S124828

IN THE SUPREME COURT OF CALIFORNIA

THOMAS C. BENNIGSON,

Plaintiff and Appellant,

vs.

MARILYN ALSDORF,

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B168200

REQUEST BY FORMER ASSEMBLY MEMBER GEORGE NAKANO FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT THOMAS C. BENNIGSON

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rule 29.1(f), Former Assembly Member George Nakano respectfully requests permission to file the attached brief as amicus curiae in support of plaintiff and appellant Thomas C. Bennigson. This application is timely made within 30 days after the filing of the reply brief on the merits.

Former Assembly Member Nakano is the author of Code of Civil Procedure section 354.3, which extends the statute of limitations in California for actions to recover artworks taken from their rightful owners as a result of Nazi persecution. As the author of legislation designed to help the true owners of Holocaust-era stolen art, like petitioner here, to recover their property, Former Assembly Member Nakano has an interest in the decision in this case.

Counsel for Former Assembly Member Nakano have reviewed the briefs on the merits filed in this case and believe this court will benefit from additional briefing on the historical and legal context of art stolen during World War II, as well as the policy implications of the jurisdictional ruling in this case.

Accordingly, Former Assembly Member Nakano respectfully requests that the court accept and file the attached amicus curiae brief.

DATED: December 3, 2004

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AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT THOMAS C. BENNIGSON

INTRODUCTION

Although this case presents a narrow and technical issue of civil procedure, the issue has broad public policy implications. The court's decision in this case will determine the extent to which citizens and residents of California are able to recover stolen art that is rightfully theirs. More precisely, the court's decision will determine whether an out-of-state possessor of stolen personal property can intentionally send the property into California without thereby becoming subject to the jurisdiction of this state's courts.

This case concerns Picasso's *Femme En Blanc*, a painting that was owned by Carlota Landsberg, the grandmother of plaintiff and appellant Thomas Bennigson. Landsberg lived in Berlin before the Nazis' rise to power, but she fled Germany shortly after the explosion of anti-Semitic violence known as "Kristallnacht" in late 1938. Before leaving, however, she sent *Femme en Blanc* to Justin Thannhauser, an art dealer in Paris, for safekeeping. Little did she know that the Nazis would soon occupy France and loot its unparalleled public and private art collections, including Thannhauser's. Landsberg never recovered the painting, though after the war the German government paid her 100,000 Deutschmarks in restitution on the condition that she return the payment if she ever managed to get the painting back. (See Reich, *Whose Picasso Is It?*, Chicago Tribune (Jan. 19, 2003) (hereafter *Whose Picasso Is It?*).)

Defendant and respondent Marilynn Alsdorf and her husband, both long-time collectors of fine art, purchased *Femme en Blanc* in 1975. The painting hung in their Chicago home until 2001, when Alsdorf sent the painting to California for display and possible sale by the David Tunkl Fine Art Gallery in Los Angeles. Tunkl succeeded in finding a potential buyer in France, who, as part of a due diligence investigation in advance of the proposed purchase, contacted the Art Loss Register (ALR), the leading source for provenance research concerning stolen art. The ALR determined that the painting was looted from Thannhauser by the Nazis and that Bennigson, Landsberg's sole heir, is its true owner.

After some fruitless negotiations, Bennigson filed suit against Alsdorf and Tunkl in Los Angeles. But just hours before Bennigson obtained a temporary restraining order to require the painting to remain in Los Angeles, Alsdorf had it returned to her home in Chicago, where it now resides once

again.[1/] Alsdorf then moved to quash service of process, arguing that she was not subject to personal jurisdiction in California's courts. The trial court granted her motion, the Court of Appeal affirmed, and this court granted review. Thus, the following issue is presented: When an out-of-state resident sends a stolen painting into California, do California courts have personal jurisdiction over the out-of-state resident in a replevin action by the painting's rightful owner?

The parties' briefs analyze the legal doctrines that govern the issue presented; that analysis need not be repeated here. Instead, this brief focuses on a single component of that analysis: "the forum state's interest in adjudicating the dispute." (*Harris Rutsky & Co. Ins. Serv. v. Bell & Clements* (9th Cir. 2003) 328 F.3d 1122, 1132.) By describing the historical and public policy context in which this case arises, this brief aims to demonstrate that California's interest in adjudicating this dispute is very strong, and therefore assertion of personal jurisdiction over Alsdorf is proper.

The brief begins with an overview of the Nazis' organized, efficient, and comprehensive campaign of art looting in occupied Europe, particularly in France, where *Femme en Blanc* was seized. We also describe the post-war disappearance of these stolen works, and the art world's recent efforts to encourage their return to their rightful owners. All of that history forms the background both for this lawsuit and for the California legislature's enactment of Code of Civil Procedure section 354.3, which suspends the statute of limitations for claims like Bennigson's through December 31, 2010.[2/]

1/ In connection with a forfeiture action against Alsdorf for knowingly transporting stolen property across state lines, the federal government has now "seized" the painting and ordered Alsdorf not to move it again. (*Feds Claim Custody of Looted Picasso*, Washington Post (Oct. 28, 2004) p. C03.)

2/ Unless otherwise indicated, all subsequent statutory references are to (continued...)

Next, the brief explains the importance and application of section 354.3, and the public policy that the statute expresses. The starting point for that discussion is the fact that, because thieves do not obtain title to the goods they steal, no purchaser can obtain good title from a thief or the thief's successor, regardless of whether the purchaser acts in good faith. Thus, the claim of the true owner of stolen property is always good against the good-faith purchaser who stands in the shoes of the thief, *as long as the true owner's claim is not time-barred.*

That last qualification is crucial because statutes of limitation often constitute serious obstacles for plaintiffs seeking to recover stolen art. Moreover, the obstacles are particularly serious for the rightful owners of *Nazi-looted* art, because of the complex and time-consuming task of assembling the evidence needed to support a claim of ownership. With these difficulties in mind, the California legislature enacted section 354.3 to give the people of this state sufficient time to research and pursue their claims for recovery of artworks stolen during the Holocaust era. In so doing, the legislature expressly announced that "California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity" to bring actions like this one. (Assem. Bill No. 1758 (2001-2002 Reg. Sess.) § 1(c).)

In view of section 354.3 and the public policy it embodies, it is difficult to deny that California has a strong interest in the adjudication of Bennigson's claim against Alsdorf. But Alsdorf does deny it, basing her argument on both the statute's language and its legislative history. The final section of this brief addresses Alsdorf's arguments and shows that they lack merit. Properly understood, the statute's terms and its legislative history confirm that the

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2/ (...continued)
the Code of Civil Procedure.

statute and the public policy it represents apply to this case. Given the legislature's expressed interest in encouraging the return of Nazi-looted art like the Picasso in this case, California courts' exercise of personal jurisdiction over Alsdorf here is perfectly appropriate.

I.

THE HISTORICAL CONTEXT – AN OVERVIEW OF NAZI ART THEFT DURING THE SECOND WORLD WAR AND THE ART WORLD'S RESPONSE TO IT.

Throughout history, "[w]ar has exposed historic monuments and works of art to two principal dangers: the danger arising out of the practice of taking spoils during or at the close of hostilities, and the danger of destruction from acts of war, especially artillery action and aerial bombardment." (Visscher, *International Protection of Works of Art and Historic Monuments*, in Law, Ethics and the Visual Arts (Merryman & Elsen edits., 1998) p. 1.) During World War II, however, the seizure of art became a tool of war itself: German Nazis systematically looted art on a grand scale, as an integral part of their "Final Solution" to eradicate Jewish people and culture and to promote (and return to Germany) what in their view were examples of superior art and culture. (Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time* (2004) 27 Colum. J.L. & Arts 349, 352 (hereafter *The Successful Use of Laches*); Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines* (2001) 16 Conn. J. Int'l L. 297, 312.) Thus, "[w]hile looting has always been a part of war, for Hitler, both the acquisition and cleansing of art was a central part of his plan for a pure Germanic race, his goal being 'to eradicate a race by extinguishing its culture as well as its people.'" (Collins, *Has the "Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-Looted Art* (2002) 54 Me. L.Rev. 115, 123-124 (hereafter *Has the Lost Museum Been Found?*).)

The Nazi art campaign began in the mid-1930s, when they began to rid Germany of "degenerate" modern art and to leave in its place only art that lived up to an acceptably classical, "Germanic" ideal. (See generally Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War (1995) pp. 3-25 [especially pp. 8-11, 22-23] (hereafter Rape of Europa).) Nazi officials denounced modern artists and their "unfinished" works, and government agents confiscated disapproved works from public collections across Germany. (*Id.* at pp. 18, 22-23.) In March 1938, the chairman of the confiscation committee announced that the museums had been "purified." (*Id.* at p. 23.) Nearly 16,000 works of art – including those by modern masters such as Picasso, Matisse, Van Gogh, Cezanne, Gaugin, and Braque – had been seized in the process. (*Ibid.*; see also Lehmann-Hupt, *Art Under a Dictatorship*, in Law, Ethics and the Visual Arts, *supra*, at pp. 433-437; Platoni, *The Ten Million Dollar Woman* (Aug. 4, 2004), East Bay Express <http://www.eastbayexpress.com/issues/2004-08-04/news/feature_3.html> [as of Nov. 16, 2004] (hereafter *The Ten Million Dollar Woman*) ["Much of the work of modern masters was dismissed as 'degenerate art' not in keeping with the Nazis' cultural ideals. 'They probably wouldn't go for a Picasso [according to one art history professor].' 'It would be too revolutionary to them'"].)

As the Nazi conquest of Europe unfolded, the organized theft and destruction of art spread from one occupied country to the next. There were two separate aspects to this program. On the one hand, the Nazis' "attack on European Jewry included stealing their victims' art as one part of the process of persecution, dehumanization, and eventual annihilation." (Petropoulos, Art as Politics in the Third Reich (1996) p. 123 (hereafter Art as Politics).) On the other, the systematic plundering of European art holdings fit into the project of "arranging the 'return' of Germanic art," which the Nazis conceived as

including works created by or previously owned by Germans. (*Id.* at p. 124.)

The occupation government purported to legalize the looting through a series of decrees that authorized the seizure of "the entire range of objects of art," including public, private, and church collections. (Rape of Europa, *supra*, at pp. 69-70.) Variations on these patterns were repeated across Europe and in the Soviet Union. (See, e.g., *id.* at pp. 81-114, 185-201.)

France's vast collection of artworks was similarly decimated. At the start of the war in 1939, Paris was the center of the art world – its assembly of artists, art dealers, and private and public collections was unrivaled. (Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art (1997) pp. 4-5 (hereafter Lost Museum).) Thus, when Germany defeated France in 1940, Paris presented the invaders with uniquely plentiful artistic resources to exploit. (*Ibid.*) The Nazis recognized the opportunity and made the most of it. When Paris was finally liberated in August 1944, "France was the most looted country in Western Europe. One-third of all the art in private hands had been pillaged by the Nazis." (*Id.* at p. 4.)

Nazi art looting in France was ultimately dominated by a single entity, the Einsatzstab Reichsleiter Rosenberg (ERR). (Art as Politics, *supra*, at p. 130; see also Lost Museum, *supra*, at p. 35 [after September 1940, the ERR soon achieved "a monopoly over the confiscation of art and other cultural properties within occupied France"].) Under the leadership of director Alfred Rosenberg, the ERR was "probably the most effective art plundering agency the world has ever witnessed." (Art as Politics, *supra*, at p. 126.) Shortly after the Nazi occupation began, "more than four hundred crates [of confiscated artworks] were deposited and unpacked" at the Galerie Nationale du Jeu de Paume, which the ERR had commandeered as its central repository. (Lost Museum, *supra*, at pp. 105-107.) The ERR confiscated, evaluated, and

inventoried tens of thousands of works of art (*id.* at pp. 4, 108), and, of that staggering total, an estimated three-fourths was confiscated by mid-1941, less than one year after the German invasion. (Art as Politics, *supra*, at p. 131).

At the Jeu de Paume, confiscated works "were divided up and, depending on their quality and desirability [in the eyes of the Nazi evaluators], either transported to Germany or put up for sale." (Lost Museum, *supra*, at p. 108.) The works "put up for sale" suffered a variety of fates. Many were directly siphoned off by the high-ranking Nazi official Hermann Goering for his private collection. (See, e.g., *id.* at pp. 31-32, 36-38 [estimating that Goering "acquired as many as one thousand paintings and other art objects" by purportedly purchasing them from the ERR, although he in fact "never paid a single cent"].) The remainder entered the Paris art market – already the largest in the world – through a number of different channels. Some dealers who were attuned to the Nazis' artistic proclivities would deliver to the ERR works that were in the Nazis' preferred classical "Germanic" style, in order to barter them for confiscated works by "degenerate" artists like Picasso, Leger, and Chagall. (*Id.* at pp. 107-108, 116-118 [describing one dealer's exploitation of the ERR's eagerness to rid itself of "works that were aesthetically unsuitable to Nazi ideology"].) Even if the Nazis did not themselves value modern artworks, they understood their market value to others: "'Any works of art stolen that were not destined for a Nazi collection on the grounds that they were modern or avant-garde were usually sold in thriving wartime art markets, principally in Paris or Amsterdam, or were used for the purposes of exchange – for example, five Impressionist paintings were swapped for two old master paintings.'" (*The Ten Million Dollar Woman*, *supra*.) Other dealers bought the looted art from the ERR at bargain prices and then resold it for a handsome profit. (Lost Museum, *supra*, at pp. 118-119, 122-154 [describing the booming Paris art market during the war, fueled by

confiscated art and "the sudden arrival of large numbers of German buyers with deep pockets"]; see also Rape of Europa, *supra*, at pp. 153-183.)

The scope of the Nazis' art theft, and its impact on the art market, is unprecedented. By 1944, the Nazis had looted over one-third of the art held in private collections in Europe. (*The Successful Use of Laches*, *supra*, 27 Colum. J.L. & Arts at p. 352.) All told, the Nazis stole more than 240,000 artworks from museums and private collections throughout Europe – about one-fifth of the world's art holdings. (Art as Politics, *supra*, at p. 9; Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art* (1999) 9 Fordham Intell. Prop. Media & Ent. L.J. 549, 549 (hereafter *Leave No Stone Unturned*); see also Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts* (2000) 34 U. Rich. L.Rev. 1, 161 (hereafter *Nuremberg in America*) [estimating that 220,000 pieces of art were looted]; *Has the Lost Museum Been Found?*, *supra*, 54 Me. L.Rev. at p. 124 ["In twelve years . . . as many works of art were displaced, transported, and stolen as during the entire Thirty Years War or all the Napoleonic Wars"].) The value of this plundered art exceeded the total value of all artwork in the United States in 1945: $2.5 billion in 1945 prices, or $20.5 billion today. (*Nuremberg in America*, *supra*, 34 U. Rich. L.Rev. at p. 161.) In other words, "[t]he Holocaust was not only the greatest murder, it was the greatest theft in history." (*Nuremberg in America*, *supra*, 34 U. Rich. L.Rev. at p. 5.)

"Many of the tens of thousands of works stolen then are missing to this day." (The Lost Museum, *supra*, at p. 4; see also *Has the Lost Museum Been Found?*, *supra*, 54 Me. L.Rev. at pp. 126-128 [detailing some of the particular problems in locating and restituting Nazi stolen art, including the chaotic situation in post-war Europe].) "According to Ronald Lauder, a former U.S. ambassador to Austria and now chairman of the Museum of Modern Art in

New York, 'more than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era.' Mr. Lauder believes that 'because of these large numbers, every institution, art museum and private collection has some of these missing works.'" (Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork* (2000) 23 Seattle U. L.Rev. 631, 660; see also Lost Museum, *supra*, pp. B1-B16 [photographs of some Impressionist works that were in Jewish collectors' hands before the war and stolen by the Nazis which remain missing]; *Leave No Stone Unturned*, *supra*, 9 Fordham Intell. Prop. Media & Ent. L.J. at p. 568 [Feliciano, the author of The Lost Museum, "has traced paintings to private vaults in Switzerland, to museums all over Europe and the United States, and to auction houses such as Christie's and Sotheby's"]; Clark, *Selected World War II Restitution Cases* (2004) SJ049 ALI-ABA 311 [listing Nazi-looted art that has appeared in the collections of many major museums, including the Los Angeles County Museum of Art, the Met, Seattle Art Museum, Art Institute of Chicago, and the National Gallery].)

The United States in particular has served as a "'consumer country for stolen art'" since World War II. (*Scope of Due Diligence*, *supra*, 23 Seattle U. L.Rev. at pp. 660-661.) The traditionally "lackadaisical 'ask no questions' commercial conventions of the international art trade" meant that reputable dealers and auction houses often sold stolen art to unsuspecting collectors, who in turn, "'in the absence of warnings'" historically did not "'require a seller to make disclosures about the chain of title.'" (*Id.* at p. 662; see also *Leave No Stone Unturned*, *supra*, 9 Fordham Intell. Prop. Media & Ent. L.J. at p. 567 [After the War, "[a]s was too often the case, neither sellers nor buyers exercised sufficient curiosity about the real origins of the paintings . . . . As a scholar and lawyer on these issues remarked, '[t]he most striking thing to a lawyer who comes upon the art world is how deep and uncritical is the assumption that transactions within it should normally be – are certainly

entitled to be – secret"; according to Joshua Kaufman, executive director of the Society to Prevent Trade in Stolen Art, '[t]his is the only business enterprise in the world where people spend tens of thousands to millions of dollars without doing any proper investigation. Before you buy a house, you do a title search. Before you buy a business, you audit the books'"]; *ibid.* ["Dealers and auction houses do not usually reveal the provenance of an object that is to be sold to buyers or the public. Museums and private collectors also do not reveal this information and, in turn, ask as few questions as possible"]; *Has the Lost Museum Been Found?*, *supra*, 54 Me. L.Rev. at pp. 126-127 ["'As early as 1946, the State Department notified museums and other institutions that stolen art was entering the country [after World War II], but in the years following the war it was not the standard practice for museums, collectors or dealers to investigate the provenance of works they acquired'"].) As a result, "[m]aterials looted during World War II 'increasingly are being found on the market and in the estates of the persons who originally acquired them in the late 1940s and 1950s.'" (*Scope of Due Diligence*, *supra*, 23 Seattle U. L.Rev. at p. 660.)

The re-emergence of works on the market, combined with the declassification of government documents from World War II and its aftermath and an increase in scholarly and journalistic interest in the period, have led to an explosion of lawsuits in recent years to settle the ownership of Nazi-looted artworks. (*The Successful Use of Laches*, *supra*, 27 Colum. J.L. & Arts at p. 353; Wissbroecker, *Six Klimts, a Picasso & a Schiele: Recent Litgation Attempts to Recover Nazi Stolen Art* (2004) 14 DePaul-LCA J. Art & Ent. L. 39 [describing recent Nazi art theft cases, including the one at issue here]; Clark, *Selected World War II Restitution Cases* (2004) SJ049 ALI-ABA 311 [summarizing current Nazi art theft disputes]; *Nuremberg in America*, *supra*, 34 U. Rich. L.Rev. at pp. 5-6, 28-30,161-189 [chronicling the rise in

Nazi art theft lawsuits]; see also Lost Museum, *supra*, at p. 6 [describing how in 1989, when the author began his investigative piece on Nazi art theft during the war, "there were only scarce threads and loose ends to be picked up" since "[m]uch of the information available was still classified in France or inaccessible in the government archives of several countries"; the author therefore was required to review a wide variety of elements that had heretofore never been put together – including wartime books and memoirs, declassified documents and interrogation reports from other countries, art history and museum documents, period photographs and personal interviews – to prepare his book]; *id.* at pp. 128, 246-253 [describing the significance of and providing a copy of the Schenker Papers, a previously classified document prepared by the English army which listed the artworks transported from Paris by German transport company Schenker International during the war].)

In response to these claims, and in an effort to stabilize the art market by clearing title to any works with a suspicious provenance, the American Association of Museums (AAM), the Association of Art Museum Directors (AAMD), and the Art Dealers Association of America (ADAA) have implemented guidelines for handling art that may have been looted by the Nazis. Members of the ADAA "have pledged that they will not knowingly buy, sell or accept on consignment looted and unrestituted works of art"and the ADAA itself "has consistently urged the establishment of public database[s] where claimants of looted works of art could register their claims and provide relevant information about looted works which they seek." (Edelson, Administrative Vice-President and Counsel, American Art Dealers Association (Oct. 2000) Speech at Vilnius International Forum on Holocaust Era Looted Cultural Assets <http://www.vilniusforum.lt/proceedings/c/gilbert_edelson_en.htm> [as of Nov. 16, 2004].)

Likewise, the AAM announced that "[w]hen faced with the possibility that an object in a museum's custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum's responsibility to practice ethical stewardship is paramount." (Museum Policy and Procedures for Nazi-Era Issues (2001) p. XVIII.) "*The AAM Code of Ethics for Museums* states that the 'stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.'" (*Ibid.*) In 2000, the AAM promulgated guidelines for its member museums to aid in the identification and discovery of unlawfully appropriated objects that might be in their custody (whether by purchase, gift, loan, or in existing collections). (See *id.* at pp. XVIII - XXI; *Scope of Due Diligence*, *supra*, 23 Seattle U. L.Rev. at p. 675 ["[M]any U.S. museums have imposed on themselves an affirmative duty to investigate the history of both prospective acquisitions and art objects already in their possession"].) These guidelines call for provenance research for objects that might have been in continental Europe during World War II and dissemination of this information over the internet for potential claimants to review. (See Museum Policy and Procedures, *supra*, at p. XXI; Nazi-Era Provenance Internet Portal <www.neip.org> [as of Nov. 16, 2004] [searchable registry of objects in U.S. museum collections that were created before 1946 and changed hands in Continental Europe during the Nazi era, designed and managed by the AAM]; see also Kisluk, *Stolen Art and the Art Loss Register* (Dec. 1999 - June 2000) <http://www.antiquesandart.com.au/article.cfm?article+36> [as of Nov. 16, 2004] [describing the Art Loss Register, the largest private database of stolen art in the world: "Since 1991 the ALR has identified and thereby helped to recover over $100 million in stolen art. Recoveries have occurred through two main activities by the Art Loss Register: the screening of auction house catalogues against the database and

inquiries by the public and law enforcement agencies"]; *Leave no Stone Unturned, supra*, 9 Fordham Intell. Prop. Media & Ent. L.J. at 616-622 [listing various internet databases for stolen art].)

Thus, museums and galleries themselves have acknowledged that locating and returning the looted works to their rightful owners has a particular moral urgency: "The Nazis weren't simply out to enrich themselves. Their looting was part of the Final Solution. They wanted to eradicate a race by extinguishing its culture as well as its people. This gives these works of art a unique resonance, the more so since some of them were used as barter for safe passage out of Germany or Austria for family members. The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice." (*Nuremberg in America, supra*, 34 U. Rich. L.Rev. at p. 165.)

Moreover, the heightened interest in establishing Nazi-era provenance of art, and the art world's renewed focus on making this provenance more transparent and publicly available, has led many museums – and recently one collector – to voluntarily return Nazi-looted artworks to their rightful owners. (See, e.g., Gagon, *Utah Art Found to Be Nazi Loot*, Deseret Morning News (Feb. 26, 2004); Clark, *Selected World War II Restitution Cases, supra* [listing various Nazi art claims as to which the museums involved returned the paintings to the victims' heirs]; Boehm, *Looted Drawing Returned*, L.A. Times (Dec. 1, 2004) p. E3 [an "anonymous American collector who sought the truth" about a drawing's origins voluntarily returned the drawing to its rightful owner in Israel after discovering that the drawing had been looted by the Nazis]; see also Jackson, The Art Loss Register <http://www.vilniusforum.lt/proceedings/c/sarah_jackson_en.htm> [as of Nov. 16, 2004] [In 2000, "6344 art objects owned by dealers or considered [for] purchase have been submitted for checks against the [Art Loss Register] database, compared to a figure of 484 objects in 1999"].)

II.

A PURCHASER OF NAZI-LOOTED ART, LIKE ANY OTHER PURCHASER OF STOLEN PROPERTY, DOES NOT ACQUIRE TITLE.

The Nazis purported to legalize or sanitize their conduct in a number of ways. For example, they decreed that property belonging to persons who had fled to escape the occupation thereby became "ownerless," so it was available for appropriation by the occupying power. (See, e.g., Rape of Europa, *supra*, at pp. 41 [Austria], 126 [France].) And throughout their art plundering operations, they often characterized their activities as being undertaken in order to "safeguard" the conquered nations' artistic works. (See, e.g., *id.* at pp. 43 [Austria], 65-66 [Poland].) But none of this legal subterfuge could mask the character of what was actually taking place: organized theft on a massive scale. That fact – that the Nazis were *stealing* art from private and public collections throughout occupied Europe – is pivotal to the analysis of claims brought by the rightful owners of art that was looted during the war.

A thief does not acquire good title (or even *voidable* title) by stealing an object, and the thief cannot transfer to a purchaser something the thief never had. (Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, *supra*, 16 Conn. J. Int'l L. at p. 299 ["Underlying any claim for recovery of Nazi-looted art in the United States is a single, fundamental rule that is at the core of all cultural property cases: no one, not even a good faith purchaser, can obtain good title to stolen property. This simple rule is accepted and applied as a fundamental tenet of property law in the United States"]; Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution for Disputes Over Title* (1998) 31 Int'l L. & Pol. 15, 16, fn. omitted ["Stolen works of art which enter into legitimate channels of commerce cause

commercial problems, because good title cannot pass to stolen artworks. Under U.S. law, neither a thief nor any purchaser who obtained artwork through a thief can take good title unless the applicable statute of limitations has expired"].) Thus, a purchaser from a thief or the thief's successor – whether acting in good faith or not – acquires *void* title to the stolen object, which is *never* good against the thief's victim or the victim's successor. (*Has the Lost Museum Been Found?*, *supra*, 54 Me. L.Rev. at p. 129, fn. omitted ["At common law, a thief cannot convey good title. As a result, the original owner retains title to property that has been stolen even if there have been several subsequent purchases by individuals who were unaware that they were buying stolen goods"].) Holocaust victims, therefore, "retain title to artwork despite the fact that innocent purchasers later acquire the art." (*Ibid.*)

It has long been the law in California that a good faith purchaser of a stolen object cannot obtain good title to it. (*Crocker Nat. Bk. v. Byrne & McDonnell* (1918) 178 Cal. 329, 332 ["[T]he seller of ordinary property can transfer to the buyer no better title than he has himself, and . . . if such property has been lost by the true owner, or stolen from him, one who buys from the finder or from the thief, though he pays full value and buys in good faith, without notice, obtains no title as against the true owner"]; *Swim v. Wilson* (1891) 90 Cal. 126, 129 ["[I]t is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner . . ."].) And the more recent case of *Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.* (1990) 218 Cal.App.3d 1354, 1359-1361, confirms that this basic principle of California property law survives this state's enactment of the Uniform Commercial Code. (See also *Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 427-428 ["Even if Naftzger is an innocent purchaser, however, he did not acquire valid title to the coins, assuming they

were stolen, because a thief cannot transfer valid title."].)

Application of this legal principle to the instant case is straightforward. Alsdorf is the successor to the Nazi thieves, so she holds void title to the painting. Bennigson is the painting's rightful owner because he is the sole heir of the thieves' victim, Carlota Landsberg. Moreover, Alsdorf's suggestions that she acted in good faith are irrelevant, because even a perfectly innocent purchaser acquires only void title in a transaction with a thief or the thief's successor. (ABOM at pp. 3, 7, 30.)[3/] Thus, Bennigson's claim is good against Alsdorf, regardless of her claimed innocence.

3/ The record in this case is not sufficiently developed to determine whether the Alsdorfs purchased the painting in good faith, though respondent Alsdorf asserts that they did. (ABOM at p. 30.) It is, however, a matter of public record that the Alsdorfs have long been extremely active and successful collectors of fine art. (See, e.g., *Chicago's Finest 15 People Who Have Enriched the Arts in 1997*, Chicago Tribune (Dec. 28, 1997) [giving a partial description of the Alsdorfs' holdings and their long and distinguished careers as art collectors].) It is certainly open to question whether two collectors with the knowledge and experience of the Alsdorfs could have been acting in good faith – or might not have at least had some suspicions about title to the piece – when they purchased a pre-World War II Picasso whose provenance included a dealer investigated by a postwar tribunal on charges of having benefitted from sales to the Nazis. (See *$10 Million Stolen Picasso Seized by U.S.* <http://www.artdaily.com/section/news/index.asp?int_sec=2&int_new=11441> [as of Nov. 16, 2004]; see also Platoni, *The Ten Million Dollar Woman*, *supra*, East Bay Express [the Alsdorfs' foundation "helped finance the International Foundation for Art Research, a nonprofit that does outreach work on art authenticity and theft issues, and helped create the Art Los Register and its database of looted artwork"; even though background checks on art provenance were not routine in the 1970s, according to one art history professor "art dealers should have known to be cautious [at that time] about works of uncertain provenance coming out of Germany or Austria" and this painting's connection to an art gallery known to deal with the Nazis should have raised particular red flags].)

III.

CODE OF CIVIL PROCEDURE SECTION 354.3 TEMPORARILY SUSPENDS THE STATUTE OF LIMITATIONS FOR THE ASSERTION OF CLAIMS TO RECOVER LOOTED ART.

Given that claims to Holocaust-era stolen artwork by original owners and their heirs are good against any post-looting purchasers (whether the art was purchased with or without good faith), in most cases the only remaining barrier to such claims is the statute of limitations. And it is for this reason that California's enactment of Code of Civil Procedure section 354.3 is so important.

In some states, both statutes of limitation and laches are serious obstacles to restitution of stolen art. "In most cases, true owners do not locate stolen works until the statute of limitations has long since run on their claims for recovery of the property. As a result, the statute of limitations historically has served as a purchaser's primary protection against liability for replevin of stolen pieces." (Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture* (1993) 43 Duke L.J. 337, 340.) However, a number of jurisdictions have sought to mitigate that harsh result by modifying their rules concerning the accrual of claims, so that the statutory period does not begin to run until the true owner of the work discovers the work's location or the identity of its possessor (the "discovery rule"), or until the owner demands return of the work and is refused (the "demand and refusal rule"). (See Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art* (2001) 50 Duke L.J. 955, 984.) But even in states employing such owner-friendly rules of accrual, the equitable defense of laches can still operate to cut off the owner's claim if the owner was not

sufficiently diligent in locating the stolen work and seeking its return. (*Id.* at p. 998.)

Before the enactment of section 354.3, California law was already favorable to true owners on both of these issues. California adopted the discovery rule for actions seeking restitution of stolen art. Section 338, subdivision (c), provides that a claim to recover any stolen "article of historical, interpretive, scientific, or artistic significance" must be brought within three years of "the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft." (Code Civ. Proc., § 338, subd. (c).) And as to the defense of laches, California courts have long held that it is an equitable defense that does not apply to an action at law like replevin. (*Fredericks v. Tracy* (1893) 98 Cal. 658, 659-660 ["Replevin (claim and delivery) is an action at law . . ."]; *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 752 [equitable defense of laches not available in actions at law].)

Thus, California law has long facilitated the recovery of stolen art by giving true owners the time necessary to discover their works' present location. Before the enactment of section 354.3, however, California law did not take into account a further difficulty that is unique to recovery of *Nazi-looted* artworks. As the legislative history of section 354.3 indicates, once such a looted work is found, the process of gathering the evidence needed to establish ownership and theft is both complex and time-consuming, because "detailed investigation is required, often involving research in several countries, translation of foreign historical documents, and the input of experts." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) as amended May 23, 2002, p. 2; see also Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) as amended June 27, 2002, p. 2.)

There is considerable evidence to corroborate the legislature's finding that documenting a claim to ownership is often a drawn-out and difficult task. According to the Association of Art Museum Directors,

> Provenance research is complex. Ownership records are often incomplete, wartime documents may have been destroyed, and standards of record keeping have changed over time. Provenance research requires the expert physical examination of works of art, and the thorough investigation of museum archives, auction and exhibition catalogues, monographic studies, and catalogues of collections, dealer records, photographic archives, and publications of the wartime activities of dealers and collectors. It can require examination of archives in foreign countries, access to documents that may not be publicly accessible, and considerable time, expertise, expense and diligence. New documents relevant to provenance research become available each year: some 400,000 pages of previously classified data – as yet uncatalogued – were recently released in the U.S. These documents, however, represent but a small percentage of the archival material that remains inaccessible in Eastern Europe.

(Association of Art Museum Directors, *Art Museums and the Identification and Restitution of Works Stolen by the Nazis* <www.aamd.org/pdfs/Nazi%20Looted%20Art.pdf> [as of Nov. 16, 2004]; see also Note, *Looted Art in the U.S. Market* (2002) 55 Rutgers L.Rev. 271, 291.) Because of the variety and complexity of the sources that must be checked, "'[i]t requires a tremendous amount of technical expertise, and frequently multilingual researches to prepare and sort through the various archival materials that are available' . . . ." (Trescott, *Museums to Facilitate Search for Nazi-Looted Art*, Wash. Post (Jan. 17, 2001) p. C01 [quoting Edward H. Able, Jr., president of the American Association of Museums].)

The difficulties inherent in tracing and documenting the ownership of Holocaust-era art are illustrated by this case. The ALR, which is widely recognized as the leading source for provenance research concerning stolen

art, initially reached an incorrect conclusion regarding the true ownership of *Femme en Blanc*. After being contacted by the potential buyer in France, the ALR found that the painting was listed in "Repetoire Des Biens Spolies En France Durant La Guerre 1939-1945," an "extensive text detailing Nazi plundered art" that was compiled in 1947. (*Whose Picasso Is It?*, *supra.*) That text indicated that the Nazis stole the painting from Thannhauser, so the ALR informed Alsdorf that ownership of the painting passed from Thannhauser to the Silva Casa Foundation, a Swiss organization that Thannhauser had created by bequest. (Platoni, *The Ten Million Dollar Woman*, *supra*, East Bay Express.) It was only later, after conducting further investigation in France, Germany, and Switzerland, that the ALR learned that Thannhauser was not the owner of the painting but rather had been holding it for Landsberg. (*Whose Picasso Is It?*, *supra.*) Thus, even the ALR, the most sophisticated provenance research service currently in existence, was required to invest considerable time and resources in order to assemble an accurate picture of *Femme en Blanc*'s provenance.[4/]

4/ In an attempt to justify her own conduct and cast doubt on Bennigson's claim to *Femme en Blanc*, Alsdorf argues that because the ALR "changed its position on ownership of the Painting," she was not "comfortable with the reliability of the Art Loss Register's conclusions." (ABOM at p. 9.) Alsdorf's argument is difficult to take seriously. The ALR never "changed its position" regarding the fact that the painting was stolen from Thannhauser. It simply discovered that Thannhauser did not own the painting but rather was holding it for Landsberg. As regards this latter conclusion,

> [t]he documentation was vast, including a photo of the painting from Thannhauser's estate with the words "Stolen by the Germans" and "Carlota Landsberg" written on the reverse side; a 1927 book on Picasso indicating the painting was owned by Robert Landsberg; documents from France's Ministres des Affaires Etrangeres specifying that the painting was on deposit with Thannhauser but "the property of Mme de Landzberg" and that many other paintings from Thannhauser's apartment had

(continued...)

Because of the lengthy and difficult investigations that are necessary to bring claims for recovery of Nazi-looted art, California enacted section 354.3. The legislative history of the statute acknowledges that this state has a strong public policy interest in affording its residents and citizens a reasonable opportunity to bring actions to recover "Holocaust-era artwork." (Assem. Bill No. 1758 (2001-2002 Reg. Sess.) § 1(c).)[5/] Accordingly, the statute provides that no such action shall be untimely as long as it is filed by December 31, 2010. (Code Civ. Proc., § 354.3, subd. (c).) That way, all Californians are allowed a reasonable amount of time to research and document their claims to looted works.

Section 354.3 therefore confirms California's public policy commitment to facilitating the litigation of claims like Bennigson's. The statute removes an obstacle that is unique to efforts to recover Nazi-looted art, and it thereby demonstrates this state's strong interest in allowing such efforts to proceed.

4/ (...continued)

been looted by the Nazis' Mobel-Aktion forces; and documents from a 1969 finding by the German restitution office that the painting had been looted by the Nazis and that Landsberg, not Thannhauser, was owed restitution, which she received.

(*Whose Picasso Is It?*, *supra.*) Given the "vast documentation" that the ALR assembled, Alsdorf's purported failure to feel "comfortable" with its conclusions is not easy to understand.

5/ The federal government has expressed a similar public policy interest. In 1998, Congress enacted and President Clinton signed the Holocaust Victims Redress Act, which states that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." (Holocaust Victims Redress Act, Pub. L. No. 105-158 (Feb. 13, 1998), § 202, 112 Stat. 15.)

IV.

CODE OF CIVIL PROCEDURE SECTION 354.3 DEMONSTRATES CALIFORNIA'S STRONG PUBLIC POLICY INTEREST IN GIVING DISPOSSESSED OWNERS LIKE PETITIONER THE OPPORTUNITY TO LITIGATE THEIR CLAIMS.

As the foregoing discussion makes clear, California's enactment of section 354.3 shows that Bennigson is correct when he argues that "California has an interest in providing a forum for these disputes." (OBOM at pp. 21-22 [discussing the fourth factor in the "reasonableness" analysis set forth in *Harris Rutsky & Co. Ins. Serv. v. Bell & Clements*, *supra*, 328 F.3d at p. 1132].) Alsdorf, however, disagrees. She argues that the public policy embodied in section 354.3 has nothing to do with this case. (ABOM at pp. 41-43.) She reasons that section 354.3 is limited to actions seeking recovery of looted art from museums and galleries and does not apply to art owned by private collectors like herself. (*Ibid.*) Alsdorf is wrong.

Alsdorf's argument has two components. First, she argues that, by its terms, section 354.3 applies to "looted artworks in museums and galleries." (ABOM at p. 41, emphasis omitted.) Alsdorf concludes that because she "is neither a 'museum' nor a 'gallery'" the statute and the public policy it expresses are "irrelevant . . . to the merits of this case." (*Ibid.*) Second, Alsdorf notes that, before section 354.3 was enacted, the legislature considered and rejected a proposal to amend the statute so that it would "apply to works in private collections as well as those in museums and galleries." (ABOM at p. 42, citation and internal quotation marks omitted.) Alsdorf concludes that the rejection of the amendment "negates any argument" that California has a public policy interest that is implicated by Bennigson's lawsuit. (ABOM at p.

43.)

Alsdorf misreads both the statutory language and the legislative history. The statute is not limited to actions against museums and galleries for artwork they purportedly *own* – it also covers work they *display* or *sell*. Section 354.3's suspension of the statute of limitations applies to any action to recover a looted work from a museum or gallery that "displays, exhibits, or sells" art. (Code Civ. Proc., § 354.3, subds. (a)(1), (b).) Thus, an action to recover such a work from a museum or gallery that is displaying or selling it is covered by the statute, even if the putative owner of the work is not the museum but rather a private collector.

This interpretation of the statute is confirmed by the text of Assembly Bill 1758, which added section 354.3 to the Code of Civil Procedure. Section (1)(c) of the bill announces that "California has a moral and public policy interest" in allowing a reasonable period of time for its residents and citizens to bring actions to recover looted artworks "*located in* museums and galleries." (Assem. Bill No. 1758 (2001-2002 Reg. Sess.) § 1(c), emphasis added.) The bill says nothing about works *owned by* museums and galleries. (*Ibid.*)

Moreover, the legislative history cited by Alsdorf does not "negate" this interpretation of the statute, but rather confirms it. According to the document Alsdorf relies on, the proposed amendment would have made the statute "apply to works *in* private collections as well as those *in* museums and galleries." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) as amended Mar. 18, 2002, p. 4, emphasis added.) Because private collectors may have limited resources for conducting provenance research, the analysis concludes that the statute should apply "only in those cases *against* museums and galleries." (*Ibid.*, emphasis added.) That is, as long as a private collector keeps a work "in" her private collection, the statute does not apply. But once the collector sends the work to be displayed

or sold at a museum or gallery, which does have ample resources for conducting provenance research, the work is "in" the museum or gallery and hence can be the subject of a replevin action "against" the museum or gallery.[6/] In such an action, the statute applies.

Indeed, those are precisely the circumstances of this case. Before sending *Femme en Blanc* for display and sale in California at the David Tunkl Fine Art Gallery, Alsdorf had kept the painting at her home in Chicago, "in" her private collection. (ABOM at pp. 7-8.) But once the painting was "in" Tunkl's gallery, it became subject to a replevin action "against" the gallery, regardless of whether Alsdorf was also named as a defendant. Section 354.3 therefore applies to Bennigson's lawsuit.[7/]

This reading of section 354.3 and its legislative history is consistent with, and supported by, the stated policies of museums and galleries across the country, which were discussed in Part I, *ante*. For example, the American Association of Museums' guidelines relating to Nazi-looted art include separate provisions for acquisitions, loans, and existing collections. (See American Association of Museums, *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* <www.aam-us.org/

6/ The plaintiff in a replevin action seeks immediate possession of a chattel from the person or persons who have actual or constructive possession of it at the time the plaintiff files suit. (*Stockton M. P. Co. v. Mariposa County* (1950) 99 Cal.App.2d 210, 215.) Hence, a museum or gallery that has possession of a looted artwork – even on loan or consignment – is a proper defendant in an action to recover the work.

7/ Bennigson has not relied on section 354.3 to establish the timeliness of his lawsuit, because he filed suit within three years of discovery of the location of *Femme en Blanc*, making the suit timely under section 338, subdivision (c). But that does not mean that section 354.3, and the policy underlying it, do not apply here. Rather, Bennigson's suit is timely both because it was filed within three years of discovery and because it was filed before the end of 2010. Both statutes apply.

museumresources/ethics/nazi_guidelines.cfm> [as of Nov. 16, 2004].) The loan guidelines state that "in their role as temporary custodians of objects on loan, museums should be aware of their ethical responsibility to consider the status of material they borrow as well as the possibility of claims being brought against a loaned object in their custody." (*Ibid.*) Accordingly, the guidelines encourage museums to obtain as much provenance information from a lender as possible, "with particular regard to the Nazi era," and also to conduct whatever further research is "prudent or necessary to resolve the Nazi-era provenance status of the object." (*Ibid.*) At the same time, the guidelines acknowledge that sometimes "public exhibition of objects with uncertain provenance may reveal further information about the object and may facilitate the resolution of its status." (*Ibid.*) In such a case, the museum may proceed with the loan as long as "the available provenance about the object is made public." (*Ibid.*) And, as noted earlier, the Art Dealers Association of America has likewise adopted guidelines dealing with Nazi-looted art, and its members "have pledged that they will not knowingly buy, sell or accept on consignment looted and unrestituted works of art." (Edelson, Administrative Vice-President and Counsel, American Art Dealers Association, *supra*, Speech at Vilnius International Forum on Holocaust Era Looted Cultural Assets.)

The museums' and dealers' policies confirm the soundness of the approach taken by California's legislature when it enacted section 354.3. Some private collectors may not have the resources or technical expertise to conduct thorough provenance research, but museums and galleries certainly do. Moreover, museums and galleries recognize their obligation to conduct that research concerning any objects in their custody. In fact, museums recognize that a potential advantage of public display of possibly looted artworks is that it can help bring about the restitution of those works. It consequently made good sense, as a matter of public policy, for the California

legislature to facilitate claims by true owners to recover objects that are "in" museums or galleries, regardless of whether the objects are on loan or consignment or belong to the museums' own collections.

In sum, respondent's arguments against the relevance of section 354.3 and the public policy it expresses lack merit. Contrary to respondent's narrow interpretation of the statute, section 354.3 actually does apply to this case. Bennigson is therefore right to argue that California's interest in this litigation strongly supports the assertion of personal jurisdiction over Alsdorf. (OBOM at p. 21-22.)

CONCLUSION

For all of the foregoing reasons, Amicus Curiae George Nakano respectfully requests that the judgment in this case be reversed.

DATED: December 3, 2004

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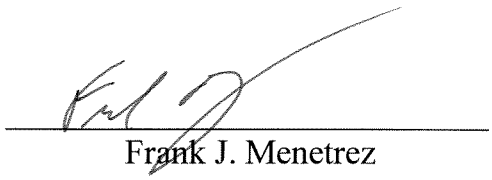
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief consists of 8,575 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: December 3, 2004



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PROOF OF SERVICE [C.C.P. § 1013a]

I, **Kacee Clanton**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On **December 3, 2004**, I served the within document entitled:

REQUEST BY FORMER ASSEMBLY MEMBER GEORGE NAKANO FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF AND APPELLANT THOMAS C. BENNIGSON

on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **December 3, 2004**, at Encino, California.

Kacee Clanton

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