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RESPONDENT'S BRIEF

Appeal Number G031636

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

**FOURTH APPELLATE DISTRICT
DIVISION THREE**

BALBOA ISLAND VILLAGE INN, INC.,

Plaintiff and Respondent,

v.

ANNE LEMEN aka ANNE LEMON,

Defendant and Appellant.

Appeal from Orange County Superior Court, State of California
Honorable Gerald G. Johnston
Orange County Superior Court Case No. 01CC13243

RESPONDENTS' BRIEF

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I.

INTRODUCTION

After a five day court trial and the testimony of 25 witnesses, Plaintiff/Respondent Balboa Island Village Inn, Inc. ("BIVI"), owner of The Balboa Island Village Inn ("The Village Inn") was granted judgment on its four causes of action against Defendant/Appellant, Anne Lemen ("Lemen"). BIVI was granted the only relief it sought, a permanent injunction to prohibit Lemen from making specific defamatory statements regarding the The Village Inn and accosting The Village Inn's employees and customers verbally and with her cameras.

Despite Herculean efforts by Lemen to make this a case about suppression of petition rights, free speech and public debate, BIVI did not contest Lemen's legitimate efforts to speak out and gather support against The Village Inn or even her [false] reports to authorities. What BIVI challenged, and which 17 witnesses testified to and the Honorable Gerald D. Johnston found to have been proved despite Lemen's denials, was that Lemen:

- Canvassed Balboa Island on a petition drive and told the residents, The Village Inn's customer base, that The Village Inn:
 - Sold drugs
 - Sold alcohol to minors;
 - Had child porn;
 - Was making sex videos;
 - Had lesbian love acts;
 - Was open until 6:00 a.m.

- Had prostitution;
- Was owned by the Mafia; and
- Served tainted food.

All of which was untrue.

- Confronted The Village Inn's customers and employees as they went in and out of the Village Inn and:
 - Called them "whores";
 - Called them "Satan";
 - Called them "drunks"; and
 - Called them "Mexicans".
- Followed, and even chased, customers with a video camera from and to their cars;
- Spent days, nights, weekdays and weekends standing or parked in front of the entrance to The Village Inn with a video camera in plain site videoing the customers and visibly upsetting them; and
- Took flash photos of the customers through the windows and doors every Thursday and Saturday night for a year, upsetting the customers.

The evidence further proved that Lemen's defamation and harassment campaign was greatly harming The Village Inn's business in an incalculable amount.

Despite the 17 witnesses who testified for BIVI, including Balboa Island residents who were retirees, local business owners and lawyers, Lemen's immediate neighbors, and The Village

Inn's employees and management, Lemen testified that not one of the above matters occurred. Judge Johnston found BIVI's contentions to be proven based on the credibility of the witnesses. [*"Defendant has denied most of the activity and statements attributed to her. However, the Court is convinced by a preponderance of the evidence based on the many witnesses called to testify, that, in fact, Defendant did make the statements attributed to her and engaged in the other conduct previously described."* (Statement of Decision, p. 5.) Judge Johnston's factual findings, set forth in his Statement of Decision dated September 12, 2002¹, are supported not just by substantial but rather overwhelming evidence.

The facts squarely fit within the parameters for injunctive relief under Civil Code Section 3422. Judge Johnston carefully crafted a very specific injunction to prohibit the specific defamatory statements proved at trial, specific contacts, and specific photo and video harassment proved at trial, leaving Lemen plenty of room to continue in her campaign against The Village Inn without violating the injunction. The injunction was certainly not an abuse of Judge Johnston's discretion.

A. Contentions.

1. Judge Johnston's findings of fact necessary to support BIVI's claims and injunctive relief are supported by substantial evidence; and
2. The permanent injunction issued by Judge

¹ The Statement of Decision was somehow not included in the Clerk's Transcript. BIVI has filed a Motion to Augment the Clerk's Transcript to add the Statement of Decision.

Johnston was not an abuse of his discretion.

II.

STATEMENT OF FACTS

Since 1989, Lemen has owned the property at 1305 Park Avenue on Balboa Island which she operates as a 2-unit vacation property called the "Island Cottage" (the "Lemen Property"). (Clerk's Transcript ("C.T."), pp. 32-33; Reporter's Transcript ("R.T."), Lemen², p. 12, lns. 6-22.) The Lemen Property is located across the alley from the back of The Village Inn, a landmark restaurant and bar opened in the 1930's and located at 127 Marine Avenue. Lemen purchased the Lemen Property from the Packards, a couple who had been at battle with The Village Inn throughout the 1980's over noise. Lemen purchased the Lemen Property during a much publicized legal fight over noise issues. (C.T., p. 34; R.T. Lemen, p. 18, ln. 12 - p. 19, ln. 8.) Lemen has since been on a personal 13-year crusade against The Village Inn.

In November 2000, BIVI, owned by the Toll family, purchased The Village Inn from Lance Wagner. (R.T. Aric Toll, p. 234, lns. 11-25.) When Mr. Wagner owned The Village Inn, to accommodate Lemen, he had the interior reconfigured to flip the bar and restaurant to move the bar and entertainment to the area farthest away from the Lemen Property. Mr. Wagner's efforts only resulted in a brief reprieve. Mr. Wagner threatened litigation against Lemen before selling The Village Inn to BIVI. (R.T. Lance Wagner, p. 124, ln. 15 - p. 125, ln. 25; p. 132, lns. 10-26.)

² For the Court' of Appeal's convenience, the person whose testimony is being cited will be identified.

Since BIVI acquired The Village Inn, Lemen's crusade against The Village Inn escalated to the point where The Village Inn could not put up with Lemen's conduct and the damage to the business any longer. The specific conduct which The Village Inn complained of, and which the witnesses at trial testified to, was the following:

- **Lemen spent days, nights, weekdays and weekends standing or parked in front of the entrance to The Village Inn with a video camera in plain site videoing the customers and visibly upsetting them.** (R.T. Carol O'Donnel, p. 89, ln. 11-15; p. 90, ln. 5 - p. 91, ln. 4; Ewa Cook, p. 104, ln. 23 - p. 105, ln. 16; p. 107, ln. 1 - p. 108, ln. 10; Kelly Wildman, p. 144, ln. 19 - p. 145, ln. 18; p. 147, ln. 9 - p. 147, ln. 19; p. 147, ln. 23 - p. 149, ln. 26; p. 150, ln. 21 - p. 151, ln. 25; Arturo Perez, p. 159, lns. 6-8; Paul Ankenman, p. 172, ln. 21 - p. 173, ln. 20; p. 174, lns. 10-25; Daniel Fagas, p. 183, ln. 2 - p. 184, ln. 21; p. 187, lns. 6-17; Aric Toll, p. 246, ln. 16 - p. 248, ln. 24.)
- **Lemen took flash photos of the customers through the windows and doors every Thursday and Saturday night for a year, upsetting the customers** (R.T. Ewa Cook, p. 105, ln. 12 - p. 106, ln. 19; Aric Toll, p. 254, ln. 19 - p. 255, ln. 17) **and took photos of employees changing.** (R.T. Felipe Anaya, p. 205, lns. 20-25.)
- **Lemen confronted and even chased customers**

and employees entering or leaving The Village Inn (R.T. Paul Ankenman, p. 175, lns. 7-22; Aric Toll, p. 242, lns. 15 - p. 243, ln. 3), **calling them "whores"** (R.T. Carol O'Donnell, p. 89, lns. 2-23; Thresa Toll, p. 196, ln. 17 - p. 197, ln. 1), **"drunks"** (R.T. Carol O'Donnell, p. 91, lns. 8-22; Paul Ankenman, p. 176, ln. 9-22), **"satan"** (R.T. Ewa Cook, p. 117, ln. 22 - p. 118, ln. 1; Kelly Wildman, p. 147, ln. 23 - p. 149, ln. 26; p. 151, ln. 26 - p. 152, ln. 10), **"Mexicans"** (R.T. Felipe Anaya, p. 205, lns. 1-13), **asking them for "greencards"** (R.T. Arturo Perez, p. 157, ln. 21 - 158, ln. 15), **used profanity** (R.T. Jason Evers, p. 164, ln. 21 - p. 166, ln. 21; Aric Toll, p. 241, ln. 25 - p. 242, ln. 11; p. 244, ln. 24 - p. 245, ln. 8; p. 246, ln. 16 - p. 248, ln. 24), and **said the food was tainted** (C.R., P. 93; R.T. Lance Wagner, p. 129, ln. 19 - p. 130, ln. 11).

- **Lemen went door-to-door throughout Balboa Island with a petition against The Village Inn and told residents that The Village Inn:**
 - **Is a "whorehouse with prostitution";**
 - **Is "making sex videos";**
 - **"Sells drugs";**
 - **"Sells alcohol to minors";**
 - **Has "child porn";**
 - **Has "lesbian love acts"; and**

○ **Is open until 6:00 a.m.**

(R.T. Kirby Gault, p. 210, ln. 1 - p. 214, ln. 26; Darren Friend, p. 224, ln. 16 - p. 228, ln. 8; R.T. (from August 26, 2002) Patricia Hitt, p. 5, ln. 15 - p. 6, ln. 18; Gale Bensussen, p. 12, ln. 22 - p. 15, ln. 20.)

None of the defamatory statements made by Lemen about The Village Inn were true. (R.T. Aric Toll, p. 253, ln. 17 - p. 254, ln. 18.) Lemen's harassment and defamation caused The Village Inn's business to suffer greatly, although the actual damages are not calculable. (R.T. Aric Toll, p. 255, ln. 26 - p. 261, ln. 17.)

While this action was pending, between the filing of the original Complaint and trial, The Village Inn went through a public hearing before the Newport Beach Planning Commission with respect to a change to its entertainment permit. After The Village Inn prevailed before the Planning Commission, before trial, The Village Inn participated in a town hall meeting with representatives from the Department of Alcoholic Beverage Control ("ABC") over alleged disturbances. Lemen spearheaded, through her petition campaign, the opposition to The Village Inn at the Planning Commission and the town hall meeting. Lemen succeeded in getting over 400 petitions signed, but what were the petition signers told? At trial and now on appeal, Lemen argues that The Village Inn's motive for this lawsuit is to stop her from her political activities. This is not true and is not supported by the pleadings or any of the evidence at trial.

III.

STANDARD OF APPELLATE REVIEW

The trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion. *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 952 [196 Cal.Rptr. 45].) Such continuing relief by injunction operates in the future. (Ibid.) A reviewing court will exercise its independent judgment when it is required to interpret and apply a statute where the underlying facts are not in dispute. (Ibid.)

However, to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, an appellate court will review such factual findings under a substantial evidence standard. Our power in this regard "begins and ends" with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] ¶ . . . When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785 [59 Cal.Rptr. 141, 427 P.2d 805].) *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.

As evidenced by the Statement of Decision, Judge Johnston made findings of fact based on disputed evidence and then exercised his sound discretion to narrowly tailor an injunction to fit the circumstances. Therefore, Judge Johnston's findings of fact will be reviewed by the "substantial evidence" standard and the injunction will be reviewed by the "abuse of discretion" standard.

IV.

LEGAL DISCUSSION

A. There Was Substantial Evidence Upon Which Judge Johnston Ruled That BIVI Proved Its Claims.

1. BIVI's causes of action.

a. Nuisance.

In order to prove its cause of action for nuisance, BIVI was required to prove: (1) It is the owner of an interest in real property, namely real property at 127 Marine Avenue; (2) Lemen interfered with BIVI's private use and enjoyment of its property interest; (3) Lemen's interference was substantial and unreasonable; and (4) the interference caused BIVI to suffer injury, damage, loss or harm. San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 937-939.

Judge Johnston's factual findings regarding Lemen's substantial and unreasonable harassment of The Village Inn's customers and employees through her video and photo campaign, and verbal abuse of customers and employees, thus interfering with BIVI's use and enjoyment of its property, is certainly supported by substantial evidence. BIVI's damages, loss or harm was also supported by substantial evidence.

b. Defamation.

"Defamation is an invasion of the interest in reputation of a person or legal entity resulting from libel or slander" . . . "Slander is a false and unprivileged publication made orally either in person . . . or by any other means which: charges any person with a crime . . . [or] . . . tends directly to injure a party in respect to that person's

office, profession, trade or business . . . by imputing something with reference to the business that has a natural tendency to lessen its profits." B.A.J.I. 7.00 - 7.03; 5 Witkin, Summary of California Law, Torts, § 476 (Supp. 2003).

Judge Johnston's factual findings regarding Lemen's statements to third persons were supported by substantial evidence, the testimony of the persons to whom Lemen made the statements. The statements certainly imputed something (selling drugs, porn, prostitution, etc.) which has a tendency to lessen The Village Inn's profits, and there was substantial evidence that the profits were in fact reduced as a result of the defamation.

c. Interference with business.

In order to prove its cause of action for interference with business [Intentional Interference with Prospective Business Advantage], BIVI was required to prove: (1) an economic relationship existed between The Village Inn and the persons Lemen contacted, containing a probable future economic benefit to The Village Inn; (2) Lemen knew of the existence of the relationship; (3) Lemen intentionally engaged in wrongful conduct designed to interfere with or disrupt this relationship; (4) the economic relationship was actually interfered with or disrupted; and (5) Lemen's wrongful conduct which was designed to interfere with or disrupt this relationship caused damage to The Village Inn.

Judge Johnston's factual findings regarding Lemen's defamatory statements to The Village Inn's customers and probable customers, and her intimidation of and driving off customers, satisfies the elements of the Intentional Interference with Prospective Business

Advantage cause of action and was supported by substantial evidence, the testimony of many witnesses.

B. The Permanent Injunction Was Not An Abuse of Discretion.

Civil Code Section 3422 states that a permanent injunction may be granted:

1. Where pecuniary compensation would not afford adequate relief;
2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
4. Where the obligation arises from a trust.

In the present case, pecuniary compensation possibly could have afforded adequate relief. However, it would have been difficult or impossible to ascertain the amount of compensation which would afford adequate relief to BIVI under the circumstances. Further, the restraint of Lemen is absolutely necessary because her conduct is repeated and ongoing and, unless restrained, will require a multiplicity of judicial proceedings. Accordingly, the present circumstances fall squarely within the parameters of Civil Code Section 3422.

C. Lemen's First Amendment Challenge To The Injunction Lacks Merit.

Lemen challenges Judge Johnston's permanent injunction prohibiting her from publishing nine specific statements found by

Judge Johnston to be defamatory. Lemen argues that the injunction constitutes an unconstitutional prior restraint on free speech, violating both the United States Constitution and California Constitution. However, the injunction is constitutional and well within Judge Johnston's sound discretion.

A 1999 decision by the California Supreme Court directs the outcome here. In Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, Avis employees complained of employment discrimination, in part based on a supervisor's repeated use of racial epithets. Id. at 126-127. After the jury found that defendant had engaged in acts of harassment or discrimination, a hearing was held to consider plaintiffs' request for an injunction. Id. at 127. In addition to awarding damages, the trial court further issued the following injunction: "Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc., in California . . ." Id. at 128.

The Court of Appeal ordered the trial court to redraft the injunction to limit its scope to the workplace, and also required that it "add 'an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence' in order to 'more precisely warn Lawrence and Avis what is forbidden'." Id. Lawrence sought review by the California Supreme Court, arguing that the injunction, even as limited by the Court of Appeal, constituted an improper prior restraint on the freedom of expression. Id. at 129.

In a plurality opinion, the Supreme Court dismissed this challenge: "Under well-established law . . . the injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that the defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity." *Id.* at 138. The Supreme Court then discussed several United States Supreme Court decisions supporting its conclusion. *Id.* at 138-140. After summarizing the decisions, the Supreme Court concluded that "once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited "prior restraint" of speech. *Id.* at 138-140. For this reason, the injunction was also not a prior restraint on expression; it was based on a continuing course of repetitive speech that was unlawful, and an injunction preventing continued violation of the law did not violate First Amendment rights. *Id.* at 140-141. Applying the same reasoning, the Supreme Court likewise held that the injunction did not violate the California Constitution's protections on free expression. *Id.* at 144-145.

Although *Aguilar* is a plurality opinion, the split among the Justices was principally over whether racially charged speech could constitute employment discrimination, and then additionally be constitutionally enjoined. *Id.*, *passim*. But Justice Kennard's would join the majority when the speech involved constitutes defamation. Although Justice Kennard disagreed overall with the plurality, she acknowledged that no heightened scrutiny is required when categories of proscribable speech—"obscenity, *defamation*, and 'fighting

words"—are involved. *Id.* at p. 183-184 (Dis. Opn. of Kennard, J.) (emphasis added). Justice Kennard further acknowledged that some courts might issue a permanent injunction prohibiting someone from again publishing "the very same defamatory statement" found to be defamatory after a full and fair trial. *Id.* at p. 187 (Dis. Opn. of Kennard, J.) Justice Kennard only suggests that it would be impermissible for a court to issue a much broader injunction in such a case, additionally prohibiting other statements that might be defamatory. Thus, a majority of the California Supreme Court would agree that it is permissible to issue a permanent injunction prohibiting future publications of statements when the same statements were already found to be defamatory after a full and fair hearing.³

Lemen had a full adversarial hearing on the defamation, nuisance and interference with business claims asserted against her. After full presentation of the evidence, Judge Johnston found against Lemen. Judge Johnston's injunction prohibits Lemen from making only the following defamatory statements to third persons:

- Plaintiff sells alcohol to minors;

³ The plurality cites a number of decisions that are in accord with this rule. *Id.* at p. 141-142 n.8; San Antonio Hosp. v. So. Cal. Council of Carpenters (9th Cir. 1997) 125 F.3d 1230, 1239 [upholding *preliminary* injunction against displaying sign near hospital with fraudulent statement]; Lothshuetz v. Carpenter (6th Cir. 1990) 898 F.2d 1200, 1208, [directing entry of injunction to prohibit repetition of same defamatory statements]; O'Brien v. University Community Tenants Union, Inc. (1975) 42 Ohio St.2d 242, 245 [after speech if found to be defamatory, an injunction prohibiting that same speech may be proper]; Advanced Training Sys. v. Caswell Equip. Co. (Minn. 1984) 352 N.W.2d 1, 11 [permanent injunction permissible against statements already found to be defamatory after a full trial].

- Plaintiff stays open until 6:00 a.m.;
- Plaintiff makes sex videos;
- Plaintiff is involved in child pornography;
- Plaintiff distributes illegal drugs;
- Plaintiff has mafia connections;
- Plaintiff encourages lesbian activities;
- Plaintiff participates in prostitution and acts of a
whorehouse; and
- Plaintiff serves tainted food.

(Statement of Decision, pp. 7-8.; Amended Judgment, C.T., p. 116, lns. 19-23.) This is exactly what is permitted by the Aguilar decision.

Lemen's citation to Wilson v. Superior Court of Los Angeles (1975) 13 Cal.3d 652 is unavailing for at least three reasons. First, Wilson addressed a preliminary injunction, which is subject to stricter scrutiny as a "prior restraint." As discussed above, a permanent injunction concerning statements already found to be defamatory is subject to a different analysis. Second, Wilson's preliminary injunction was extraordinarily broad, prohibiting statements "substantially similar" to those the trial court believed would be found to be defamatory, and additionally requiring that future statements be fair, balanced, and provide full presentation of facts. Id. at 658. The permanent injunction here is extremely narrow, prohibiting nine specific defamatory statements. Third, Wilson dealt with alleged defamation of a public figure during his candidacy for public office, a context to which the court attached particular importance. Id. at 659. The Wilson court in fact distinguished much

of the respondent's cited authority because it did not address criticism of public officials. Id.

Lemen's citation to Walker v. Kiouisis (2001) 93 Cal.App.4th 1432 is likewise unhelpful to her position. Although Lemen quotes the general rule regarding content-based proscriptions on speech, Walker also notes that three categories of speech -- defamation, obscenity, and fighting words -- "can constitutionally be proscribed notwithstanding the First Amendment." Id. at 1449. As Walker illustrates, speech in these categories may be regulated if, among others, the "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id. at p. 1450 (quoting R.A.V. v. St. Paul (1992) 505 U.S. 377, 393, 112 S.Ct. 2538, 2549).

As discussed above, Judge Johnston found certain statements by Lemen to be defamatory after a full and fair trial on the merits. Judge Johnston enjoined Lemen from making those exact defamatory statements in the future. There is no suggestion that "official suppression of ideas is afoot," and thus Walker supports Judge Johnston's decision to enter a permanent injunction against Lemen.

D. Judge Johnston Narrowly And Properly Tailored The Injunction With Respect To Lemen's Photo Activities And Contacts To Balance Her Alleged Needs And The Damage To The Village Inn.

An injunction is the traditional method of abating a nuisance. L.A. Brick Etc. Co. v. City of Los Angeles (1943) 60 Cal.App.2d 478, 486; see also Code of Civil Procedure § 731

(authorizing injunction to abate nuisance). Injunctions are also available to restraint interference with economic relations, including acts of harassment against a business operator and its patrons.

Uptown Enters. v. Strand (1961) 195 Cal.App.2d 45, 50-51.

The injunction against Lemen prohibits her from:

- initiating contact with The Village Inn's employees, except through The Village Inn's management; and
- filming (whether by video camera or still photography) within 25 feet of The Village Inn's property unless on her own property, or unless she is documenting an immediate disturbance or damage to her property.

Judge Johnston narrowly tailored the injunction to permit Lemen to continue her "documentary campaign" in a manner that interferes less with The Village Inn's business. Lemen can video and photo 24 hours a day, but not within 25 feet of The Village Inn unless on her own property. This will be far less uncomfortable and intimidating to The Village Inn's customers, and, in the extreme case (an immediate disturbance or damage), the prohibition does not apply. Lemen has no reason to contact The Village Inn's employees, but if she has a problem or complaint, she has the ability to communicate with and the telephone number of The Village Inn's management. The injunction certainly is permissible and is not an abuse of discretion under the circumstances.

V.

BIVI SHOULD BE AWARDED ITS COSTS ON APPEAL

As a general rule, the party who prevails on appeal is entitled to recover its costs on appeal as an incident to the judgment

on appeal. BIVI is the prevailing party entitled to costs following an affirmance of the appealed judgment. California Rules of Court, Rule 26(a)(1). BIVI therefore requests that the Court of Appeal, in affirming the trial court's Judgment, provide that BIVI shall be awarded its costs on appeal.

VI.

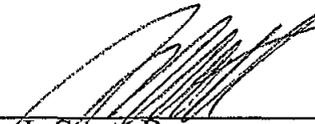
CONCLUSION

For the foregoing reasons, the trial court's Judgment should be affirmed and BIVI should be awarded its costs on appeal.

DATED: October 8, 2003

DUBIA, ERICKSON, TENERELLI
& RUSSO, LLP

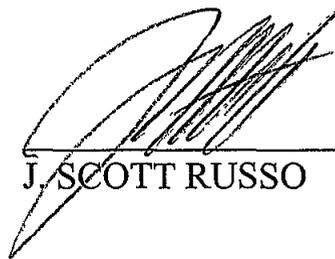
By: _____


J. Scott Russo
Attorneys for Plaintiff and
Respondent BALBOA
ISLAND VILLAGE INN, INC.

CERTIFICATE OF WORD COUNT

I, J. Scott Russo, certify that this Respondents' Brief contains 4,118 words, as contained in the Properties section of the Microsoft Word 2000 processing program used to count the words of this Respondents' Brief, except for this Certificate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Certificate was executed this 9th day of October, 2003, at Irvine, California.



J. SCOTT RUSSO

PROOF OF SERVICE

(CCP §1013A(3) Revised)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the above County, State of California. I am over the age of 18 and not a party to the within action. My business address is 2 Park Plaza, Suite 300, Irvine, California 92614.

On **October 9, 2003**, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the interested parties in this action in the manner indicated below and as further indicated on the attached service/mailling list:

[XXX] by placing a true copy thereof enclosed in a sealed envelope addressed to each of the interested parties as indicated on the attached service/mailling list.

[] by placing [] the original [] a true copy thereof in a sealed envelope addressed to each of the following interested parties:

[XXX] **BY MAIL** I deposited such envelope in the mail at Irvine, California. The envelope was mailed with postage thereon fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit. Executed on **October 9, 2003**, at Irvine, California.

[] **BY PERSONAL SERVICE** I caused such envelope to be personally delivered to the addressee indicated on the attached service/mailling list. Executed on _____, at Irvine, California.

[] **BY TELECOPIER** I forwarded the above document via telecopier to the above interested parties to the telecopier numbers noted on the attached service/mailling list. Each transmission was completed, without error or interruption. Executed on _____, at Irvine, California.

[] **BY OVERNIGHT DELIVERY:** I am readily familiar with Dubia, Erickson, Tenerelli & Russo, LLP's practice for collection and processing of correspondence for overnight delivery with Overnight Express. Pursuant to such practice, all correspondence is deposited in a regularly maintained box or delivered to any authorized Overnight Express courier in the ordinary course of business on the date it is generated. I know that the envelope was sealed, and with delivery fees thereon fully prepaid, placed for collection on this date, following ordinary business practices in the United States, at Irvine, California. Executed on _____, at Irvine, California.

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

Executed on **October 9, 2003**, at Irvine, California.



Kelley L. Saunders

SERVICE/MAILING LIST

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Clerk of the Court
[Honorable Gerald G. Johnston]
Orange County Superior Court
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Santa Ana, California 92701

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[5 Copies]