

1 ROGER A. BROWN
STATE BAR NO. 053235
2 Post Office Box 475
Sonora CA 95370
3 209-533-7755
209-533-7757 (Facsimile)
4

5 Attorney for ODD FELLOWS SIERRA RECREATION
ASSOCIATION, INC., OF TUOLUMNE COUNTY,
DEL WALLIS
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF TUOLUMNE

11 ALAMEDA BOY SCOUTS FOUNDATION, a California Nonprofit Benefit Corporation,)	Case No. CV 49802
12 Plaintiff,)	
13 v.)	DEFENDANTS' TRIAL BRIEF
14 ODD FELLOWS SIERRA RECREATION ASSOCIATION, INC., OF TUOLUMNE 15 COUNTY, et al.,)	Date: June 7 & 8, 2004 Time: 8:15 a.m. Dept. 1
16 Defendants.)	

17
18 INTRODUCTION

19 The Alameda Boy Scouts Foundation and their predecessors in interest (hereafter "Boy
20 Scouts") have been adjoining landowners and neighbors of defendant Odd Fellows Sierra
21 Recreation Association, Inc. (hereafter "Odd Fellows") since the Odd Fellows purchased
22 approximately 740 acres in the area in 1949. The Boy Scouts call their property "Camp
23 Cedarbrook." Defendant, Del Wallis, was the President of Odd Fellows at one time, but at
24 present he is neither a director nor an officer of the corporation.

25 In 1949, when Odd Fellows purchased their property, there was, and still is a road called
26 "Long Barn Sugar Pine Road" which ran through both Odd Fellows and Boy Scouts property.
27 The portion of the road which runs through Odd Fellows Park was closed to public use by the
28 Tuolumne County Board of Supervisors in the 1990's. As with many roads in this area, Long

1 Barn Sugar Pine Road was named for the villages at each end of the road. Access to Camp
2 Cedarbrook has always been available from what is now Highway 108 via Long Barn Sugar Pine
3 Road from Mi Wuk Village to Camp Cedarbrook. Access has also been available from Highway
4 108 via Bottini Apple Ranch Road to its intersection with Long Barn Sugar Pine Road into Camp
5 Cedarbrook. There will be testimony that both roads are still in the County Maintained Road
6 System.

7 There will also be testimony that a road has bisected what is now Camp Cedarbrook since
8 at least 1876 and that road is in the same general location as what is now called Long Barn Sugar
9 Pine Road. In 1992, the Tuolumne County Board of Supervisors authorized the closure of the
10 portion of Long Barn Sugar Pine Road which goes through the Odd Fellows Park subdivision.
11 Each summer since the mid 1980's the Boy Scouts have petitioned the County Board of
12 Supervisors to authorize the *temporary* closure of Long Barn Sugar Pine Road through the Camp
13 Cedarbrook property, but our investigation fails to reveal any permanent closure of this public
14 roadway approaching Camp Cedarbrook from the West or through the camp itself.

15 The Boy Scouts claim to own an easement by necessity, by implication and by prescription
16 to pass over the roads of Odd Fellows to get to their Camp Cedarbrook. Odd Fellows denies this
17 claim and while they have offered to give the Boy Scouts a license to use these roads by consent
18 for as long as the Boy Scouts own their property as a scouting camp, the Scouts have rejected this
19 offer.

20 The Boy Scouts claim that their long use of the Odd Fellows' roads is enough to create
21 the right to use these roads forever and to pass this right on to their successors in interest. The
22 Odd Fellows deny these claims on numerous grounds.

23 First, the Odd Fellows contend that they have always given permission to the Scouts and
24 their predecessors to use the Odd Fellows roads and that this consent goes back to the earliest
25 days of their ownership. Of course, use by permission negates an essential element of a
26 prescriptive easement and defeats the claim.

27 Next, Odd Fellows contends that there is no easement by necessity because the Boy
28 Scouts' property is not landlocked and it has a proper and legal access. The legal access route is

1 from Highway 108 to Bottini Apple Ranch Road, then to Long Barn Sugar Pine Road and into
2 Camp Cedarbrook itself. Our research convinces us that this route has been in the county road
3 system and a public roadway for as long as the Scouts and their predecessors in interest have
4 owned their property. Licensed surveyor, Frank Walter is expected to testify that in his opinion,
5 from his examination of old maps and other resources, an access road has existed in the same
6 general location as Long Barn Sugar Pine Road since at least 1876. Thus, we believe the
7 evidence will show that the Boy Scouts and their predecessors have had legal access to the Camp
8 Cedarbrook property since the parcel was first severed from its initial common ownership in about
9 1930.

10 Odd Fellows will present witnesses and a video tape to demonstrate that this access route
11 still exists and is passable. An easement by necessity requires proof that the claimed easement
12 route is *the only possible* access and that the property is landlocked. Accordingly, an easement by
13 necessity cannot be shown.

14 Odd Fellows contends that an easement by implication cannot be proved for a number of
15 reasons. First, no witnesses and no information or evidence has been produced in discovery to
16 show what, if any, roads existed in the area at the time when the Odd Fellows and Boy Scouts
17 parcels were split off from common ownership. No evidence has been produced to show what
18 routes of travel, if any, the common ancestor owner may have used to get from one part of the
19 larger parcel to another. Without this kind of evidence, the claim fails.

20 Next, no witnesses have been identified who might have been present or knowledgeable
21 about the intent of the original grantor at the time he parted with the property. Since an easement
22 by implication is intended to capture the original intent of the grantor, there must be some
23 evidence of that intent or the claim will fail.

24 Furthermore, the original route of Wheeler Road in 1949 has long since been abandoned
25 and is blocked off from through travel. That road was abandoned when the Odd Fellows built a
26 new road, but gave it the same name as the old road. The new road has a different path than the
27 old road. Thus, even if there was an easement by implication over the old road (which we deny),
28 it was abandoned when the road was abandoned and blocked from further travel. Any rights to

1 the new road would have to stand on their own from the date the new road was created. Since
2 the road was created long after the properties were severed from common ownership, there can
3 be no claim to an easement by implication.

4 Finally, the route of the claimed easement by implication must be reasonably necessary to
5 the beneficial use of the Scouts' property. While the Odd Fellows route may be the most
6 desirable route *today* because it is paved, maintained, improved and plowed of snow by the Odd
7 Fellows, that road did not exist when the parcels were severed from common ownership and thus,
8 it cannot qualify as a possible easement by implication. Unless the alleged easement route existed
9 and was used by the common ancestral owner at the time the parcels were severed from common
10 ownership, the court will never get to the question of whether the route is reasonably necessary.
11 Since the route did not exist when the parcels were severed, it is immaterial that a *road built later*
12 by the Odd Fellows could offer a more desirable route for the Scouts.

13 The Scouts have a lawful and adequate access along the route described above. The real
14 difference in the routes is the difference in who must pay to maintain, improve and protect the
15 routes. There is no good reason why the Boy Scouts should not use their own funds to maintain
16 their own access to their camp. There are many good reasons why the Boy Scouts should not be
17 permitted to transfer these road maintenance costs to Odd Fellows because then it would
18 constitute a virtual charitable tax on the Odd Fellows some of whom may actually not wish to
19 contribute to Boy Scouts from Alameda.

20 For all of these reasons, the legal basis for which will be developed herein, the Odd
21 Fellows contend this suit lacks merit and that judgment should be rendered for the defendants.

22 Moreover, the action against Mr. Wallis should never have been filed and he is entitled to
23 a dismissal or a judgment for the defense on the face of the complaint. That is because the
24 complaint fails to allege any wrongdoing of any kind by Mr. Wallis. In addition, the complaint
25 fails to allege or seek any damages of any kind against Mr. Wallis. He should be dismissed from
26 the case outright.

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1 **THE PLEADINGS**

2 The case is going to trial on the Boy Scouts' verified Second Amended Complaint filed on
3 or about September 26, 2003 (hereafter "the Complaint"). The Complaint states causes of action
4 to quiet title to a prescriptive easement (1st Cause), an easement by way of necessity (2nd Cause),
5 an easement by implication (3rd Cause), a Fourth Cause of Action denominated "Quiet Title" and
6 a Fifth Cause of Action for Declaratory Relief. The Prayer seeks to establish the Boy Scouts'
7 claims to an easement by necessity, implication and prescription and to quiet their claims against
8 all other competing claims. In addition, the Boy Scouts pray for damages of not less than
9 \$400,000 for "diminution in value of property, loss of revenue from encampments, timber
10 harvesting and insurance reimbursements" and for attorneys fees and costs of suit. The trial of
11 this action has been bifurcated with the first phase dealing with the equitable issues to be tried to
12 the Court sitting without a jury.

13 Odd Fellows and Mr. Wallis filed a verified Answer to the Second Amended Complaint on
14 November 4, 2003 in which they specifically denied most of the material allegations in the
15 Complaint and asserted seven affirmative defenses, including failure to state a cause of action,
16 statute of limitations, laches, estoppel, waiver, failure to mitigate damages and reserved the right
17 to plead additional defenses which may be discovered at a later time.

18 **THE FACTS**

19 The Boy Scouts acquired Camp Cedarbrook from the Camp Cedarbrook Foundation, Inc.
20 as a gift when the foundation dissolved a few years ago. The property had been in the hands of
21 one or another owner and devoted to scouting purposes for scouts (either girl or boy scouts)
22 since the 1930's. Current Alameda Boy Scouts Foundation, Inc. President, Richard Anderson
23 testified at his deposition that the Boy Scouts have been using the property as a camp since the
24 early 1970's when they began building permanent structures on the property.

25 The Odd Fellows purchased their property in 1949. The Odd Fellows formed a
26 corporation to purchase and develop the property for the benefit of their members, but eventually,
27 the right to own lots in the development spread to non-members as well. In 1949 there was a
28 county road, Long Barn Sugar Pine Road, which ran through both the Boy Scouts and the Odd

1 Fellows property. That road still exists, although the County relinquished maintenance on the
2 portion of the road through Odd Fellows Park subdivision. While the Boy Scouts claim the road
3 has been abandoned by the County, we have been provided no documents or other writings to
4 confirm this claim and our independent research has likewise failed to reveal evidence to support
5 this contention.

6 In 1949 the only other routes on the Odd Fellows property were really just dirt paths or
7 trails in various states of disrepair. The property was once part of the "Wheeler Ranch" and one
8 of the dirt paths was named, "Wheeler Road." This road no longer exists in its original route, but
9 was abandoned and replaced by a new and different road, in a different route, but which kept the
10 old name. It is over this new "Wheeler Road" that the Boy Scouts seek access over the Odd
11 Fellows property. All of the roads, streets and drives in Odd Fellows Park have been developed,
12 improved, paved, maintained and protected by the defendant, Odd Fellows Sierra Recreation
13 Association, Inc.

14 The oldest known surviving member of the original board of directors of Odd Fellows, is
15 an elderly man named Loren Hosmer. Mr. Hosmer is expected to testify at trial about the history
16 of the relationship between Odd Fellows and Boy Scouts over the use of the roads. We expect
17 Mr. Hosmer to testify that the Boy Scouts use of the Odd Fellows roads was always by consent as
18 a neighborly accommodation. Other former and present board members of Odd Fellows,
19 including Del Wallis and Ed Smith and perhaps others are expected to testify. We expect these
20 witnesses to testify that the Boy Scouts use of Odd Fellows roads was always permissive.

21 We expect one or more maps may be introduced in evidence to show the relationship of
22 each parcel to the other and to the features around them. The county road, Long Barn Sugar Pine
23 Road will be very clearly shown as an access route to both properties. We also expect direct
24 testimony from more than one witness who has driven roads other than the Odd Fellows' roads to
25 access Camp Cedarbrook over the years. We expect to offer in evidence a video tape showing
26 the route a vehicle took to access the Boy Scouts Camp Cedarbrook on March 12, 2004 over
27 Bottini Apple Ranch Road and Long Barn Sugar Pine Road to help the court visualize the route
28 as it exists today.

1 As a result of the direct and photographic evidence, we expect to prove false, the Boy
2 Scouts allegations that: a) Odd Fellows' roads are the only reasonable access (Comp. ¶9);
3 b) access to Camp Cedarbrook over Odd Fellows' roads was continuous and uninterrupted for 72
4 years (Comp. ¶12); c) access to Camp Cedarbrook was completely prevented by denying the
5 Scouts access through the roads of Odd Fellows (Comp. ¶12); d) there is no other access to
6 Camp Cedarbrook other than Odd Fellows' roads (Comp. ¶ 25) it is impossible to travel Long
7 Barn Sugar Pine Road at all times (Comp. ¶25); e) and the Camp Cedarbrook property is
8 "landlocked" (Comp. ¶33), among other things.

9 We expect to present expert testimony from Frank Walter, a licensed surveyor, to the
10 effect that what is now known as Long Barn Sugar Pine Road has been in existence through the
11 Camp Cedarbrook location for over a century. Mr. Walter is expected to present a demonstrative
12 exhibit which he prepared from maps, originally drawn and surveyed as early as 1876 which
13 showed the road traversing generally parallel to Sugar Pine Creek directly through what Mr.
14 Walter plotted as the current Camp Cedarbrook property. Accordingly, we expect evidence to
15 establish that Camp Cedarbrook had legal access when the parcel was severed from the common
16 ancestral owner of the larger parcel.

17 Since damages is not at issue in the first phase of this trial, we will not address them
18 herein, but leave that subject to a later brief, if the case ever gets that far.

19 **THE LAW**

20 **Easement by Necessity**

21 The elements of an easement by necessity are fairly simple. The easement by necessity
22 arises by operation of law when both: (1) There is a strict necessity for the right-of-way; and (2)
23 the dominant and servient tenements were under the same ownership at the time of the
24 conveyance giving rise to the necessity. (*Reese v. Borghi* (1963) 216 Cal.App.2d 324, 332.) The
25 facts will not support either element.

26 There was no strict necessity at the time the Boy Scouts' parcel was conveyed away from
27 the original owner because the county road, Long Barn Sugar Pine Road was the normal access
28 to the property. The county road was a public highway at the time the parcel was severed from

1 common ownership and any roads built thereafter are immaterial to this claim.

2 Strict necessity means the proposed right-of-way is the *only possible* means of access to
3 the property. It is not enough for the plaintiff to claim its own land is too steep, narrow, or
4 difficult or even that access is only available by waterway. (*Los Angeles County v. Bartlett* (1962)
5 203 Cal.App.2d 523, 528.) In the *Bartlett* case, supra, the court held there was no easement by
6 necessity nor by implication where a parcel was landlocked on three sides by other parcels but
7 which had a canal on the fourth side. The court found the canal to be a street and legal access
8 that defeated the claim of necessity.

9 [T]he following language from *Kripp v. Curtis*, 71 Cal.62 [11 P. 879] is quoted
10 with approval: "The right of way from necessity must be in fact what the term
11 naturally imports, and cannot exist except in cases of strict necessity....That the
12 way over his land is too steep, or too narrow, or that other and like difficulties
13 exist, does not alter the case, and it is only when there is no way through his own
14 land that a grantee can claim a right over that of his grantor. It must also appear
15 that the grantee has no other way." (*Los Angeles County v. Bartlett*, supra p.528.)

16 The evidence will show that there is not now, and never has been an easement by necessity
17 across the property which is now owned by Odd Fellows. There has always been access to the
18 Boy Scouts' property by way of the county road, Long Barn Sugar Pine Road. Accordingly, this
19 cause of action fails.

20 Easement by Implication

21 An implied easement arises when all of the following elements are present:

- 22 (1) There is a separation or severance of title which implies a unity
23 of ownership at some time in the past;
- 24 (2) Before the separation took place, the use which gives rise to the
25 easement must have continued for so long and in such an obvious
26 manner as to show that it was intended to be permanent; *and*
- 27 (3) The easement must be reasonably necessary to the beneficial
28 enjoyment of the land granted. (*Kytasty v. Godwin* (1980) 102
Cal.App.3d 762, 769[emphasis added].)

Discovery to date has failed to yield any evidence of the obvious or apparent use which
might have been visible on the claimed servient tenement (Odd Fellows) without which, the
claimed implied easement cannot be established. (*Warfield v. Basich* (1958) 161 Cal.App.2d 493,
499.) The Boy Scouts must prove, by admissible evidence, what use was made of the claimed
servient tenement *before the separation of title*. (*Piazza v. Schaefer* (1967) 255 Cal.App.2d 328,

1 334.) Thus, the important facts will be whether there was any “obvious or apparent use” of what
2 is now Odd Fellows property by the former common owner To date, discovery has failed to
3 disclose any evidence of the use of the Odd Fellows property prior to the date when it was
4 separated from common ownership of what is now the Boy Scouts property.¹ Without such
5 evidence, there can be no proof of an easement by implication and this cause of action must also
6 fail. Moreover, since the roads and drives within Odd Fellows were built *after* Odd Fellows
7 purchased the property in 1949, any proof of use in the 1930's would be ineffectual unless the
8 same roads existed in the same place.

9 The person claiming ownership of an easement has the burden of proving its exact
10 location. However, special rules also apply to easements by implication because of the unique
11 method of their creation. Civil Code section 1104 provides that an easement created by
12 implication entitles the owner to use the servient tenement “in the same manner and to the same
13 extent as such property was obviously and permanently used” by the grantor at the time of the
14 conveyance. “Therefore, unless there are additional circumstances that indicate that the parties
15 intended a different location, the statute limits the location of an implied easement to the area of
16 the servient tenement used by the grantor prior to the conveyance.” (Miller & Starr, 6 California
17 Real Estate (3rd Ed. 2000) §15:51, Location of Implied Easements, p. 162.)

18 The purpose of recognizing an easement by implication is to give effect to the presumed
19 intent of the original parties to the conveyance which first severed the dominant tenement from
20 the servient tenement.

21 The law does not favor the implication of easements....Whether an easement arises
22 by implication on a conveyance of real estate depends on the intent of the parties,
23 which must clearly appear in order to sustain an easement by implication. In order
24 to determine the intent, the court will take into consideration the circumstances
25 attending the transaction, the particular situation of the parties, and the state of the
26 thing granted.[Citation] The purpose of the doctrine of implied easements is to
27 give effect to the actual intent of the parties as shown by all the facts and
28 circumstances. (*Los Angeles County v. Bartlett* (1962) 203 Cal.App.2d 523, 530.)

27 ¹ Of course, Odd Fellows acknowledges the existence of the county road which traversed through both parcels
28 for many years before the severance. However, in 1992, the County Board of Supervisors by resolution, abandoned
Long Barn Sugar Pine Road through the Odd Fellows Park subdivision. Thus, even if the road was once a public
highway through Odd Fellows, that status has now changed and it is a private roadway in Odd Fellows Park.

1 **Easement by Prescription**

2 In order to establish an easement by prescription, the Boy Scouts must prove their use of a
3 specific way was open and notorious, continuous and uninterrupted for a period of five years or
4 more, hostile to the true owner, and under a claim of right. (*Taormino v. Denny* (1970) 1 Cal.3d
5 679, 686.)

6 In this case, the various roads on which the Boy Scouts claim an easement were built at
7 different times and for different purposes. Wheeler Road is in a different alignment than it was
8 when the Odd Fellows first developed their land. Jordan Way has a newer spur of a gravel road
9 which goes adjacent to Sugar Pine Creek and then continues around the meadow on Odd Fellows
10 property. Thus, the evidence will be somewhat different depending upon which road is examined.

11 The Boy Scouts must prove the elements of prescription as to each road and drive over
12 which they wish to establish such an easement. As to Wheeler Road, even if the Boy Scouts were
13 able to show the elements of prescription on the original road (and we contend they cannot), that
14 road has been abandoned for more than five years and the new road was clearly used by
15 permission.

16 It is true that the case law provides that the use of an easement over a long period of time
17 without interference gives rise to a presumption that such use was hostile for purposes of
18 establishing that element of a prescriptive easement. However, the presumption is rebuttable.
19 Once such evidence is admitted, the burden shifts to the Odd Fellows to show permission.
20 (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708-709.)

21 Odd Fellows contends that the Boy Scouts use of Odd Fellows' roads has always been
22 permissive. One of the original members of the Odd Fellows board of directors, Loren Hosmer, is
23 expected to testify that Odd Fellows gave consent to the Boy Scouts to use their roads because
24 Odd Fellows wanted to be a "good neighbor." Others will testify to the same effect. This
25 testimony will be sufficient to overcome the presumption of hostility which may arise if the Boy
26 Scouts are able to prove long use of the Odd Fellows' roads.

27 **EVIDENTIARY ISSUES**

28 No particular evidentiary issues are expected by the defense at this time. While it is true

1 that the case requires proof of the uses to which what is now Odd Fellows property was put over
2 70 years ago, we have no idea what form of proof or evidence Plaintiff may attempt to introduce
3 to prove these issues.

4 Since Plaintiff has not produced any evidence of ancient use of the property in discovery,
5 it may be that the Odd Fellows would object to all such evidence if it was concealed from the
6 defense during discovery.

7 Further, during a recent deposition, the Boy Scouts' attorney presented documents for
8 examination by a witness when such documents had never been disclosed in discovery. If
9 additional previously undisclosed documents find their way into the trial, there may be motions to
10 exclude such evidence for abuse of discovery. Of course, we have no idea at this time whether
11 any such documents may exist or be offered in evidence.

12 WITNESSES EXPECTED TO BE CALLED

13 At this time, the defense expects to call the following witnesses at trial, although
14 depending upon developments at trial the list could change:

15 Fred Coleman	Bert Johnson
16 Del Wallis	Ed Cole
17 Ed Smith	
18 Loren Hosmer	
19 Frank Walter	
20 George Hill	
21 Cyrus Hoblett	
22 Newell Egger	
23 Mike Wright	
24 Ed Hinton	
25 Robert Cloak	
26 Ron Hawke	
27 Ed Cole	
28 Larry Houseberg	

23 CONCLUSION

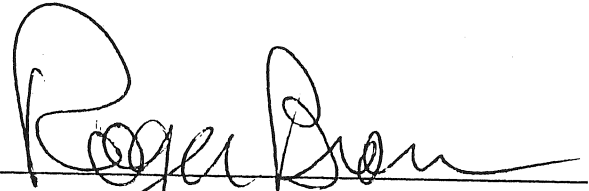
24 The essence of the Boy Scouts' claim is that since they have used Odd Fellows' roads for
25 many years, that use has ripened into the absolute right to continue using the Odd Fellows' roads
26 and to convey the same right to anyone who might purchase the property if they sell. We expect
27 that there will be witnesses who testify that permission was never sought nor obtained and there
28 will be witnesses who will testify that the Boy Scouts' use has always been by permission. Thus,

1 on the question of whether the Boy Scouts can prove sufficient hostility to satisfy that prong of
2 the prescriptive easement claim, the Court will be called upon to carefully weigh conflicting
3 evidence.

4 However, on the claims of an easement by necessity or implication, we believe the
5 evidence will be insufficient to establish either kind of easement. Unless the Boy Scouts are able
6 to prove the obvious and apparent uses to which what is now the Odd Fellows property was put
7 in 1930, they cannot establish the elements of either an easement by necessity or by implication.
8 To date, no such evidence has been revealed by the Boy Scouts in discovery and none is expected
9 to surface at trial.

10 The evidence will show that the Alameda Boy Scouts Foundation, Inc. has not and cannot
11 establish the essential elements of their easement claims. On the face of the pleadings, there are
12 no allegations of wrongdoing and no prayer for damages against Del Wallis and accordingly, he
13 should be dismissed from the case at the outset. The Court will be respectfully asked to deny all
14 of the Alameda Boy Scouts Foundation's claims and render a judgment for the defense on all
15 counts.

16
17 Dated: June 3, 2004

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22 ROGER A. BROWN, Lawyer for Defendants
23 ODD FELLOWS SIERRA RECREATION
24 ASSOCIATION, INC., OF TUOLUMNE
25 COUNTY, and DEL WALLIS
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PROOF OF SERVICE BY MAIL - CCP 1013a(3)

STATE OF CALIFORNIA, COUNTY OF TUOLUMNE

I am employed in the County of Tuolumne, State of California. I am over the age of 18 years and not a party to the within action; my business address is 38 North Washington Street, Sonora, CA 95370. On June 4, 2004, I served the following:

TRIAL BRIEF

on the parties to be noticed in said action by placing a true copy in a sealed envelope addressed as follows:

Stacy L. Sisco, Esq.
Damrell, Nelson, Schrimp,
Pallios, Pacher & Silva
1601 "I" Street, Fifth Floor
Modesto CA 95354

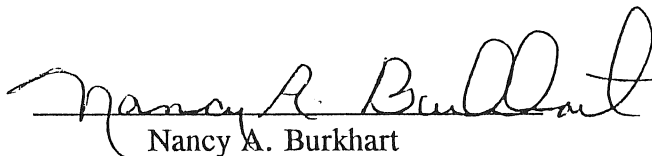
Causing the envelope to be deposited in the U.S. Mail at Sonora, California, with postage fully prepaid. (I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more that one day after the date of deposit for mailing noted in this affidavit.)

By facsimile, I caused said document to be transmitted to the telephone number(s) of the addressee(s) designated.

By handing said envelope to

Executed on June 4, 2004, at Sonora, California.

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


Nancy A. Burkhart