law (“NCCUSL”) in July of 1999,⁶ on which the CA UETA is based, further elucidates why this is so.

Overview and History of UETA

The increasing use of electronic signatures in America is a natural outgrowth of advances in computer and communications technology. The world has long relied on ink signatures to memorialize agreements, effect payment, or acknowledge receipt. Many laws assume the existence of ink signatures and frequently require a signature in connection with certain transactions.

As electronic media increasingly become a fact of life, lawmakers have been forced to rethink many of these assumptions and requirements and adapt the law to accommodate new ways of conducting one’s ordinary dealings. Among the key questions that lawmakers have grappled with in this process are: To what extent should electronic records and signatures be used to satisfy “writing” and “signing” requirements (in all consumer, commercial and governmental transactions or only in certain specified transactions), and to what extent should their use be regulated?

Adopting new laws to answer these questions is not an easy matter. In any given jurisdiction, the number of statutes that contain “writing or

⁶ Unif. Elec. Transactions Act found at www.ncussl.org.

“signing” requirements is in the thousands. In many instances these laws were crafted before electronic transactions were possible or prevalent. But trying to identify and rewrite all the state and federal rules necessary to permit and ratify electronic signatures and records would be a Herculean task.

UETA as an Overlay Statute

Lawmakers concluded the best way to overcome these barriers and accommodate the increasingly widespread use of electronic signatures and records was to create a procedural statute that would act as “overlay” to underlying statutory laws. UETA does just that. It is an “overlay” statute that sets up global rules for replacing writing and signature requirements. UETA establishes the legal validity and enforceability for the use of electronic records and signatures in place of paper and ink counterparts.⁷

⁷ See Unif. Elec. Transactions Act, Prefatory Note (“[A] fundamental premise of the Act is that it be minimalist and procedural. The general efficacy of existing law in an electronic context, so long as biases and barriers to the medium are removed, validates this approach”). The drafters further note that:

The provisions of this Act validating and effectuating the employ of electronic media allow the courts to apply them to new and unforeseen technologies and practices. As time progresses, it is anticipated that what is new and unforeseen today will be commonplace tomorrow. Accordingly, this legislation is intended to set a framework for the validation of media which may be developed in the future and which demonstrate the same qualities as the

In the early 1990s states experimented with different types of overlay statutes leading to significant discrepancies from state to state in the operation of state statutes governing electronic dealings. The lack of uniformity among competing overlay statutes in various states was an impediment to the expansion of electronic intercourse and commerce. In response to this problem the NCCUSL developed the model statute called UETA as a uniform set of rules for electronic equivalents of records and signatures. The overarching objective of UETA, and one ensconced in all 49 enactments of UETA to date⁸ is to “[f]acilitate electronic transactions.”

electronic media contemplated and validated
under this Act.

Unif. Elec. Transactions Act § 6 cmt. 2.

⁸ As of May 31, 2010, the following jurisdictions have adopted some form of UETA: Alabama (ALA. CODE § 8-1A-1 *et seq.*); Alaska (ALASKA STAT. ANN. § 09.80.010 *et seq.*); Arizona (ARIZ. REV. STAT. ANN. § 44-7001 *et seq.*); Arkansas (ARK. CODE ANN. § 25-32-101 *et seq.*); California (CAL. CIV. CODE § 1633.1 *et seq.*); Colorado (COLO. REV. STAT. ANN. § 24-71.3-101 *et seq.*); Connecticut (CONN. GEN. STAT. ANN. § 1-266 *et seq.*); Delaware (DEL. CODE ANN. tit. 6, § 12A-101 *et seq.*); District of Columbia (D.C. CODE § 28-4901 *et seq.*); Florida (FLA. STAT. ANN. § 668.50); Georgia (GA. CODE ANN. § 10-12-1 *et seq.*); Hawaii (HAW. REV. STAT. § 489E-1 *et seq.*); Idaho (IDAHO CODE ANN. § 28-50-101 *et seq.*); Indiana (IND. CODE ANN. § 26-2-8-101 *et seq.*); Iowa (IOWA CODE ANN. § 554D.101 *et seq.*); Kansas (KAN. STAT. ANN. § 16-1601 *et seq.*); Kentucky (KY. REV. STAT. ANN. § 369.101 *et seq.*); Louisiana (LA. REV. STAT. ANN. § 9:2601 *et seq.*); Maine (ME. REV. STAT. ANN. tit 10, § 9401 *et seq.*); Maryland (MD. CODE ANN., COM. LAW § 21-101 *et seq.*); Massachusetts (MASS. GEN. LAWS ANN. ch. 110G, § 1 *et seq.*); Michigan (MICH. COMP. LAWS ANN. § 450.831 *et seq.*); Minnesota (MINN. STAT. ANN. § 325L.01 *et seq.*); Mississippi (MISS. CODE ANN. § 75-12-1 *et seq.*); Missouri (MO. ANN. STAT. § 432.200 *et seq.*); Montana (MONT. CODE ANN. § 30-18-101 *et seq.*); Nebraska (NEB. REV. STAT. § 86-612 *et seq.*); Nevada (NEV. REV. STAT. § 719.010 *et seq.*); New Hampshire (N.H. REV. STAT. ANN. § 294-E:1

UETA was designed to eliminate the legal sufficiency defense for a wide variety of signing methods, continuing a long history of common law flexibility towards what constitutes a signature.

As promulgated by NCCUSL, there are three general rules that characterize the legal principles established in UETA:

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form;
- If a law requires a record to be in writing, an electronic record satisfies the law; and
- If a law requires a signature, an electronic signature satisfies the law.⁹

Thus, UETA removes barriers to electronic transactions¹⁰ by

et seq.); New Jersey (N.J. STAT. ANN. § 12A:12-1 *et seq.*); New Mexico (N.M. STAT. ANN. § 14-16-1 *et seq.*); North Carolina (N.C. GEN. STAT. ANN. § 66-311 *et seq.*); North Dakota (N.D. CENT. CODE ANN. § 9-16-01 *et seq.*); Ohio (OHIO REV. CODE ANN. § 1306.01 *et seq.*); Oklahoma (OKLA. STAT. tit. 12A, § 15-101 *et seq.*); Oregon (OR. REV. STAT. ANN. § 84.001 *et seq.*); Pennsylvania (73 PA. CONS. STAT. ANN. § 2260.301 *et seq.*); Rhode Island (R.I. GEN. LAWS ANN. § 42-127.1-1 *et seq.*); South Carolina (S.C. CODE ANN. § 26-6-10 *et seq.*); South Dakota (S.D. CODIFIED LAWS § 53-12-1 *et seq.*); Tennessee (TENN. CODE ANN. § 47-10-101 *et seq.*); Texas (TEX. BUS. & COM. CODE ANN. § 322.001 *et seq.*); U.S. Virgin Islands (11 V.I.C § 101 *et seq.*); Utah (UTAH CODE ANN. § 46-4-101 *et seq.*); Vermont (VT. STAT. ANN. tit. 9, § 270 *et seq.*); Virginia (VA. CODE ANN. § 59.1-479 *et seq.*); West Virginia (W. VA. CODE ANN. § 39A-1-1 *et seq.*); Wisconsin (Wis. Stat. Ann. § 137.01.); and Wyoming (WYO. STAT. ANN. § 40-21-101 *et seq.*). As of that date, Illinois, New York and Washington are the only states that have not adopted UETA.

⁹ See Unif. Elec. Transactions Act § 7.

¹⁰ See Unif. Elec. Transactions Act § 2(16).

providing that agreements, notices, disclosures or other communications and electronic signatures on such records made through electronic means may not be found invalid *solely* because they are in electronic form.^{11, 12}

II. CALIFORNIA'S UETA MAKES AN ELECTRONIC SIGNATURE LEGALLY EQUIVALENT TO A MANUAL INK SIGNATURE

As noted above, California adopted UETA in 1999 and subsequently amended its CA UETA in 2009.¹³ The CA UETA applies to “transactions,” including governmental transactions¹⁴ and expressly provides that electronic signatures (discussed in more detail below) are the equivalent of manual ink signatures. Under California law, relying on, and in compliance with the CA UETA, an electronic signature may therefore be presented whenever a manual ink signature is required. This includes California's

¹¹ *See generally id.* Also note the enactment of the Electronic Signatures in Global and National Commerce Act (“ESIGN”) in 2000. 15 U.S.C. § 7001, *et seq.* ESIGN was enactment to create a federal baseline for the use of electronic signatures and records and acts as a governor on state enactments of the UETA and state regulatory actions. *See* 15 U.S.C. §§ 7002, 7004.

¹² *See generally* Julian Epstein, *Cleaning Up A Mess On The Web: A Comparison Of Federal And State Digital Signature Laws*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 491 (2001/2002); *Lawmakers Seen As Working Through E-Sign, UETA Issues Before Taking Up Next Big Thing*, 6 BNA Elec. Comm. & Law Report 35 (Jan. 10, 2001); Robert A. Wittie and Jane K. Winn, *E-Sign of the Times*, E-COMMERCE LAW REPORT (July, 2000); JEREMIAH S. BUCKLEY ET AL., *THE LAW OF ELECTRONIC RECORDS AND SIGNATURES* (2009). *See also* David E. Ewan, John A. Richards, and Margo H.K. Tank, *It's the Message Not the Medium! Electronic Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments*, *THE BUSINESS LAWYER*, Vol. 60, No.4 (August 2005).

¹³ *See supra* note 5.

¹⁴ CAL. CIV. CODE § 1633.2(o)

requirement in Sections 100 and 9020 of the Election Code.

The CA UETA—like the uniform UETA—is a self-effectuating legislative vehicle which acts as an overlay statute. In other words, the CA UETA provides that electronic records and electronic signatures meet “writing,” “signing,” or “original” requirements in other California laws without having to amend these existing laws or regulations.

CA’s UETA, like the uniform UETA, defines an “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.”¹⁵ The definition is broad and technologically neutral, thereby permitting any number of actions or processes to create a signature: a typed name, a click-through procedure on a computer, a recorded voice, use of a PIN or password, or a digital capture of a hand written signature. An electronic signature would include a digital signature but is not limited to a digital signature.¹⁶ In the Comments elucidating UETA,¹⁷ the drafters wrote: “The idea of a signature

¹⁵ CAL. CIV. CODE § 1633.2(h).

¹⁶ While CAL GOV’T CODE § 16.5 enables public entities to accept digital signatures, the CA UETA uses the term “electronic signature” which would include a digital signature as well as types of “electronic signatures” that are not digital signatures.

¹⁷ We cite the Comments and Legislative Notes to UETA as a means of further elucidating UETA’s intent because many states that have adopted UETA have not included a comprehensive legislative history to determine questions of legislative intent. Where state legislatures enact uniform acts, courts have found commentary to the uniform acts to be persuasive

is broad... This Act establishes to the greatest extent possible the

authority. See, e.g., *Pacific Sunwear of California, Inc. v. Olaes Enterprises, Inc.*, 167 Cal.App.4th 466, 84 Cal.Rptr.3d 182, 187-8 (2008) (“The primary extrinsic aid for interpretation of the Uniform Commercial Code is the official commentary to that code. While the statutory text, of course, controls over any inconsistent commentary, courts regularly look to the official commentary to determine the meaning of ambiguous statutory provisions.”); *Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 754 n. 6 (Tenn. 2001) (citing *Armstrong v. Pilot Life Ins. Co.*, 656 S.W.2d 18, 28 (Tenn. App. 1983); *Universal Motors, Inc. v. Neary*, 984 P.2d 515, 517 (Alaska 1999) (“In construing statutes taken from uniform acts we generally regard the commentary to the uniform act as a reliable guide to the statute's meaning.”); *In re Estate of Dobert*, 192 Ariz. 248, 963 P.2d 327, 331 (Ct. App. 1998) (“When a statute is based on a uniform act, we assume that the legislature ‘intended to adopt the construction placed on the act by its drafters.’ Thus, commentary to such a uniform act is ‘highly persuasive unless erroneous or contrary to settled policy in this state.’” (citations omitted)); *In re Nocita*, 914 S.W.2d 358, 359 (Mo. 1996) (“When ‘construing uniform and uniform acts enacted by the General Assembly, we must assume it did so with the intention of adopting the accompanying interpretations placed thereon by the drafters of the Uniform or uniform act.’ (citations omitted)”); *Clymer v. Summit Bancorp*, 334 N.J. Super. 252, 758 A.2d 652, 653 (App. Div. 2000) (“In the absence of a contrary design, clearly articulated, the Legislature is taken to have adopted the expressed intention of the uniform act drafters.”); *In re Margaret Susan P.*, 169 Vt. 252, 733 A.2d 38, 47 (1999) (“We are reluctant to conclude, however, that when the Legislature uses Uniform language it does so for a purpose different from the purpose in the uniform act.”); “Where the words of a law are not explicit, the intent of the legislature may be ascertained by considering other laws upon the same or similar subjects. In this case, we must ascertain the intention of the legislature with respect to a uniform act. The intention of the drafters of a uniform act becomes the legislative intent upon enactment. Where a provision of the uniform state law is ambiguous, resort may be had to the notes of the drafters.” *Butler v. Goldetsky*, 552 N.W.2d 226, 231 (Minn. 1996) (emphasis added) (interpreting Minnesota’s enactment of the Uniform Fraudulent Transfer Act and citing *Layne-Minnesota Co. v. Regents of the Univ. of Minnesota*, 266 Minn. 284, 290-91 n. 13, 123 N.W.2d 371, 376 n. 13 (1963)) and *Record v. Metropolitan Transit Comm’n*, 284 N.W.2d 542 (1979) (considering the comments to the Uniform Motor Vehicle Accident Reparations Act in construing Minnesota's No-Fault Automobile Insurance Act.).

equivalency of electronic signatures and manual signatures. Therefore the term “signature” has been used to connote and convey that equivalency. The purpose is to overcome unwarranted biases against electronic methods of signing and authenticating records.”¹⁸ The drafters of UETA further explained: “No specific technology need be used in order to create a valid signature. One’s voice on an answering machine may suffice if the requisite intention is present. It may also be shown that the requisite intent was not present, and accordingly, the sound symbol or process did not amount to a signature. In any case, the critical element is the intention to execute or adopt the sound, symbol (a graphical representation of a handwritten signature visible on a record stored on a thumb drive) or process for the purpose of signing the related record.”¹⁹ Thus, the focus of the law is on (1) the intent of the signer rather than the choice of sound, symbol or process; and (2) whether the electronic signature can be linked to or logically associated with the record; not whether the signature is in electronic form.

The CA UETA, like the uniform UETA, also expressly makes electronic records legally equivalent to paper records. Section 1633.7 (c) of the California UETA states that “[i]f a law requires a record to be in

¹⁸ Unif. Elec. Transactions Act, Comment 7.

¹⁹ *Id.*

writing, an electronic record satisfies the law.”²⁰ Under the CA UETA an “electronic record” is defined as “a record created generated, sent, communicated, received, or stored by electronic means.”²¹ In addition, the Comments to UETA clarify that an electronic record is “any record created, used or stored in a medium other than paper . . . information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this Act. Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.”²²

CA UETA Three Pillars

As does UETA, Section 1633.7 of the CA UETA states that:

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form
- If a law requires a record to be in writing, an electronic record satisfies the law; and

²⁰ CAL. CIV. CODE § 1633.7(c).

²¹ CAL. CIV. CODE § 1633.2(g).

²² Unif. Elec. Transactions Act, Comment 7.

- If a law requires a signature, an electronic signature satisfies the law.²³

Section 1633.7 of the CA UETA sets forth the fundamental premise of the Act; namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. The CA UETA is designed to eliminate the single element of medium as a reason to deny effect or enforceability to an electronic record, signature, or contract. The fact that the information is set forth electronically, as opposed to on paper or manually, is irrelevant.

III. THE CALIFORNIA UETA MAY PERMIT SAN MATEO COUNTY CHIEF ELECTIONS OFFICER WARREN SLOCUM TO REGULATE HIS ACCEPTANCE OF ELECTRONIC SIGNATURES AND RECORDS

While CA's UETA makes clear that electronic signatures can be eligible on a petition to a San Mateo County Chief Elections Officer Warren Slocum, the statute may also empower the Chief of Elections to decide whether to accept an electronically signed petition or to regulate the use of electronic signatures and records. Specifically, Section 1633.17 of UETA provides:

“No State Agency, board or commission may require, prohibit or regulate the use of an electronic signature in a transaction in which the agency board or commission is not *a party* unless a law other than this title expressly

²³ CAL. CIV. CODE § 1633.7.

authorizes the requirement, prohibition or regulation.”²⁴ (emphasis added).²⁵

If the Chief of Elections is a party he could elect to accept or decline electronic records and signatures.²⁶ Whether the court determines the Chief of Elections to be a party for purposes of his dealings with Mr. Ni or not, the CA UETA nevertheless holds that the fundamental validity of the use of an electronic signature to meet Elections Code requirements is unchanged.

IV. CONCLUSION

Respondent’s claim that CA UETA is not applicable to this case because it is a “general statute” fundamentally misunderstands the nature of that law. CA UETA is not a “general statute” – rather it is an “overlay” statute creating global rules for replacing writing and signature requirements throughout California law. As noted above, Respondent’s claim that there is “no support for the conclusion that the California legislature intended UETA to apply to the California Elections Code” is also undermined by Section 1633.3 of UETA which specifically identifies

²⁴ CAL. CIV. CODE § 1633.17.

²⁵ *See also* Unif. Elec. Transactions Act, Comments and Legislative Notes to §§ 17-19.

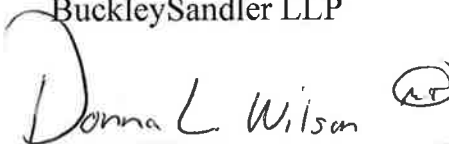
²⁶ *See also* CAL GOV’T CODE § 16.5 and CAL. CODE REGS. tit. 2, § 22003 with respect to agreeing to use a digital signature which is one type of electronic signature in connection with written communications with a public entity in which a signature is required.

the sections of the California code to which it does not apply.²⁷ That the Elections Code is not among those areas of law specifically exempted from UETA, is evidence of the drafter's intention that CA UETA's scope extend far across the landscape of California law.

Instead, UETA is clearly applicable to the facts in the instant case, and mandates that Mr. Ni's signature be considered valid under sections 100 and 9020 of the California elections code, at least until such time as the Chief Elections Officer of San Mateo County formally decides how to treat such signatures for purposes of transactions with his office.

Date: February 22, 2011

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²⁷ CAL. CIV. CODE § 1633.3(b),(c)


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CERTIFICATE OF WORD COUNT

I certify that the attached Amicus Curiae Brief contains 4043 words, exclusive of the certificate of service and the tables of contents and authorities, as determined by the word counting function of the program used to prepare this brief.

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