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file - amicus

SUPREME COURT
FILED
FEB 0 8 2001
Frederick K. Ohlrich Clerk
DEPUTY

February 6, 2001

California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: Case No. S094580, Asplund v. Selected Investments and Financial Equities, Inc.; First Appellate District Case No. A089432

Dear Sir or Madam:

LETTER OF AMICUS CURIAE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF THE GRANTING OF THE PETITION FOR REVIEW AND REQUESTING DEPUBLICATION OF THE FIRST APPELLATE DISTRICT'S OPINION

Statement of Interest of Amicus Curiae

The Public Investors Arbitration Bar Association ("PIABA") has several hundred attorney members from more than forty states who devote a significant portion of their practice to the arbitration of securities disputes and represent public investors in arbitration. Collectively, PIABA members have represented tens of thousands of public investors in securities arbitrations around the country, including California. PIABA seeks to advance the rights of public investors through a variety of activities, including the submission of briefs as amicus curiae. PIABA appears as amicus in court cases because broker-dealers today commonly require investors to sign pre-dispute arbitration agreements, and most individual retail securities disputes are, as a consequence, resolved in arbitration. Cases litigated in court and brought to an appeal are important to PIABA members because litigated retail securities cases are now rare, and arbitrators look to these cases for guidance. The undersigned is a member of the board of directors of PIABA and has been authorized on behalf of the organization to submit this letter brief.

Introduction

In the decision below in Asplund v. Selected Investments and Financial Equity, S094580, First Appellate District No. A089432 (a copy is attached), the Court of Appeal held that a broker-dealer has no duty to supervise the private securities transactions of its licensed and registered representative, even if (1) the representative tells the broker-dealer he is privately selling investments which the dealer should know are illegally not registered in violation of state and federal law, and (2)

the dealer's compliance office helps the representative prepare radio advertisements for these illegal securities. This holding flies in the face of a long line of federal and state enforcement decisions imposing a strict duty on dealers to supervise their licensed personnel. The decision substantially undercuts the ability of the Securities and Exchange Commission ("SEC") and the California Department of Corporations to protect retail investors in this state by requiring dealers to supervise. Under this decision, dealers can place their licensed representatives in California as "independent contractors," these representatives can then use their status as licensed representatives of an established brokerage firm to market fraudulent and unregistered securities, and they can even tell the dealer about these sales, without any requirement on the dealer to supervise the representatives and take responsibility for the representatives' actions.

The First District agreed with the trial judge that the California Department of Corporations did not have statutory authority to promulgate 10 Cal. Code Regs., § 260.218.4(a), which requires broker-dealers to "exercise diligent supervision over the securities activities of all of its agents." (Slip op. at 13) The broker-dealer community will therefore take this decision as a message that § 260.218.4(a) is invalid and that California does not require dealers to supervise their representatives. This decision calls for review by this Court or, at least, depublication.

<u>The Federal Duty to Supervise</u>

The facts of this case reveal that SIFE's registered representative, Joseph Tufo ("Tufo"), sold fraudulent and unregistered promissory notes issued by MEDCO, Inc. ("MEDCO"), to the Plaintiffs ("Investors") in violation of state and federal law. Tufo said he told SIFE in writing that he was selling MEDCO, and several of SIFE's officers knew about his sales. (Slip op. at 8) An employee in SIFE's compliance office helped him prepare MEDCO radio advertisements. (Slip op. at 8) The trial court found factually that "SIFE did not supervise [Tufo] as to activities other than the selling of SIFE securities." (Slip op. at 12) The question for the trial court was whether a dealer has "a duty to supervise [its representative] in the event that he or she chooses, with the broker-dealer's blessing, to sell other securities." (Slip op. at 12) The trial court found that no such duty to supervise existed under federal or state law, and the First District agreed. This ruling was incorrect.

The Plaintiffs argued a negligence *per se* theory under Cal. Evid. Code § 669 that SIFE's failure to supervise violated federal law and that SIFE had therefore breached its duty of care. In <u>Elsworth v. Beech Aircraft Corp.</u> (1984) 37 Cal. 3d 540, this Court said under Section 669 that "negligence of a person is presumed if he violated a statute or regulation of a public entity." This Court in <u>Elsworth</u> approved a negligence *per se* judgment against an aircraft manufacturer for its violations of Federal Aviation Administration safety regulations. "There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care." (<u>DiRosa v. Showa Denko K.K.</u> (1996) 44 Cal. App. 4th 799, 808.)

Pursuant to 15 U.S.C. § 78o(b)(4)(E), the SEC requires dealers to "supervise, with a view to preventing violations of the provisions of [federal] statutes, rules, and regulations another person who commits such a violation, if such other person is subject to his supervision." This federal

provision is almost identical to Cal. Corp. Code § 25212(g). The California Department of Corporations promulgated 10 Cal. Code Regs., § 260.218.4(a) and (c)(3), which provide that "[e]very broker-dealer shall exercise diligent supervision over the securities activities of all of its agents," and that every dealer must "establish, maintain and enforce written procedures," calling for the "prompt review and written approval by the designated supervisor of **all** securities transactions by agents." The Department's use of the word "all" here clearly expresses the Department's view that dealers must supervise "all" securities transactions by their agents, not merely those transactions in securities pre-approved by the firm.

The supervision requirement also follows from 15 U.S.C. § 78(t), and Cal. Corp. Code § 25504, which impose liability on any person who directly or indirectly controls any other person who violates federal or state securities laws. The controlling person statutes are "construed liberally" and are "interpreted as requiring only some indirect means of discipline or influence short of actual direction to hold a 'controlling person' liable." (Maher v. Durango Metals, Inc. (10th Cir. 1998) 144 F.3d 1302, 1305.) "[A] brokerage house is, as a matter of law, a controlling person for purposes of the securities laws," even if the sale of the security in question is "consummated through [a different] brokerage house." (Martin v. Shearson Lehman Hutton, Inc. (8th Cir. 1993) 986 F.2d 242, 244 (citation omitted).)

Brokerage firms have a defense if they show that they "maintained and enforced a reasonable and proper system of supervision and internal control over controlled persons so as to prevent, so far as possible, violations of [the securities laws]." (Zweig v. Hearst Corp. (9th Cir. 1975) 521 F.2d 1129, 1135.) Merely pleading ignorance does not satisfy the broker-dealer's burden of proof. That a brokerage firm "neither participated in nor had knowledge of the fraudulent activities of its employees [is] insufficient . . . in the absence of evidence establishing . . . that [the brokerage firm] adequately supervised [the broker's] activities." (Paul F. Newton & Co. v. Texas Commerce Bank (5th Cir. 1980) 630 F.2d 1111, 1120.)

The Federal Courts' and Federal and State Enforcement Agencies' View that Dealers Must Supervise the Private Securities Transactions of Registered Representatives

The SEC, state securities agencies, and the National Association of Securities Dealers, Inc. ("NASD") have consistently interpreted these supervision requirements to extend to private securities transactions by individual registered representatives of the sort at issue in this case. These determinations are entitled to great deference in federal courts and in this Court. In a case involving the SEC's interpretation of federal securities laws, the Court said that a "reviewing court [must] be guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .'" (E.I. du Pont de Nemours and Co. v. Collins (1977) 432 U.S. 46, 54-55 (citation omitted); accord Roland v. Ramelli (In re Waters of Long Valley Creek Stream System) (1979) 25 Cal. 3d 339, 349 n.4 ("[T]he long standing rule [is] that the 'contemporaneous administrative construction of the

enactment by those charged with its enforcement and interpretation is entitled to great weight . . . .").)

In 1982, the SEC told the NASD that when, as in this case, a firm hires a representative as an independent contractor, the firm must assume "the supervisory responsibilities attendant to a relationship with an associated person." (Gordon S. Macklin (SEC June 18, 1982) [1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,303 at 78,117-18.) Dealers have an obligation to control or supervise the activities of their salespersons and using the independent contractor device as a means "to limit broker-dealer liability for the acts of such persons under the federal securities laws [is] of no effect." Id. at 78,117.

In 1986, the NASD likewise required firms to supervise their registered representatives' private security transactions, known in the industry as "selling away" from the firm. The NASD told firms to supervise compliance with NASD Rule 3040 (numbered at that time as Article III, Section 40 of the NASD Rules of Fair Practice), which prohibits representatives from selling securities without their firm's knowledge.

> [F]irms employing off-site representatives are responsible for establishing and carrying out procedures that will subject these individuals to effective supervision designed to monitor their securities-related activities and to detect and prevent regulatory and compliance problems. . . .
>
> Because of their location and other circumstances of their employment, off-site personnel have a greater opportunity than on-site personnel to engage in undetected selling away. Consequently, firms that employ such persons are responsible for monitoring their activities in a manner reasonably intended to detect violations.

(NASD Notice to Members 86-65 (Sept. 12, 1986) 1986 WL 591919 at *2-3.)

The SEC, the NASD, and state enforcement agencies have repeatedly sanctioned firms for failing to supervise selling away activities. For example, in Mutual Fund Sec., Inc. (SEC Feb. 10, 1976) 1976 WL17169 at *2, the California broker-dealers "never bothered to look into the precise composition" of the investments that their salesman was selling, and he in fact sold fraudulent securities.

> [The broker-dealer] forgot that he was *their* representative. They held him out as such to the world, they thus impliedly represented that he was being adequately supervised and had derived some pecuniary benefit, however small, from his activities. Hence they were under a duty to supervise.

In SECO Sec., Inc. (SEC Sept. 1, 1988) 1988 WL 240375 at * 2, the SEC stated as follows regarding a San Diego office.

> [The stockbrokers] engaged in numerous private securities transactions without obtaining prior approval from [the firm]. The NASD found that, in connection with those transactions, applicants failed to review and adequately monitor the activities of the San Diego branch office.
>
> We agree with the NASD that applicants were responsible for deficient supervision with respect to the violations at issue. Although no specific information came to their attention that alerted them to the misconduct that occurred, applicants fostered the violative activities . . . by abdicating their supervisory responsibility.

(See also PFS Investments, Inc. (SEC July 28, 1998) 1998 WL 422161 at *6 ("[T]he procedures in place at the compliance departments . . . were not reasonably designed to detect selling away activities. . . . [The firm therefore] failed reasonably to supervise. . . with a view towards preventing violations of the securities laws, within the meaning of Section 15(b)(4)(E) of the Exchange Act,"); Royal Alliance Assoc. (SEC Jan. 15, 1997) 1997 WL13023 at *6 ("Many failure-to-supervise cases involve indicators of misconduct or 'red flags' that should immediately alert management to potential wrongdoing. . . . Here, [the firm's] failure to scrutinize adequately the securities-related businesses of its registered representatives, which were conducted beyond the direct aegis of the firm, was a certain recipe for trouble.").)

The California Department of Corporations also requires supervision and rejects dealers' attempts to avoid their supervisory obligations by entering into independent contractor relationships with their agents. In Release No. 91-C (Cal. Dep't Corp. 1997) Blue Sky Law Rep. (CCH) ¶ 12,624 at 8119, the Department said that "strict supervisory responsibilities are imposed on broker-dealers with respect to agents employed by them."

> The Commissioner is primarily concerned with the supervision provided by a broker dealer over persons representing the broker-dealer and effecting transactions and securities. Every broker-dealer shall exercise diligent supervision over all of its agents to ensure proper adherence to the requirements of the Law. A broker-dealer may not seek to disavow or limit its supervisory responsibilities under the Law by encouraging or permitting an agent to represent himself as an "independent contractor."

Recently, the Department announced it had obtained a final judgment against a broker-dealer for failing to supervise an investment advisor who had his own investment service but was a registered representative of the brokerage firm. Without the knowledge of the brokerage firm, the investment advisor created "an illegal mutual fund," using the commingled funds of his customers. "[O]ne of the most important duties of securities broker-dealers is the supervision of the activities of their agents. . . . The investing public has a right to expect that securities broker-dealers will exercise proper supervision over the agents who advised them on investments and handled their money. There is no higher fiduciary duty for a securities firm than maintaining a culture of rigorous

compliance and supervision." (Dep't of Corp. News Release 01-04 (available on the Internet at www.corp.ca.gov/pressrel/nr0104.htm.).)

Other state securities agencies have likewise sanctioned brokerage firms and supervisors for failing to supervise selling away activities. (See WMA Sec., Inc. (Ariz. Corp. Comm'n Nov. 23, 1998) 1998 WL 894863 at *2 (The firm's "procedures and the system for employing those procedures was not reasonably designed to prevent and detect [selling away] violations by [its] salesmen."); Advest, Inc. (Vt. Sec. Div. Feb. 12, 1998) 1998 WL 281064 at *2 (The firm's conduct "demonstrates [the firm's] cavalier attitude and indifference to enforcing compliance with Rule 3040 [regarding selling away] . . . . It was this indifference to Rule 3040 which ultimately harmed some of [the firm's] clients."); Philadelphia Investors, Ltd. (Pa. Sec. Com. Aug. 13, 1998) 1998 WL 644775 at *3 (Firm "should have been aware of [its representative's] private securities transactions . . . . [The firm's] supervisory failure had the effect of allowing [the representative] to conduct such activities . . . .").)

Courts agree that brokerage firms must supervise their agents' unauthorized transactions. In Martin v. Shearson Lehman Hutton, Inc. (8th Cir. 1993) 986 F.2d 242, 244, a Shearson representative persuaded an investor to purchase stock through another brokerage house, after Shearson had instructed its brokers to halt recommendations for that stock.

> We think that [the broker's] solicitation of the business while she was an employee of Shearson is sufficient to make out a prima facie case of controlling person liability. . . . Shearson's agent solicited the purchase of the stock and misrepresented its nature. Shearson had the ability to discipline [the broker's] conduct, and it was this conduct that gave rise to the loss.

In Vestax Sec. Corp. v. Skillman (N.D. Ohio 2000) 117 F. Supp. 2d 654, 657-58, the court found that investors' claims against a brokerage firm for failing to supervise the private securities transactions of its registered representative were arbitrable under NASD rules.

> [The investors'] claims against [the firm] are based in part on [the firm's] alleged failure to effectively supervise its registered representative . . . . The fact that [the firm] received no compensation for the transactions at issue is insignificant because [the firm's] business includes the supervision of its large corps of registered representatives.

Thus, contrary to the decision below, the federal courts, the SEC, the Department of Corporations, and state securities enforcement agencies all agree that brokerage firms have a duty to supervise private securities transactions of their registered representatives.

The Duty to Supervise Licensed Independent Contractors

A pervasive theme of the First District's opinion below is that a broker-dealer can avoid liability by entering into "independent contractor" contracts with its agents. As explained above, however, the SEC and the California Department of Corporations have rejected this position. Under 15 U.S.C. § 78cc(b), any contract intended to insulate a firm from liability under the federal securities laws is void. In Hall v. Superior Court (1983) 150 Cal. App. 3d 411, the court refused to apply a Nevada choice of law provision to a California transaction, because this provision violated Cal. Corp. Code 25701, which like federal law, prohibits contractual attempts to evade California securities law.

This view is consistent with this Court's general position on employers' attempts to avoid liability by claiming that their agents are independent contractors. In Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 251, 253, this Court said:

> A number of factors concur to constitute the grounds of policy for . . . allocation of risk from the [independent contractor] to the [employer]. These considerations, in fact, constitute such a powerful argument for the liability of the employer of an independent contractor that it would seem highly desirable for the courts to adopt the rule of liability and confine non-liability to a few exceptional cases. . . .
>
> . . . Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, . . . such persons can not escape liability for a failure to perform the duties as imposed by entrusting it to an independent contractor. . . .
>
> . . . .
>
> It is clear that the liability of an employer of an independent contractor for the latter's tortious conduct is broad . . . .

In this case, SIFE licensed Tufo as its general securities agent with the California Department of Corporations and the SEC, and it thereby announced to the world that Tufo was its representative, authorized to sell securities on SIFE's behalf. This Court has held that licensees cannot escape liability merely by calling their agents "independent contractors."

> The rule of non-delegable duties for licensees is of common law derivation. The essential justification for this rule is one of ensuring accountability of licensees so as to safeguard the public welfare. . . . If a licensee were not liable for the actions of his independent contractor, "effective regulation would be impossible. He could contract away the daily operations of his business to independent contractors and become immune to disciplinary action by the licensing authority."

(California Ass'n of Health Facilities v. Dep't of Health Services (1997) 16 Cal. 4th 284, 296.)

Disturbingly, the First District agreed with the trial court that, it did "not believe SIFE subjected itself to the requirements of federal (or state) securities laws with respect to its responsibility to supervise the outside activities of its registered representatives." (Slip op. at 14) According to Article IV, § 1(a)(1) of the NASD By-Laws, however, when SIFE became an NASD member, it made "an agreement to comply with the federal securities laws, [and] the rules and regulations thereunder." Similarly, California's Department of Corporations would be greatly surprised to hear SIFE's current position that, when SIFE applied with the Department to become a licensed broker-dealer, it never agreed to comply with California securities laws. This remarkable assertion by the First District that SIFE did not agree to follow California law is a particularly important reason why the opinion should be depublished.

Hauser is Substantially Different From this Case

The First District relied primarily on Hauser v. Farrell (9th Cir. 1994) 14 F.3d 1338, but Hauser is substantially distinguishable. Unlike Hauser, in which the brokerage firm knew nothing about the private securities transaction, Tufo testified he told SIFE he was selling the MEDCO securities. SIFE's officers often asked Tufo how MEDCO was doing, and a SIFE compliance officer helped him prepare his MEDCO radio advertisements. Thus, the Investors below provided evidence that SIFE knew about the transactions and participated in the marketing of these securities. Nothing in Hauser suggests that the Ninth Circuit would agree that a brokerage firm can have actual knowledge of and participation in its stockbroker's fraudulent private securities transactions and nevertheless have no fear of liability.

Furthermore, Hauser emphasized that the investors knew that the brokerage firm had no association with the securities. The brokers in Hauser told the investors several times that the venture had no connection with the brokerage firm. The venture was not even a security, and the brokers therefore did not have to be registered to sell it. "[N]o evidence . . . reasonably suggests that the Plaintiffs relied on [the brokers] as registered representatives of [the brokerage firm] in choosing to invest in" the investment. 14 F.3d at 1342. By contrast, in the present case, the MEDCO promissory notes were securities, and Tufo was required to have a license to sell it. The investors testified that they believed Tufo was acting as a SIFE registered representative, that they were dealing with SIFE, and that MEDCO was one of the investments offered by SIFE. (Slip. Op at 4-5) These facts are substantially different from those in Hauser, and the First District therefore improperly relied on Hauser.

The *Respondeat Superior* Doctrine

The First District also erred in not applying the *respondeat superior* doctrine. The evidence showed that Tufo offered SIFE and MEDCO simultaneously, and he led the Investors to believe that both the MEDCO promissory notes and the SIFE mutual funds were products that SIFE offered to its customers. Tufo provided the Investors with SIFE business cards and SIFE marketing materials, establishing that he was a legitimate agent of SIFE. (Slip op. at 4)

Under the doctrine of *respondeat superior*, SIFE was liable for Tufo's misconduct, regardless of the Investors' reliance on or knowledge of Tufo's status as a SIFE employee, and regardless of any fault by SIFE, because the risk of liability was foreseeable to SIFE.

> "[F]oreseeability" as a test for *respondeat superior* merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.

(Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618-19 (citations and quotation marks omitted).)

California law does not require "that an employee's act benefit an employer for *respondeat superior* to apply. In fact, an employer can be liable for his employee's unauthorized *intentional* torts committed within the scope of employment despite lack of benefit to the employer." (Perez v. Van Groningen & Sons (1986) 41 Cal. 3d 962, 969.) The employee need not intend to benefit or further the interest of the employer; "the 'motive test' . . . has been abandoned in California." (Rodgers, 50 Cal. App. 3d at 621.) "[T]he proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." (Perez, 41 Cal. 3d at 970 (quotation marks omitted).) If "the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury . . . ." (Id.)

Here, Tufo offered the SIFE and MEDCO products simultaneously, and SIFE should therefore be liable, even if Tufo was acting for personal purposes in selling MEDCO. In NASD Notice to Members 86-65, the NASD notified SIFE regarding the risks of "selling away" when a firm such as SIFE allows its employees to act unsupervised from their own offices. Because the risk that Tufo might engage in selling away activities was foreseeable, SIFE is liable for his misconduct under the *respondeat superior* doctrine.

The courts have frequently found that broker-dealers are liable under the *respondeat superior* doctrine. For example, in Lewis v. Walston & Co. (5th Cir. 1973) 487 F.2d 617, as in the present case, the stockbroker sold unregistered securities not approved by the firm.

> That Walston did not deal in unregistered securities addresses only the question whether [the broker's] conduct was authorized; . . . however, conduct may be within the scope of employment even if it is unauthorized, if it is sufficiently similar to authorized conduct. . . . Brokers may and do take many actions in the course of their dealings with customers that do not relate directly to transactions executed

> through the brokerage house; these actions are not for that reason necessarily beyond the scope of the broker's employment. . . . If a particular act is authorized, or sufficiently similar to an authorized act, finding that act to be within the scope of employment does not require that the act has conferred any particular benefit, financial or otherwise, on the employer.

Id. at 623-24.

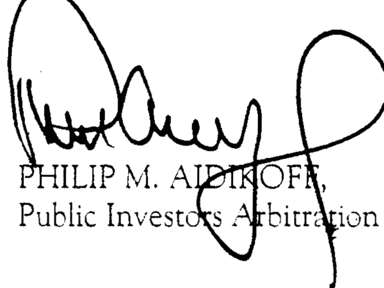
In Holloway v. Howerdd (6th Cir. 1976) 536 F.2d 690, 696, the Sixth Circuit likewise found *respondeat superior* liability against a brokerage firm for the private securities transactions of its representative.

> [The firm], however, had an affirmative obligation to prevent use of the prestige of its firm to defraud the investing public. When its agents are dealing individually in the sale of securities [the firm] must be clearly disassociated from those transactions, as otherwise it will incur liability on the basis of *respondeat superior* for the fraudulent representations of its agents.

In accordance with these authorities, this Court should grant review or at least depublish the decision below, because it violates well-settled *respondeat superior* principles. It should also grant review or depublish the decision because it incorrectly allows broker-dealers to disclaim all responsibility for their registered representatives' actions, by the simple expedient of calling them independent contractors. This decision should not be citable as authority in this state.

Sincerely,

AIDIKOFF & UHL



PHILIP M. AIDIKOFF,
Public Investors Arbitration Bar Association

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 9454 Wilshire Blvd., Penthouse Suite, Beverly Hills, California 90212.

On February 6, 2001, I served **LETTER OF AMICUS CURIAE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF THE GRANTING OF OF THE PETITION FOR REVIEW AND REQUESTING DEPUBLICATION OF THE FIRST APPELLATE DISTRICT'S OPINION** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Beverly Hills, California, addressed as follows:

Jan Stiglitz, Esq.
225 Cedar Street
San Diego, CA 92101

California Court of Appeal
First Appellate District
350 McAllister Street
Division 3
San Francisco, CA 94102-3600

Stephen McNichols, Esq.
Hallgrimson McNichols, LLP
5000 Hopyard Rd.-Ste. 400
Pleasonton, CA 94588

X / MAIL

/ X / I deposited such envelope in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

/ x / As follows: I am readily familiar with the firm's practice of collection and processing correspondence for mailing, Under that practice it would be deposited with US Postal Service on that same day within postage therein fully prepaid at Beverly Hills, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

[ ] (BY FEDERAL EXPRESS)

[X] (BY TELECOPIER) In addition to service by mail as set forth above, the counsel by whose name an asterisk appears was also forwarded a copy of said document(s) by telecopier.

[ ] (BY PERSONAL SERVICE) I personally delivered such envelope to the addressee at ________________________, California at ____.m. on said date.

[ ] (BY MESSENGER) I delivered such envelopes(s) by hand to the office(s) of the addressee(s) during regular business hours on said date.

Executed on February 6, 2001, at Beverly Hills, California.

/X/ (State) I declare under penalty of perjury under the laws if the State of California that the above is true and correct.

RYAN K. BAKHTIARI