

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL D. RUNYAN,

Defendant and Appellant.

Case No. S187804
**SUPREME COURT
FILED**

MAY 25 2011

Frederick K. Ohirich Clerk
Deputy

Second Appellate District, Division Eight, Case No. B218863
Los Angeles County Superior Court, No. BA322080
The Honorable Marcelita Haynes, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether the Appellant was improperly ordered to pay restitution to the estate of his victim where the estate did not suffer economic loss as a result of Appellant's conduct because it was not a direct victim of the crime.

Appellant respectfully ask this Court to review the published decision of a panel of the Court of Appeal, Second Appellate District, affirming the judgment of the Los Angeles County Superior Court, which awarded the victim's estate \$446,486.00 in restitution.

INTRODUCTION

Defendant and Appellant Paul D. Runyan (hereafter Mr. Runyan) appeals from the Court of Appeals opinion affirming the Superior Court's order, directing him to pay restitution in the amount of \$446,486 to the Estate of Donald Eugene Bengé.

STATEMENT OF THE CASE

A. Procedural History

On October 31, 2007, the prosecution filed in Los Angeles County Superior Court an Information which charged Mr. Runyan with one count of Murder (California Penal Code § 187(a)) (Count 1), one count Gross Vehicular Manslaughter (California Penal Code § 191.5(a)) (Count 2), one count of Driving Under the Influence Causing Injury (California Vehicle Code § 23153(a)) (Count 3), and one count of Driving Under the Influence with a Blood Alcohol Content of .08% or Greater Causing Injury (California Vehicle Code § 23153(b)) (Count 4). (CT 200-203.)

On November 4, 2008, a jury acquitted Mr. Runyan of Count 1 and convicted him of Count 2, Count 3 and Count 4. (CT 475-478.)

The trial court conducted a restitution hearing on August 5, 2009 and subsequently ordered Mr. Runyan to pay \$446,486 to the Estate of Donald Bengé. (RT 616.)

Mr. Runyan filed a notice of appeal on September 8, 2009. (CT 586.)

B. Facts

On April 6, 2007, Mr. Runyan was driving on the 134 Freeway in Glendale in his 2006 Honda Element. He had been drinking alcohol and was driving the wrong way (driving westbound in eastbound lanes). He then hit, almost head-on, Donald Eugene Benges's 1988 Chevy Cavalier. Donald Eugene Benge (hereafter Mr. Benge) died at the scene and Mr. Runyan was taken to the hospital. The sole victim in the case was Mr. Benge. (CT 109-117.) Mr. Benge was not survived by any family members.

ARGUMENT

THE TRIAL COURT IMPROPERLY ORDERED APPELLANT TO PAY RESTITUTION TO THE VICTIM'S ESTATE

A. Standard of Review

Any time a court, for whatever reason, ignores the express language and intent of a statute and simply finds in favor of the more sympathetic party, an important question of law exists.

Further "when the propriety of a restitution order turns on the interpretation of a statute, a question of law is raised, which is subject to de novo review on appeal. [Citations.]" (*People v. Williams* (2010) 184 Cal.App.4th 142, 146.) This issue in this case regarding whether or not Mr. Benge's estate qualifies as a "victim," as defined by section 1202.4, subdivision (k), and Marsy's Law is such to independent review because it requires constitutional and statutory interpretation. (*See People v. Saint-Amans* (2005) 131 Cal.App.4th 1076, 1084.) The plain meaning of constitutional and statutory provisions takes precedent in terms of construction and interpretation, so where the meaning is clear and ambiguous the plain meaning governs Legislative intent. (*See People v. Birkett* (1999) 21 Cal.4th 226, 231-232.)

B. Marsy's Law Is Inapplicable In The Present Case Because The Term Victim Is Not Broadened By Proposition 9 And Because The People's Argument Was Untimely Made

California Penal Code § 1202.4 outlines the procedures that guide the imposition of restitution, amounts, hearings, court orders and financial disclosures that are made in

post-conviction criminal matters. In relevant part, subdivision (f) provides the language necessary to determine whether the question of restitution can be considered and further, who may be reward restitution payments: “(f) Except as provided in subdivision (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order.” (California Penal Code §1202.4(f).)

In 2008, the voters of California adopted Marsy’s Law and amended the California Constitution. Marsy’s Law went into effect on November 5, 2008. (Voter Information Guide, general Election (November 4, 2008) analysis of Proposition 9, p. 58 [Criminal Justice System. Victim’s Rights. Parole. Initiative Constitutional Amendment and Statute.] <<http://voterguide.sos.ca.gov/past/2008/general/analysis/prop9-analysis.htm>> [as of May 3, 2011].) While Appellant does not concede that Marsy’s Law applies to the present case, as it went into effect after the wrongful act occurred in this case, Respondent’s argument nonetheless fails for the following reasons: 1) Respondent’s reliance on Marsy’s Law is inapplicable to the present case; 2) Section (c)(1) of Marsy’s Law only deals with who has standing to enforce restitution awards and not who is entitled to collect such awards; 3) Because Section (c)(1) or Marsy’s Law expands only on who can enforce restitution awards, not on who qualifies as a “victim,” Respondent’s argument is misconstrued; and 4) With no mention of Mary’s Law in any moving papers prior to Respondent’s Brief on the Merits to this Court, Appellant is deprived of notice on the new matter.

1. Section (c)(1) of Marsy’s Law is Inapplicable Because it Only Addresses Enforcement of Restitution Awards and Not Who Is Entitled to Receive the Restitution Itself

Respondent quotes the ballot materials, indicating that “Marsy’s Law ‘expand[s] the legal right of crime victims and the payment of restitution by criminal offenders,’ eradicating the “unless compelling and extraordinary reasons exists to the contrary” language from the former subdivision (b) of the California Constitution. (*Id.*) The

deletion of the qualifying language, however, does little to the present case. In pertinent part, the California Constitution article I, section 28, subdivision (b)(13), reads:

“(b) In order to preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to the following rights: [...]

(13) *To restitution.*

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.

(14) To the prompt return of property when no longer needed as evidence.

(15) To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.

(16) To have the safety of the victim, the victim’s family, and the general public considered before any parole or other post-judgment release decision is made.

(17) To be informed of the rights enumerated in paragraphs (1) through (16).

(c) (1) *A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may **enforce** the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.*

(2) This section does not create any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court.

(d) The granting of these rights to victims shall not be construed to deny or disparage other rights possessed by victims. The court in its discretion may extend the right to be heard at sentencing to any person harmed by the defendant. The parole authority shall extend the right to be heard at a parole hearing to any person harmed by the offender.

(e) As used in this section, a “victim” is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The

term “victim” also includes the person’s spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term “victim” does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.” (Cal. Const., art. I, § 28, subd. (b)-(e); Voter Information Guide, General Election (November 4, 2008) text of Proposition 9, § 10, p.129-30 <<http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>> emphasis added.)

2. Because Section (c)(1) of Marsy’s Law Only Deals With Enforcement, Not Who Is Actually Awarded Restitution, Respondent’s Reliance on Marsy’s Law Is Misconstrued

The expansion of the amended subdivision (b) only seeks to expand who can *enforce* such restitution payments and not who can collect the rewards, or qualify as a “victim”. While Proposition 9 states, “(c) (1) A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may *enforce* the rights enumerated in subdivision (b),” directing who has standing to impose said restitution payments; Penal Code 1202.4, on the other hand, directs to whom the restitution payments may be dispersed: “the court shall require that the defendant *make* restitution *to the* victim or victims in an amount established by court order...” (Cal. Const., art. I, § 28, subd.(c)(1); Pen. Code, § 1202.4, subd.(f), emphasis added.) In other words, if the District Attorney selects not to enforce the restitution payments, then others, such the lawful representative of the decedent’s estate, can seek such an imposition. The aforementioned subdivision does not, however, discuss restitution payments. Accordingly, contrary to what Respondent contends, the term “victim” is not broadened by Marsy’s Law.

When Respondent contends that Marsy’s Law expands the legal rights of crime victims, they fail to articulate that the expansion was not in the term “victim,” but in the discretion of the court to order restitution payments; now making the “compelling and extraordinary reasons [...] to the contrary” language obsolete. Appellant concedes that “[t]he right to restitution may be *enforced* by ‘[a] victim, the retained attorney of a victim representative of the, a lawful representative of the victim, or the prosecuting attorney

upon request of the victim[.]” (Cal. Const., art. I, § 28, subd.(c)(1); Respondent’s Brief on the Merits, *People v. Runyan*, at 7, emphasis added.) In fact, Respondent, has already sought to *enforce* such restitution payments. The code does not, however, redefine the term “victim” for the purposes of who shall be paid, it merely expands who has standing to enforce the restitution payments on behalf of the direct victim of the crime.

3. The Right to Enforce Is Distinct From the Right to Collect

While Marsy’s Law was passed to expand who has standing to enforce restitution payments on behalf of direct crime victims, and, admittedly, self-executing, section 1202.4(k) actually defines who can collect the award after such enforcement is sought. If Respondent’s new argument were adopted, declaring that the expansion of who can enforce is equivalent to that of who can collect, then a monumental logical gap would ensue. By Respondent’s argument, the District Attorney’s Office would be entitled to actually collect restitution payments as would the law office representing the victim. Restitution checks made payable to either such party is erroneous and contrary to the intent of the statute.

Accordingly, the trial court erred in its interpretation that Mr. Benges’s estate qualified as a victim entitled to receive restitution from Appellant under the California Constitution even under Marsy’s Law, the newly raised argument by Respondent.

4. No Mention of Marsy’s Law Anywhere in the Record Deprives Appellant of His Right to Notice and Opportunity to Be Heard

Arguments raised for the first time in the reply brief are untimely and may be disregarded. (*Worldmark v. Wyndham Resort Dev. Corp.*, 187 Cal.App.4th 1017, 1039, 114 Cal. Rptr. 3d 546, 561 (Cal. Ct. App. 2010), as modified (Aug. 25, 2010), review denied (Dec. 1, 2010), reh’g denied (Sept. 13, 2010), quoting *Hernandez v. Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1461, fn. 10, 95 Cal.Rptr.3d 734.) In the event that Ex Post Facto principles are deemed to be inapplicable, the new argument raised by Respondent, Marsy’s Law, although does little for the merits of their case, was just another attempt to divert Appellant’s legally sound argument because of its

seemingly unjust results. Respondent made no reference to this new law in any of their moving papers to the Superior Court or Appellate Court. It was only in the transcript of the Superior Court that Marsy's Law was briefly touched on, and even there, the court incorrectly addressed it. "The Court: -- is Prop. 8, The Victim's Bill of Right. I think it's Marsy's Laws." (Superior Court R. at 6.) Not only was the reference brief, to say the least, but it was also erroneous and unclear. Accordingly, Appellant had no notice of this newly raised issue upon appeal. Respondent's contention that "Indeed, without defense objection, the trial court relied on the language of Marsy's Law in finding that Mr. Benge's estate qualified as a victim," is absurd because no notice was granted in any of Respondent's moving papers about said Law.¹ (2RT 605-606; Respondent's Brief on the Merits, *People v. Runyan*, at 6, fn. 3.) To deem Appellant's lack of objection as a waiver to an issue which was never previously cited in any moving papers violates Appellant's right of notice and opportunity to be heard on the matter.² Consequently, not only is Marsy's Law inapplicable, but it is untimely as well.

C. The Victim's Estate Was Improperly Awarded Restitution Under Section 1202.4 Of The California Penal Code

1. Section 1202.4 Requires Restitution to be Paid to a Victim or Victims and Defines the Term "Victim"

California Penal Code § 1202.4 requires restitution to be paid to a victim or victims and defines the term "victim." Subdivision (f) of the aforementioned code section provides the language necessary to determine whether the question of restitution can be considered:

¹ Furthermore, the sole fact that Respondent raises the issue of waiver in terms of Marsy's Law indicates that they concede that ex post facto may apply and accordingly, waiver of such objections only works in their favor. Regardless, unjust and unreasonable results would ensue if Appellant is deemed to have waived his right to objection about an issue that was briefly and erroneously addressed by the Superior Court.

² It should be noted that the District Attorney's "Points and Authorities in Support of Restitution to the Estate of Donald Benge" is not a part of the record on appeal.

“(f) Except as provided in subdivisions (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. The court may specify that funds confiscated at the time of the defendant's arrest, except for funds confiscated pursuant to § 11469 of the Health and Safety Code, be applied to the restitution order if the funds are not exempt for spousal or child support or subject to any other legal exemption.” (California Penal Code § 1202.4(f).)

Subdivision (f) above allows a victim or victims to be paid restitution by the defendant. Subdivision (k) of the code outlines who a victim is in a criminal matter:

“(k) For purposes of this §, "victim" shall include all of the following:

- (1) The immediate surviving family of the actual victim.
- (2) Any corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of a crime.
- (3) Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions:
 - (A) At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim.
 - (B) At the time of the crime was living in the household of the victim.
 - (C) At the time of the crime was a person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to a relationship listed in subparagraph (A).
 - (D) Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime.
 - (E) Is the primary caretaker of a minor victim.
- (4) Any person who is eligible to receive assistance from the Restitution Fund pursuant to Chapter 5 (commencing with § 13950) of Part 4 of Division 3 of Title 2 of the Government Code.
- (5) Any governmental entity that is responsible for repairing, replacing, or restoring public or privately owned property that has been defaced with graffiti or other inscribed material, as defined in subdivision (e) of § 594, and that has sustained an economic loss as the result of a violation of §s

594, 594.3, 594.4, 640.5, 640.6, or 640.7 of the Penal Code.” California Penal Code § 1202.4(k)

Because California Penal Code § 1202.4(f) specifies that restitution may be made to a “victim or victims,” it is clear that the Legislature mean to exclude non-victims from recovering money from convicted defendants in criminal cases. Further, because the Legislature defined the term victim, it is clear that the intent of the statute was to exclude individuals not described in the code from being considered victims.

2. Nowhere in the Record Is Any Victim, as Defined in California Penal Code Section 1202.4, Identified in the Present Case

Nowhere in the record, including at the restitution hearing conducted on August 5, 2009, is any individual identified as a victim under California Penal Code §1202.4.

Further, Mr. Bengé’s estate cannot qualify as a victim because the code specifically mandates that an “estate” is only a victim if it is “the direct victim of a crime.” (California Penal Code § 1202.4(k)(2).)

Mr. Bengé himself, not his estate, was the victim of the crime. Courts have held that financial institutions and other non-human entities are entitled to restitution only if the crime was specifically directed at the entity in question.

In *People v. O’Casey*, a case where the defendant was convicted of fraud and perjury for filing a false worker’s compensation claim. The defendant was ordered to pay restitution (pursuant to California Penal Code § 1202.4) to the insurance company that paid her workers compensation claim. (*People v. O’Casey*, (2001) 88 Cal.App.4th 967 at 969.)

“As explained in *Birkett* and other cases (*People v. Birkett, supra*, 21 Cal. 4th at p. 232), the victim is the object of the crime. In contrast to *Birkett*, in which the direct victims of the crimes were the automobile owners whose vehicles had been stolen to dismantle and sell the parts, and the only involvement of the insurers was to indemnify the owners for covered property losses under their insurance policies, in this case, the trial court reasonably viewed the insurance company as a direct crime victim, where, based upon appellant's fraud, it was induced to make payments directly to appellant and to medical providers on appellant's behalf. Thus, in

this instance, the insurance company itself is the object of the crime.” (*O’Casey* at 971).

The Court’s language in *O’Casey* that “the victim is the object of the crime” is clear. The financial entity here, Mr. Bengé’s estate, was not the direct victim of the crime. Mr. Runyan did not defraud or take any money from Mr. Bengé’s estate. In fact, Mr. Bengé’s estate did not even exist at the time Mr. Runyan committed the crimes he was convicted of. Mr. Runyan’s crime was against Mr. Bengé himself, similar to the automobile owners who lost their cars in *Birkett*.

The convictions in this case were the result of Mr. Runyan driving a motor vehicle under the influence of alcohol, not any financial or related crimes against Mr. Bengé’s estate. Mr. Runyan, unlike the defendant in *O’Casey*, did not contemplate, consciously or unconsciously, that Mr. Bengé’s estate would ever be financially harmed by his actions.

The fact that the Legislature requires that the aforementioned entities be the “direct victim” of a crime in order to recover restitution obviously infers that substantial involvement by the entity in question is required before restitution is appropriate.

The Court of Appeals opinion relies heavily on the idea that Mr. Runyan concedes that if Mr. Bengé had survived the accident, Mr. Runyan would be required to provide Mr. Bengé considerable restitution and thus, Mr. Bengé and his estate are in a worse position because Mr. Bengé did not survive the accident. While Mr. Runyan concedes that Mr. Bengé is worse off, the opinion then simply makes the erroneous and incorrect assumption that the legislature never intended this result.

The language of the statute and cases are more than clear. The legislature could have easily inserted a provision allowing the estate to recover restitution if no other victim existed. However, that language is absent. The **only** language regarding the estate recovering restitution prohibits this in this case. To find otherwise means ignoring the intent of the legislature, ignoring the statute, ignoring controlling caselaw, and simply finding in favor of the more sympathetic party.

Mr. Bengé died tragically as a result of Mr. Runyan’s actions. Because of Mr. Runyan’s actions, he is currently serving a prison sentence. However, Mr. Runyan should

not be punished in a manner beyond what California law allows. Mr. Bengé's estate is not a victim pursuant to the code, and because no other victim allowed by California law has been identified, no judgment of restitution is appropriate in this matter.

3. *People v. Slattery* Is Distinct from the Present Case and Respondent's Reliance on it Is Unfounded, As Major Distinctions Exist

Respondent relies on *People v. Slattery* to claim that restitution to the estate is proper. However, major distinctions between the present case and *Slattery* exist. The court applied section 1202.4, subdivision (f) indicating that “[u]nder the plain language of this statute, the court may order restitution only to a “victim.” (167 Cal.App.4th 1091, 1095 (2008).) There, the defendant injured his mother who died in the hospital ten (10) days after she was admitted and the hospital wanted to collect the unpaid bills in restitution from the defendant. (*Id.* at 1093-94.) The court stated that because the hospital was not the immediate object of the offense it was not entitled to restitution, holding that “the hospital incurred its economic loss indirectly from defendant's conduct: first, defendant illegally inflicted injuries upon her mother; second, Marshall Hospital treated defendant's mother for the injuries; third, defendant's mother did not pay the hospital bills.” (*Id.* at 1097.)

While the rule in *Slattery* addresses a similar issue as the present case, there are several critical distinguishing facts. The victim of *Slattery* incurred out-of-pocket hospital expenses *after* restitution was owed to her, namely after the crime occurred. It is for this reason alone that the court allowed the estate of the mother to receive restitution – because otherwise she would be placed in a worse position than she would have been prior to her injury. In the present case, the estate was neither in existence at the time of Mr. Bengé's death nor did the trial court award it any out-of-pocket expenses. Accordingly, granting restitution to Mr. Bengé's estate would not serve the same purpose as did the restitution served in *Slattery*.

Contrary to *Slattery*, where the debt incurred was solely a result of the injury, there was no such debt in the present case. The restitution paid to the victim's estate in *Slattery*

was nothing other than the debt incurred from the hospital bills, a critical factor which is not present in this case.

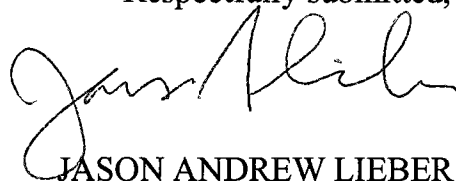
CONCLUSION

The legislature clearly intended to exclude the estate of a victim from receiving restitution in cases like the one here, given the fact that the language of California Penal Code § 1202.4 could have easily included victim's estates in similar situations. If the judgment is affirmed, the purpose of the statute providing for and defining who a victim is would be futile. While Mr. Runyan's actions cannot be excused, punishing him beyond what California law allows is not an appropriate remedy.

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Court of Appeal's decision upholding the restitution order.

Dated: May 21, 2011

Respectfully submitted,



JASON ANDREW LIEBER

ATTORNEY AT LAW

Attorney for Defendant and Appellant PAUL D. RUNYAN

CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANT'S REPLY BRIEF ON THE MERIT** uses 13 point Times New Roman font and contains 4, 230 words. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: May 21, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason Andrew Lieber". The signature is fluid and cursive, with a large initial "J" and "L".

JASON ANDREW LIEBER

ATTORNEY AT LAW

Attorney for Defendant and Appellant PAUL D. RUNYAN

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and a resident of the County of Los Angeles; I am over the age of eighteen years and not a party to the within-entitled action. My business address is 22130 Clarendon Street, Woodland Hills, California 91367. On May 21, 2011, I caused a copy of the within;

APPELLANT'S REPLY BRIEF ON THE MERITS (Supreme Court of the State of California Case No. S187804; Court of Appeal Case No. B218863; Los Angeles County Superior Court No. BA322080),

To be delivered via United States Mail, in sealed envelopes with proper postage on the following:

The Honorable Marcelita Haynes
1945 South Hill St
Los Angeles CA 90007

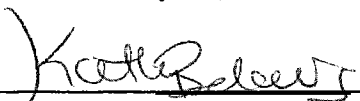
Los Angeles County District Attorney's Office
210 West Temple Street
Los Angeles CA 90012

California Attorney General's Office
300 South Spring Street
Los Angeles CA 90013

Clerk, California Court of Appeals
Second Appellate District
300 South Spring Street
Los Angeles CA 90013

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

Executed: May 21, 2011, at Los Angeles County, California.



Kathy Belous
Declarant