

64139-5

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Docket No. 64139-5-1
WASHINGTON STATE COURT OF APPEALS
DIVISION ONE AT SEATTLE

Rong Su, Appellant,

v

Smith & Just, P.S., Respondents

APPELLANT'S REPLY BRIEF

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III. INTRODUCTION

This appeal asks the court to give effect to the important public policy in RCW 49.52.050 which makes it a crime to intentionally underpay employee compensation, knowing without a doubt that a contract obligation says to pay more. The employer asserts in their Response Brief that Su has established neither the elements required for her claim nor a rebuttal to their legitimate reasons for discharge. However, the facts in evidence clearly demonstrate that the employer unilaterally changed Su's employment contract, dismissed her because of her complaints about the way her contract was being gutted, and used as the pretext for termination a client-time-charge quota that contradicted the written terms of her contract.

IV. FACTS IN REPLY

Su's opening brief set forth that her termination was effected by importing into her written employment agreement a 50-hour/week minimum production quota which willfully contravened three written employment guarantees:

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1. Cancelling production-based-compensation **minimum** “base” salary (**draw** against commission) \$44,000” (CP 70¶3)(emp. added)
2. Cancelling “full-time exempt salaried employee” status (CP 70¶3)
3. Cancelling the upwards-only guarantee of client-time-charge based compensation that if earnings by the 33% time charges formula produced “less money at the end of the year than we paid in salary, [you’d be] not responsible to pay it back.” (CP 182)

Employer adopted a unilateral **mid-course** contract correction, willfully contravening Su’s draw, contract minimum, regularly recurring salary payment and upwards-only client-time-charge pay. Employer introduced instead a new floor, new pay configuration, and new client-time-charge condition and interval defined as the “50-hour billable expectation during tax season (Feb 1st to April 15th)...” (CP 214 ¶4) Instead of agreed salary, employer **unilaterally** imposed “pay at an **hourly rate** of \$21.15.. [which] rate never changed through her employment.” (Respondents’ Brief 3)

Employer then terminated Su, asserting that they relied, in part, Su v Smith and Just; Reply Brief--2

upon the new and contradictory client-time-charge condition in that “she failed to meet the hours of work requirement...and spent more time than was billable to clients on the tax returns....” (CP 215 ¶7)

Defendants contend that undisputed facts establish their reserved right under the contract that terms of agreement “may be modified with the written consent of the parties.” (CP 197 ¶ 13)

Defendants point out one written agreement: effecting a “transition period” for part time work and “prorated salary” (CP 192) as she wound down a prior engagement. (CP 20-21) But employer’s written consent terminated the transition period effective January 31st, asserting “that [transition] process will not continue past January.” (CP 192)

Employer also contends that undisputed facts establish their reserved right to “modify” the “rate” paid for base salary without written consent. (CP 197 ¶13)(Resp Brf 12)

Employer suggests that it exercised this right when imposing a “modified” \$44,000 “base” rate of \$0 draw. Employer suggests that

this rate “**modification**”¹ (1) cancelled Su’s draw and (2) abolished regularly recurring “salary,” (3) in favor of a fluctuating hourly rate dependent upon the quantity of client-time-charge - hours worked, (4) excluding from compensation all admin time. Employer also includes under the umbrella of partial, moderating, change-in-degree **modification** a cancellation of Su’s (5) client-time-charge bonus spanning a 12 month interval guaranteeing no reduction from salary even if 33% time charges less salary put her in negative territory. This was gutted in favor of a (6) client-time-charge- based 50 hr/week minimum quota. The employer also contends that undisputed facts establish their belief to be bona fide (Resp Brf 13) that Su’s consent to paragraph 13 (CP 197 ¶ 13)

¹ The court may take judicial notice of facts ascertainable by sources whose accuracy is beyond question (ER 201), such as the Random House Dictionary, Inc. (2010) [<http://dictionary.reference.com/browse/modify>] definition of the verb “modify”
mod□i□fy
–verb (used with object)
1. to **change somewhat** the form or qualities of; alter partially; amend: to modify a contract.
2. Grammatical....
3. to be the modifier or attribute of.
4. to change (a vowel) by umlaut.
5. to reduce or **lessen in degree** or extent; **moderate**; **soften**: to modify one's demands.

incremental, moderating, change-in-degree “modification” of her \$44,000 rate authorized the employer to gut from her contract terms 1,2,4,5 identified above.

The employer suggests that undisputed deposition admissions or assertions establish that Su consented **since inception** (CP 214) to gutting her draw, salary-based pay, upwards-only client-time-charges incentive, and replacing those contract terms with a fluctuating, hourly rate, billable hours only, and a 50-hour- client-time-charge quota. However, the deposition record shows the exact opposite.

Q: ...You agree(d) there needs to be a change in your compensation to hourly?

A: No...There was no discussion of any change at all.

...

A: This company pays you twice a month so whatever paycheck is issued each period should be the same unless there are days you are missing that you didn't show up at work

(CP 21-22)

Q: (Omitted by employer)

A: (Dahl)² reiterated what she said in the email...February

2 Conray to what Mr. Just stated in his statement, that Su was told during the job interview about the fifty billable hours requirement and orally agreed to it (CP 214 ¶ 4), Su was never informed of this (50-hr-billable) requirement until the firm administrator, Ms. Dahl, told her about it on Feb. 20, 2007. (CP172 ¶5) This is a dispute about fact. The case should go to trial so the jury can decide whom to believe. Summary Judgment was error.

19th that **from now** to the end of the tax season all hours on your time sheets have only billable hours and you'll be paid for billable hours and you are expected to produce fifty billable hours per week....(A)nd I do have concerns...the fifty billable hour thing is when I first heard about it. **I never heard about it before.** ...

A: I'm still talking about this meeting with Jacquie. And I said ...Fifty billable hours....I can't guarantee it, but I will try."
(CP 35)(emph. added)

The employer also contends that undisputed facts establish that Su never put the employer on notice she opposed willfully contravening her contract wage by gutting her minimum draw, abolishing salary-based pay, imposing pay-by-the-hour status ³ for billable client-time-charges only. The employer contends Su never

³ Employer Just asserts: "Neither I nor anyone at Smith and Just was aware that Su believed she was not paid for all **hours she believed she worked.**" (CP 215 ¶9) This archly worded denial, absurdly reducing Su's contract claims to an "hours of work" claim, raises a triable litigation issue, for no other reason than its evident effort to drain the context and meaning from Su's lawsuit allegations.

opposed replacing her base salary floor and the promise that client-time-charge incentives would never replace her guaranteed minimum salary even if the contract formula put her in negative territory. The record contradicts the employer.

Su notified the firm with her daily time accounts through February 19th that she was billing them for administrative hours as well as client time charges. (CP 75-98) but never more than 8 hours in a day. (Id)

Su notified the corporation's administrator, Dahl, on February 20th "I thought I was only supposed to put down 8 hours per day because I was paid on a salary basis." (CP 244 ¶2) Dahl said she had herself observed Su working more than 8 hours in a day while recording only 8 hours on her time card. (Id) Dahl then instructed Su "from now on put down billable hours but not administrative time." (Id)

The firm paid only "regular rate" without overtime premiums; counted only the pro-forma 8-hour tally with no addition for the additional hours observed, and contrived the tallies after February

20th by forcing Su to record no admin time except the mandatory staff meeting every Saturday morning.⁴

4

Week Ending	CP 82-132 Billable Hours Recorded	CP 82-132 Admin/ Training Hours	CP 82-132 Weekly Running Total	CP 82-132 Full Days Recorded As "8.0" Hours	CP 82-132 Days Admin/ Training Time Recorded as "0"	CP 82-132 Overtime Hours Recorded	CP 133 Reg hrs pd. / Overtime hrs. paid
2/4/07	15.35	6.25	21.6	3	0	0	
2/5-2/8	22.1	9.9		4	0		80.4 hrs / 0 OT
2/9-2/11	1.8	3.7	37.5	0	0	0	
2/18/07	28.8	14.5	43.3	5	0	3.3	77.1 hrs / 0 OT
2/19-2/23	23.8	4.7		1	2		
2/24-2/25	3.3	0.5	32.1	0	0	0	75.1 hrs / 0 OT
3/4/07	28.8	0.5	29.3	0	4	0	
3/11/07	41.5	0.5	42	1	5	2	
3/18	37.4	0.8	38.2	0	4	0	78.7 hrs / 0 OT
3/25/07	39.9	0.6	40.5	1	5	0.5	
3/31/07	36.3	.3	36.6	0	5	0	44.6 hrs / 0 OT
4/8/07	unrecorded		8			0	

Su gave her notice to Roberts on February 19th that she questioned and told him that she “need(s) to talk” to him about the edict delivered by Dahl Feb. 19th that all time accounting “needs to be chargeable...no ADMIN time during tax season.” (CP 200)

Her followup conversation with Roberts was an attempt to discuss the above change in pay practices which Roberts rejected, cut off, and tabled.

A....I said gosh, that means if you worked nine hours a day but you produced ...seven billable hours a day, you will only be paid seven hour instead of eight. You actually worked nine. So that's really underpaying you. According to the salaried thing, you are supposed to be getting a paycheck twice a month for the same amount but you do it this way, you will be underpaid even though you are actually overworking. You're working more than eight hours, but you only get paid seven so I thought that's an issue. And I did bring that up to Norman Roberts,. I said well, I have some concerns about the way I'm being paid. ...He was angry. We can get into that later. We didn't get a chance to discuss that issue. He rush(ed) to

something that he have to take care of urgent.

(CP 23)

...[Roberts] received a phone call at that point [after concerns about pay were raised] and we got interrupted. Then after his call we started talking again. He told me that perhaps I should look for another job.

(CP 174 ¶11)

Su attempted to reopen discussions about lawful procedures under the H1-B rules, were employer to amend her contract status, which Roberts also stonewalled and shut down.

I did speak with my immigration attorney on Feb 22,⁵ 2007 regarding the issue of changing my status to working part time for defendant and part time for my former employer and shortly thereafter reported back to

⁵ A review of time records showed Su's half day off following her meeting with Roberts occurred February 21st, [not Feb 23d] as Feb 21st is the day she left work early to check on immigration status issues arising from the proposed contract modifications (CP 175 ¶11)

Mr. Roberts that was doable, only the firm would have to amend the H1-B immigration petition⁶ to USCIS but I never heard anything more about the issue from Mr. Roberts.

(CP 176 ¶13)

There were additional incidents after February 21st where Su again notified the corporation that it was wrong to dock her pay for admin time when the employer summoned her to meetings with Roberts and Dahl to discuss issues related to time records and pay docking (CP 200, 202-203) and summoned her to do admin tasks at the shred bin in February and April. (CP 212)

Not only did the employer import an unwritten 50-billable hours requirement into Su's contract and fail to notify her of the requirement until February 19th (CP 35), it also failed to provide

⁶ 20 CFR 655.731 - What is the first LCA requirement, regarding wages?

An employer seeking to employ H-1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall rate on Form ETA 9035 or 9035E that it will pay the H-1B nonimmigrant the required wage rate.

her in the month of March with a workload adequate to allow her to produce enough billable hours. Su notified the corporation's principal, Smith, that efforts to comply with 50-billable-hour weekly work demands were obstructed when she was idled at her desk awaiting more tax returns on March 12, 17, and 22, after having notified employer she had run out of tax returns. (CP 179 ¶ 23)

Defendants further assert that uncontradicted deposition admissions establish that Su's employment was ended February 23d before Su made any complaint about contract pay. (Resp Brf 4-5, 18) The purported deposition admission is nowhere in evidence. The question posed about Su's "complaints" to Roberts elicited , first, Su's explanation that contract pay violations were occurring, then a discussion with Roberts about her concerns about pay, before the subject of looking for work came up.

A: after I went home, I'm like, well, if you're only paid billable hours, this is really not fair and that's not what the contract says. A typical day is you work 9 hours.

You produce 7 billable hours. That's very unlikely which means you're overworking and underpaid So Eventually I got to talk to Norman on the 23d (sic)... He was angry about not meeting quota....I said I had concerns about pay”

(CP 35-36) There is no record here that Roberts had terminated Su's employment before Su raised her pay concerns. The 2/19 email (CP 200) to Roberts elevating the issue of pay practices to his attention in the first place precedes this meeting. Su's February 19th conversation with Dahl (CP 244) -- wherein Su demanded salaried pay, having under-reported her hours in reliance on salaried status -- precedes this meeting. Preceding this meeting as well are Su's February 1st-20th, day-in, day-out, time accounting assertions that her admin time was compensable, exceeding 40 hr weeks at times, and furnished pro-forma "8-hr" entries, despite Dahl's failure to account for the unpaid components on her February checks. (CP 84-98)

Defendant also contends that the Feb. 21st assertion by

Roberts “perhaps you should look for another job” (CP 174 ¶ 11) indisputably constituted termination of employment. This is a false claim. Su worked, and employer paid her for work for 4 pay periods past February 21st (CP 207-210). Robert’s suggestion was conditional, without final effect. It spurred hypothetical discussions about how to amend the existing contract to part-time yet still comply with H1-B regulations. (CP 175 ¶ 11) Mr Just’s own admission disputes this claim: “*By April 2, 2007*”, we determined we had to end the relationship.” (CP 215 ¶8)

Defendants also assert the facts are undisputed that employer never refused to pay earned contract or statutory wages. However, Employer paid \$3,114 to Su after her termination, amidst an administrative audit of their pay practices. (CP 138) This \$3,114 penalty equals more than one third of the \$8,278 sum of all Su’s paychecks during her course

⁷Furthermore, the interpersonal disputes and absences the employer cites as reasons for termination occurred after the February 21st conversation between Su and Roberts.

of employment (CP 205-210). Persons who refuse to pay because they owe no wage generally refuse to pay what they don't owe. The magnitude of this penalty contradicts Mr. Just's claim that his "sole purpose (was) ...resolving the (DOL) dispute in the least expensive manner." (CP 216 ¶ 10) Its magnitude contradicts the assertion that the lawsuit allegations may be "disregarded" as minor grumblings about a few seconds or a few minutes of time (Resp Brf 15) A more elaborate trial record is likely to include for the trier of fact the scope of the DOL investigation. The summary judgment record does not support that Su's opposition was limited to .1 unpaid hours at the shred bin or .2 unpaid hours or 43 minutes explaining wage complaints to administrators.

V. ISSUES ON APPEAL

1. Employer contravened a clear mandate of public policy in terminating Su according to unilateral changes to her employment contract.
2. Employer admitted dismissing Su in reliance upon Su's complaints about the way her contract was being gutted.

3. The asserted “failure” to meet client- time-charge minimums is an unlawful contradiction of written contract terms guaranteeing client-time-charge incentive pay and guaranteeing client-time-charge calculations would span 12 months and would not undercut Su’s base salary.

VI. ARGUMENT

A. EMPLOYER CONTRAVENED A CLEAR MANDATE OF PUBLIC POLICY IN TERMINATING SU

A “willful” failure to pay earned salary “is volitional...the employer knows what he is doing, intends to do what he is doing and is a free agent.” Morgan v Kingen, 141 Wn App 143, aff’d other grds 166 Wn 2d 526 2009. Employer signed their commitment to Su’s “exempt-salaried” contract, which outlawed amendments of such exempt-salaried status without her written consent. (CP 70 ¶3, 73 ¶13) Yet Employer admits unilaterally amending Su’s method of pay to hourly despite exempt salaried status. (Resp. Brf 3, 12) Employer admittedly docked pay off the predetermined \$44,000 base rate every pay period, gutting the contractual upward-only, 12-month-interval client-

time-charge bonus, in favor of 2-month-interval client-time-charge quota minimums (Resp. Brf 12-13) (CP 205 - 210). They continued to do this *after the agreed transition period* for “pro-rated salary “expired January 31st (CP 192, 214 ¶ 3), and now contradict the evidence with their assertion that “....prior to starting her employment, Appellant was informed that she would be paid on a prorated basis and *all* of her paychecks support the fact that she was consistently paid in such a manner” (Resp Brf 13-14, emph. added). Employer acted volitionally and knew what they were doing and did it despite their contrary contract commitment. This is willful. Summary judgment dismissal on this record is error.

Furthermore, employer unilaterally changed Su to hourly pay. Hourly pay for salaried status is a direct contradiction of the contractual term “salaried.”

An employee is compensated on a “salary basis”...if [he] regularly receives, each pay period, a predetermined amount, not subject to reduction because of variations in the quality or quantity of the work performed.

Clawson v Grays Harbor College, 148 Wn 2d 528, 539 (2003).

Pay docking is a second direct violation of the statutory
salaried administrator exemption

Making deductions in pay when employees fail to meet a
weekly hours quota is inconsistent with salaried
employment...it is improper...to dock employees pay
when they fail to meet the weekly hours quota
requirements.

Drinkwitz v Allied Tech, 140 Wn 2d 291, 304 (2000). Gutting
Su's salaried status from the contract willfully contravened her
contract wage. Summary judgment should be reversed.

Defendants nonetheless assert that Su's facts cannot
support a claim for willful withholding of earned contract wage
contravening RCW 49.52.050 because their right to pay hourly
was a bona fide dispute about the obligation to pay salaried
exempt wages. But Employer's belief is not bona fide that they
could unilaterally contradict their written contract commitment
or extend the written transition period when Employer wrote
and signed both commitments (1) not to amend salaried

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contract status without written consent (CP 70 ¶3, 73 ¶13) and (2) not to extend the pro-rata transition period past January 31st (CP 192, 214 ¶ 3). Summary judgment was granted in error for this added reason.

Defendants also contend that proof of willfully contravening RCW 49.52.050 requirements to pay correct contract wages is conclusively absent given Mr. Just's understanding that Su' work place and later DOL complaints were limited to unpaid hourly wages. This is Mr. Just's meritless spin, not evidence. Su notified Dahl that her lost time encompassed unrecorded hours left off the time sheets because "I was only supposed to put down 8 hours per day because I was salaried." (CP 244 ¶2) Unpaid salary in violation of contract rights willfully contravenes RCW 49.52.050. Summary judgment on this basis was error.

Unpaid admin hours under an implied hourly pay contract is an additional willful violation of implied contract. If, for the sake of argument, employer had lawfully or by implication modified Su's salaried contract to hourly based pay,

employer had no right to put her to work waiting for more tax returns to work on or handling administrative tasks, while demanding that she “from now on put down billable hours but not administrative time”, and then paying her only for the former. Summary judgment dismissal was error on this record.

Defendants characterize as “trifling” and “abstract grumbling” or unknowable the assertions that led Employer to pay a 33% penalty to settle the unpaid wage audit. Calling a horse’s tail a leg does not make a five-legged animal. No reported case has ever extended the trifling or grumblings rational so far as to say that where the employer tables the discussion and refuses to discuss employee concerns, and in fact threatens to end tenure in response, the employee has been too abstract or obscure to furnish notice of a claim.

Lindow v US, 783 F.2d 1057, 1062 (9th Cir 1984); See, Lambert v Ackerly, 180 F.3d at 1007 are inapposite. The threat to end tenure itself evinces guilty knowledge of the claim. Summary judgment was improperly granted for this added reason.

B. EMPLOYER ADMITTED DISMISSING SU IN RELIANCE

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UPON SU'S COMPLAINTS ABOUT THE WAY HER
CONTRACT WAS BEING GUTTED.

Determinative factor causation was conclusively rejected
in Wilmot.

The employee need *not* attempt to prove the employer's
sole motivation was retaliation...Instead the employee
must produce evidence that (protected conduct) was a
cause of the firing....

Wilmot v. Kaiser Alum. Co., 118 Wn.2d.46, 70-74, 821 P.2d 18
(1991) (emph. added). Defendant Just admits dismissing Su
in reliance upon Su's "fail(ure) to meet the hours of work
requirements." (CP 215, ¶7)⁸ Defendants admittedly
substituted a client-time-charge quota and time-charge-only
hourly-pay program for the written client-time-charge incentive
and written guarantee that client-time-charge pay will not
undercut the "salaried" minimum. Reliance upon new,

⁸In fact, while defendants have since come up with pretextual reasons
for terminating Su, this is the only reason given for Roberts telling Su
to look for other work on 2/21/07 (CP 36-37; 144; 152; 220-221).

contradictory, and substituted contract terms to dismiss Su contravened the contract "salary", contract "draw", and contract work hours upward-only bonus in violation of RCW 49.52.050. Summary judgment was improvidently granted.

Furthermore, "proximity in time" between the desirable employee action and firing creates a rebuttable presumption of a causal link which "precludes a motion for dismissal." Wilmot, 118 Wn 2d 46 at 68-69. The corporate managers Dahl and Roberts heard Su expressing her concerns about "the contract" and docking pay for admin time and being 'salaried" during the 48 hours prior to first telling her to look elsewhere for work. (CP 23; CP 200; CP 244 ¶ 2) The corporate managers received Su's complaints she was "not paid properly" (CP 177 ¶ 16, 212) one half hour prior to dismissing her. Absent a lawful justification, Su's rebuttable presumption precludes a motion for dismissal. Summary judgment was granted in error.

C. JUSTIFICATION Employer's "*sole motivation*" is not an issue in public policy tort litigation " (T)he employee must produce evidence that (protected conduct) was a cause of the

firing....Wilmot v. Kaiser Alum. Co., 118 Wn.2d.46, 70-74, 821 P.2d 18 (1991) (emph. added). See also DeLisle, 57 Wn App at 83 (Summary judgment determining the motive for discharge is “seldom appropriate.”) One such motivating factor was the client-time-charge quota, and client-time-charge pay **ceiling**. Both parol changes are inadmissible, immaterial new matter. Emrich, 105 Wn 2d at 556. Each purported change would “substantially limit and (be) clearly inconsistent with” the contract right, Emrich, 105 Wn 2d at 556. The existing contract guaranteed “salary,” a salary-based contract **floor**, and the contract-based client-time-charge upwards-only adjustment spanning a 12-month retrospective. Client-time-charge-based quota based on a 2-month interval, the *hourly* pay floor and client-time-charge pay ceiling are inadmissible surplusage to the contract terms. Inadmissible parol evidence about a change to one’s written commitments is not a “legitimate” business reasons for denying contract benefits. Nor is it a debatable reason for denying contract benefits. Defendants’ client-time-charge quota justification admittedly

motivated Su's termination, yet cannot even be admitted in evidence. Summary judgment on the basis of legitimate business justification was improper.

Further Employer is here seeking to enforce its contract right to "terminate at will" Su's employment rights. (CP 71¶6). However, employer cannot bear its burden to prove performance of "salaried" wage payments, base salary minimums, and a client-time-charge incentive program. "One who seeks to enforce the terms of a contract against another ... must show that there has been no breach on his own part." Downs v Smith, 169 Wn 203, 13 P.2d 440, 441 (1932) cited with approval in Willener v Sweeting, 107 Wn 2d 388, 392 (1986); Jacks v Blazer, 39 Wn 2d 277, 286 (1951) (Jacks' "breach...operated as a discharge of the contract") Employer may not render Su terminable at will without having performed their contract obligations. In particular, employer must apply the salary based contract floor and the upward-only client time charge formula to Su's record; without substituting in its place a 2 month internal, client-time-charge quota and salary floor

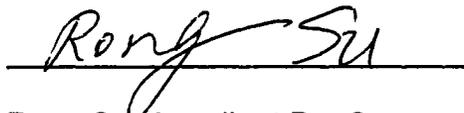
reduction to hourly. Summary judgment dismissal for justification was error for this added reason.

VII. CONCLUSION

The harm to be avoided by RCW 49.52.050 can only be avoided where willful disregard of contract wage terms is penalized. Any other result condones deliberate underpaid contract salaried wages in favor of hourly wages. The contrary result condones deliberate underpaid client-time-charge incentive pay on a 12-month interval in favor of client-time-charge quota requirements on a 2-month interval. The contrary result condones admitting parole evidence to vary written terms of contract. The contrary result coerces affected employees to submit to underpaid contract wages or pay with their job security.

The order granting summary judgment must be reversed.

Respectfully submitted this 26th day of March 2010.

A handwritten signature in cursive script, reading "Rong Su", is written over a horizontal line.

Rong Su, Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on March 26th 2010 I hand delivered a true copy of Appellant's Reply Brief to the company's representatives at:

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Signed: Rong Su

Rong Su, Appellant Pro Se

Dated: 3/26/2010