S207536

In the Supreme Court of the State of California

Avery Richey,
Plaintiff and Appellant,
v.
AutoNation, Inc., *et al.*
Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Seven, Case No. B234711
Los Angeles County Superior Court; Case No.BC408319
Honorable Malcolm H. Mackey

Reply Brief on the Merits

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Introduction

The principal question for this court is whether employer-employee arbitrations involving an employee's unwaivable rights should be subject to special rules such that an employee—but not the employer—may have de novo review of issues decided by the arbitrator. Richey's answer brief provides no persuasive reason for this court to adopt such a radical rule that would make such proceedings arbitrations in name only. Richey's only response is to assert in so many words that this court has already decided the issue in his favor. But if that were the case, this court would not have granted review.

In addition to asserting that this court should not adopt ordinary *Moncharsh* standards of review of such arbitrations as AutoNation contends, Richey also urges this court to reject a proposed middle ground, namely, that such arbitrations be reviewed under the manifest disregard of law standard. Richey argues that because his arbitration agreement requires the arbitrator to decide based upon the law and not principles of fairness and equity, he is entitled to de novo review for a second reason. But as we explain below, that argument is foreclosed by this court's decision in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334. And Richey makes no argument why this standard would not accommodate this court's desire to ensure arbitrators decide cases involving an employee's unwaivable rights based on the law, while at the same time not turning such arbitrations into what are really court trials, but presided over by an arbitrator.

Finally, on the honest belief issue, Richey's arguments are both substantively incorrect, and in some cases forfeited. On the former, his only attempt to refute the argument in the opening brief why this court should adopt the honest belief defense is to take snippets of opinions out-of-context. Richey also tries to expand this case to include issues different from those he raised in moving to vacate the award. Because those issues were neither raised in the trial court, nor in any answer to the petition for review, they are forfeited.

This court should reverse the decision of the court of appeal and remand with instructions to the trial court to reinstate the judgment confirming the arbitration award.

Legal Discussion

I

Richey's Answer Brief Does Not Refute the Opening Brief's Argument that Legal Error—If Any—Should Not Be Grounds to Vacate an Arbitration Award Involving Unwaivable Rights

In the argument section of Richey's answering brief concerning the standard of review (Answer Brief at 17-22), he fails to provide any extended analysis. Instead, he asserts that a court should review the arbitrator's decision de novo, citing five cases, *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665; *Armendariz v. Foundation Health Psychcare Servs, Inc.* (2000) 24 Cal.4th 83; *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519; *Department of Personnel Administration v. California*

Correctional Peace Officers Ass'n (2007) 152 Cal.App.4th 1193; *Board of Education v. Round Valley Teachers Ass'n* (1996) 13 Cal.4th 269.

None of these cases supports Richey's argument.

As discussed in the opening brief on the merits, both *Armendariz* and *Pearson Dental* leave open the standard of review in such circumstances—which is presumably why this court granted the petition for review. (OBM at 10-13.) We have thoroughly discussed these cases in the opening brief and will not rehash those arguments here.

Nor does Richey's citation of *Board of Education* and *Department of Personnel Administration*—which we also discussed in the opening brief (OBM at 9-10)—require any extended discussion to show that they do not support Richey either. In *Board of Education*, the Education Code preempted the remedy imposed by the arbitrator, and in *Department of Personnel,* the arbitrator exceeded his power by reforming a memorandum of understanding after its terms had been ratified by the Legislature. Thus, in both *Board of Education* and *Department of Personnel,* the arbitrator had no power to issue the remedy he did. To the extent those cases engaged in a de novo review, it was to determine if the arbitrator had the power to invoke the remedy he did, not whether a remedy indisputably within the arbitrator's power should be second-guessed.

Here, by contrast, Richey does not argue that an arbitrator lacks power to refuse to order reinstatement of an employee who has been granted leave under CFRA. And the arbitrator never claimed to lack authority to reinstate Richey had he thought it appropriate. Richey's quarrel thus boils down to whether appropriate circumstances exist here for reinstatement to be ordered and whether a court should second-guess an arbitrator's decision that they do not. That is a fact-based inquiry appropriate for deference to the arbitrator, not an issue going to the arbitrator's power or whether the decision violates public policy. It is just whether the arbitrator was right or wrong. In the typical arbitration, that is not a ground for upsetting an award and should also be the case in an arbitration involving an employee's unwaivable rights.

This distinction is illustrated by the fifth case Richey cites, *Kelly Sutherlin, supra.* In that case, the defendant claimed that an arbitration award violated public policy—the defendant's First Amendment rights—by requiring the defendant to communicate a retraction to a third party. The court of appeal disagreed. It held that forced speech in the form of a retraction did not always violate the First Amendment, but whether it did or not depended upon the circumstances: "Where, as here, statements of a party have been determined to be false and are the bases for finding liability, courts have approved orders requiring the parties to correct those statements." 194 Cal.App.4th at 531-32. As such, the court of appeal held that the arbitrator did not violate any

public policy by requiring a retraction in the circumstances of that case.

By a parity of reasoning, an employee is not always entitled to reinstatement when on approved CFRA leave and Richey does not argue otherwise. See Cal. Code Regs., tit. 2, § 7297.2(c)(1) (employee has no greater right to reinstatement than if employee had been continuously employed during CFRA leave period). Put another way, the arbitrator indisputably had the power to decide whether Richey should be reinstated. Refusing to reinstate him was not an act beyond the arbitrator's power. Richey's answering brief thus fails to appreciate—and refute—the opening brief's principal argument, namely that the relevant question here is whether "a court may second-guess the arbitrator's legal and factual findings determining that Richey was not entitled to reinstatement." (OBM at 17.) This is the type of conclusion to which the arbitrator should be given deference. Opening up such findings to de novo review as Richey argues would be the antithesis of arbitration. This court should reject Richey's argument for de novo review.

II

Richey Makes No Persuasive Argument Why Manifest Disregard Would Not Be an Appropriate Standard

In the opening brief, we argued that if this court were inclined to grant broader review of arbitration awards involving an employee's unwaivable rights than would be the case in an ordinary arbitration governed by *Moncharsh's* general rule

(*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1), this court should adopt the "manifest disregard" standard as a means of assuring that arbitrators follow the law. Richey's argument why this court should not adopt a manifest disregard standard is not persuasive.

Richey's principal argument against this approach ignores existing law. He argues that because his arbitration agreement with AutoNation requires the arbitrator to resolve disputes on the basis of the law and not principles of equity, review must be de novo. (Answer Brief at 22.) This argument is foreclosed by recent precedent from this court. What Richey fails to recognize is that a provision in an arbitration agreement requiring the arbitrator to follow the law does not mean that a court has the power to correct *errors* of law. (OBM at 7-8, citing *Cable Connection, supra,* 44 Cal.4th at 1360; *City of Richmond v. Service Employees Internat. Union, Local 1021* (2010) 189 Cal.App.4th 663, 669 n.4.)[1]

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[1] Richey cites *Cable Connection, supra,* as support for his argument favoring de novo review. (Answer Brief at 21-22.) In context, *Cable Connection* was discussing the United States Supreme Court decision in *Hall St. Assocs., L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, which held that under the Federal Arbitration Act parties may not contract for expanded judicial review. In the passage Richey cites, this court concluded that (i) *Hall Street* did not apply to cases arising under the California Arbitration Act, (ii) in California parties could contract for broader judicial review, and (iii) a contrary result would call into question California's public policy exception, citing *Armendariz. Cable Connection, supra,* 44 Cal.4th at 1354 n.14. But this court's discussion did not suggest what the answer should be to the issue presented in this case.

Richey also offers no persuasive argument why this standard would not be an appropriate middle ground. It would satisfy this court's concern as expressed in *Armendariz* and *Pearson Dental*, both *surpa*, that an arbitrator's decision be tethered to the law and an employee's rights be determined on the merits. At the same time, applying manifest disregard rather than allowing de novo review would prevent arbitrations from turning into court trials in which only the plaintiff-employee is entitled to expanded review. If Richey's position were accepted, arbitrations involving an employee's unwaivable rights would be arbitrations in name only.

III

Richey Makes No Persuasive Argument Why this Court Should Not Adopt the Honest Belief Defense

A. Richey makes no attempt to refute AutoNation's argument that the cases Richey relies upon do not apply

AutoNation spent a number of pages in its opening brief on the merits explaining why cases the court of appeal cited (and Richey now relies upon) do not apply. (OBM at 28-36.) Specifically, AutoNation showed that the cases Richey now cites as supposedly rejecting the honest belief defense did not do so. Those cases had nothing to do with an employer's determination that an employee violated company policy while on leave, but instead all concerned whether the employer had mistaken its own obligations about the leave, by for example, not properly calculating the leave due the plaintiff or by penalizing a plaintiff

for taking protected leave. E.g., *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112 (employer mistakenly included protected leave in calculating employee's absences); *Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125 (employer mischaracterized protected leave as unprotected); *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237 (dispute whether employee had adequately applied for CFRA leave resolved in his favor; fact that individual supervisors did not know of employee's protected status is no defense if plaintiff is terminated because of protected absences); *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864 (employer failed to comply with its obligations under CFRA).

Richey takes snippets from these opinions out-of-context without analyzing the factual setting in which the courts made them. (Answer Brief at 27-29.) These cases provide no support for Richey's position.

B. Contrary to Richey's argument, AutoNation's position does not allow it to "play doctor"

Richey argues that AutoNation's position is "essentially license for ignorant employers, as long as their ignorance is sincere, to fire employees so long as they honestly believe the employee is not properly using the medical leave, regardless of the opinion of the employee's doctor." (Answer Brief at 24.) This argument sidesteps the reason AutoNation terminated Richey and is mistaken on the law because an employee is still entitled to a remedy if wrongfully discharged.

While on leave, Richey was receiving disability benefits. [3CT 541.] AutoNation advised Richey in writing that AutoNation's policy prohibited outside employment while an employee is on a leave of absence. [3CT 541.] Richey was asked to call if he had any questions. [3CT 541.] Richey ignored the letter. [3CT 541.] Multiple employees witnessed Richey working at his restaurant while he was out on leave. [3CT 541.] Richey himself testified to taking change, handling orders, and answering the phone while at the restaurant during his leave of absence. [3CT 541.] The arbitrator found that AutoNation adhered to the statutory requirements in granting leave "and other follow-up that occurred." [3CT 549.] And the arbitrator also found that none of Richey's doctor's notes "make comment on Mr. Richey's restaurant or what level of work the doctor would allow." [3CT 541.]

And finally the arbitrator found that AutoNation could terminate Richey *either* because "it has an 'honest' belief that he is abusing his medical leave and/or is not telling the company the truth about his outside employment." [3CT 553.] The arbitrator found both conditions were met here: "[Mr. Gagnet's] testimony and the supporting documents . . . are strong evidence that he was concerned about *two* issues: a) Was Mr. Richey honest with the dealership about his medical condition, and b) did [Mr. Richey] have another job?" [3CT 553 (emphasis added).] Thus, regardless of Richey's medical condition, the arbitrator found that AutoNation was entitled to terminate him for violating company policy while on leave. Even if Richey's argument about playing

doctor had some merit, therefore, the arbitrator's decision is supported by independent reasons.

But AutoNation was not "playing doctor." At AutoNation, Richey was an assistant sales manager. [3CT 539.] While working at the restaurant—while on disability leave—Richey engaged in a number of kinds of physical activity. He was seen sweeping, hanging a sign, bending over, and working the front counter, among other things. [3CT 541.] Although admittedly the arbitrator said that what AutoNation did could be "considered a superficial investigation," [3CT 553.] it was enough for AutoNation to form an honest belief that Richey was abusing his leave. *Kariotis v. Navistar Internat. Transp. Corp.* (7th Cir. 1997) 131 F.3d 672, 677 (employer's investigation "hardly looks world-class" but while "the decision arguably was wrong, [plaintiff] has not shown it was based on illegal discrimination").

Moreover, to the extent Richey argues (Answer Brief at 24-25) that AutoNation acted inappropriately by taking matters into its own hands because it had the statutory right under Government Code section 12945.2(k) to obtain a second opinion, that citation does not support his argument. To begin with, that statute speaks to the granting of initial leave or extensions. Gov't. Code § 12945.2(k). That is not what Richey is complaining about. But even if the statute conceivably applied here, this court held in *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201 that such a procedure is optional and does not prevent the

employer from litigating issues pertaining to the employee's health rather than obtaining a second opinion:

> Here, the pertinent statutory language does *not* require an employer faced with two conflicting health care provider opinions to obtain a binding decision from a third health care provider, and it does *not* say that an employer who fails to obtain such a decision will be barred, in litigation with the employee, from claiming that the employee did not suffer from a serious health condition making the employee unable to work.

Lonicki, supra, 43 Cal.4th at 210 (emphasis in original).

Although this passage is framed in terms of the "tiebreaking" language in section 12945.2, subdivisions (k)(3)(C) and (k)(3)(D), the same permissive "may" language also appears in subdivision (k)(3)(A) which permits the employer to request a second opinion. In other words, AutoNation had no obligation to seek a second doctor's opinion, but could rely on its own investigation and take action—subject to litigation to challenge that action. Here, AutoNation took action, Richey chose to litigate, the arbitrator ruled in AutoNation's favor, and that should be the end of it. See *Lonicki, supra*, 43 Cal.4th at 213 ("If an employer doubts the validity of such a claim, nothing in either law precludes the employer from denying the employee's request for medical leave and discharging the employee if the employee does not come to work. Of course, an employer embarking on that course risks a lawsuit by the employee and perhaps a finding by the trier of fact that the employer's conduct violated the

employee's rights under either the CFRA or the FMLA, or both, by denying the requested medical leave.").

C. This court should reject Richey's argument that AutoNation's policy against accepting other employment cannot be used as a nondiscriminatory reason to terminate an employee

Richey argues that the arbitrator should not have been able to use AutoNation's policy against accepting other employment while on leave as a basis to justify AutoNation's termination of Richey. In this regard, Richey makes two points: the policy is a restraint on FMLA leave and AutoNation did not give adequate notice that the policy applied to CFRA leave or prohibited the employee from working in an employee-owned business. (Answer Brief at 35-39.) This court should reject the argument for two reasons: (i) Richey has forfeited the argument and (ii) it is wrong in any event.

1. Richey has forfeited the argument in three ways

One looks in vain in Richey's motion to vacate the arbitration award and his reply for any argument that the award should be vacated because of some deficiency in AutoNation's policy or in giving Richey notice of it. [2CT 263-86; 4CT 669-83.] In his petition to vacate the award, Richey argued only that the arbitrator erroneously invoked the honest belief defense. He did not argue that AutoNation's policy concerning working while on leave was either illegal or had not been adequately communicated to Richey. As such Richey has forfeited these

arguments. E.g., *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40, 53-54 (party must adhere to trial court arguments and may not adopt a new theory on appeal); *Delany v. Dahl* (2002) 99 Cal.App.4th 647, 660 (argument forfeited on appeal because it was not raised in petition to vacate arbitration award).

And Richey has forfeited this argument for another reason as well. AutoNation's petition for review raised two issues, and two issues only: (i) the proper standard of review of an arbitration award involving an employee's unwaivable rights; and (ii) whether California should adopt the honest belief defense. Richey did not file an answer to the petition for review and thus did not seek to raise any additional issues on review. Cal. Rules of Court, rule 8.504(c). As such he cannot raise this issue now, even if it were a live issue in the court of appeal. Cal. Rules of Court, rule 8.516(b)(1) ("The Supreme Court may decide any issues that are raised or fairly included in the petition or answer."). This issue is not fairly raised in the petition and this court should not consider it.

Finally, Richey did not provide the trial court, the court of appeal, or this court a sufficient record to determine the validity of his argument, at least as to notice. The arbitrator found that AutoNation complied with all statutory requirements in granting Richey's leave and with regard to all necessary follow-up. [3CT 549.] The arbitrator's award makes reference to the fact that a company called Matrix was handing the leave administrative

details for AutoNation [3CT 540], but Richey has not supplied any Matrix documents in the appellate record, and without those documents and a transcript of the arbitration hearings, he should not be entitled to second-guess the arbitrator's findings. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-41; *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.

2. AutoNation's policy is not deficient and Richey cannot seek reversal based on an alleged lack of notice

Even if Richey had not forfeited the issue he should lose on the merits. AutoNation did have a uniformly-applied policy that satisfies section 825.216(e). The policy in place at AutoNation was that employees were not permitted to work other jobs while on leave unless specifically authorized by management. [3CT 492-93, 553.] This type of policy complies with 29 C.F.R. section 825.216(e), and the fact that AutoNation sometimes authorized second jobs does not disqualify the policy from the protection of section 825.216(e). A case on all fours is *Pharakhone v. Nissan North America, Inc.* (6th Cir. 2003) 324 F.3d 405.

In *Pharakhone* the employee took FMLA leave to care for a newborn child. The employer's policy prohibited "unauthorized" work while on leave. While on leave, the employee worked at a restaurant owned by his wife. Upon learning that the employee was working at the restaurant, the employer sent the employee a memorandum reminding him that company policy prohibited such work. *Id.* at 406-07. The employee continued to work at the restaurant despite the warning, without attempting to secure

authorization, and when the employer discovered it, it fired him. In short, the facts in *Pharakhone* are strikingly similar to the facts here.

The court of appeal affirmed summary judgment in favor of the employer. "The right to reinstatement under the FMLA is not absolute," the court explained. *Id.* at 407 (formatting omitted). "[A]n employer need not reinstate an employee if application of 'a uniformly-applied policy governing outside or supplemental employment'—*i.e., a rule against working while on leave*—results in the employee's discharge." *Id.* at 408 (emphasis added; formatting omitted).

Similarly, here, AutoNation's policy was exactly the same as the policy in *Pharakhone*—it prohibited unauthorized work while on leave. [3CT 492-93, 494 n.9, 553.] Richey complains that the evidence shows exceptions were made, but that is entirely consistent with prohibiting *unauthorized* work while on leave. Thus, even if Richey had not waived this argument, AutoNation had a uniformly-applied policy against working while on leave and could validly fire Richey for violating that policy.

D. The arbitrator did not use a *McDonnell Douglas* burden-shifting approach and Richey has forfeited the argument anyway

Richey complains that the arbitrator erroneously used a *McDonnell Douglas* burden-shifting approach in deciding the case. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. There are two answers to this argument.

First, Richey did not raise this issue in an answer to the petition for review. As such, for the reasons stated above, he has forfeited this argument.

Second, there is no indication in the arbitrator's opinion that he actually employed the *McDonnell Douglas* framework for any cause of action. The arbitrator mentions *McDonnell Douglas* in passing in making general legal remarks about the case. [3CT 550.] Nowhere else, however, does the arbitrator mention burden shifting. In the section beginning with "The case law provides the answers" [3CT 550-51], which is where the arbitrator's analysis truly begins, he nowhere mentions *McDonnell Douglas* or any sort of burden shifting. And the award shows he did not engage in any burden shifting. The arbitrator concluded "[t]he weight of the evidence is overwhelming that Power Toyota fired Mr. Richey for non-discriminatory reasons."[2] [3CT 554.] This is not a burden-shifting analysis; it is an assessment of the entire record by a trier of fact. Thus it was not as though AutoNation barely

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[2] The fact that the arbitrator mentioned "non-discriminatory reasons" does not prove that he treated the issue as one of discrimination. His phraseology is consistent with how courts discuss the honest-belief defense. *See Medley v. Polk Co.* (10th Cir. 2001) 260 F.3d 1202, 1207 ("The law, from a number of authorities at both the federal appellate and district court levels, is, however, uncontradictedly being pronounced that an employer who discharges an employee honestly believing that the employee has abandoned her job and is otherwise not using FMLA leave for its here [sic] 'intended purpose,' to care for a parent, would not be in violation of FMLA, even if its conclusion is mistaken, *since this would not be a discriminatory firing.*" (Emphasis added.)).

scraped by due to Richey failing to put on a prima facie case—the affirmative evidence in AutoNation's favor was "overwhelming." Finally, the arbitrator referred to the doctrine as an "Honest Belief *Defense*," indicating he understood that it was an affirmative defense, which is AutoNation's burden to prove. [3CT 551.]

Even if the arbitrator had applied the *McDonnell Douglas* framework to the failure-to-reinstate claim, the error would have been unreviewable and harmless in any event because, as noted above, the arbitrator found "overwhelming" evidence that Power Toyota honestly believed Richey committed fireable offenses apart from his protected absences. [3CT 554.] Thus, even if the arbitrator had erroneously imposed a burden on Richey to make out a prima facie case that he was fired because of his absences, the ruling did not turn on Richey's ability or failure to satisfy that burden. Because any prima facie burden placed on Richey had no effect on the ruling, the alleged error in employing the *McDonnell Douglas* framework was harmless and does not warrant reversal. Code Civ. Proc. § 475 (error reversible only if a "different result would have been probable" absent the error).

And because it was harmless, it certainly does not rise to the level of egregious error necessary to satisfy the statutory-rights exception. Thus the error, if any, is not even reviewable.

E. The arbitrator made sufficient findings and Richey has forfeited any error

Richey complains that the arbitrator failed to make sufficient findings. He claims that "the Arbitrator never made findings of fact and conclusions of law that were relevant and necessary to determining liability as to each and every of [Richey's] FEHA causes of action." (Answer Brief at 34.) His answer brief, however, provides no examples of omitted findings. (*Ibid.*) Once again Richey has both forfeited the argument and he is wrong in any event.

As explained above, Richey only moved to vacate the award on the ground that the arbitrator improperly invoked the honest belief defense; Richey did not appeal the judgment confirming the award as to causes of action other than his claim for reinstatement; and Richey did not file an answer to the petition for review to present additional questions for this court. His argument about additional findings is forfeited.

But in any event, the arbitrator's 19-page decision adequately explains how the arbitrator decided the case and surely meets *Armendariz's* admonition that an award involving an employee's unwaivable rights "reveal[s], however briefly, the essential findings and conclusions on which the award is based." *Armendariz, supra*, 24 Cal.4th at 107.

Conclusion

This court should affirm the judgment confirming the arbitration award.

Dated: July 8, 2013

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 4,361 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

Dated: July 8, 2013

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On July 8, 2013, I served, in the manner indicated below, the foregoing document described as **Reply Brief on the Merits** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

See attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 8, 2013, at Costa Mesa, California.

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For Delivery to Hon. Malcolm Mackey