#44 9/2/66

Memorandum 66-52

Subject: Study 44 - The Fictitious Business Name Statute

You will recall that we have prepared and distributed a tentative recommendation on this subject. A copy of the tentative recommendation (dated May 31, 1966) is attached. You also will recall that when we prepared this tentative recommendation we considered a number of letters from various persons and organizations indicating that the publication requirement served no useful purpose.

At the August meeting, the staff reported that we had discussed this tentative recommendation with the office of the Secretary of State and that that office would be in a position to handle the workload imposed by the tentative recommendation by combining it with the financing statement filings under the Commercial Code. At the last meeting, the staff also suggested that it would be possible to eliminate the dual filing requirement and to have the Secretary of State provide the county clerks with information printed out by data processing equipment so that a duplicate index would be maintained by the county clerks but no separate filing would be required with the county clerk. At the suggestion of the Commission, we have prepared a revised tentative recommendation (dated August 28, 1966) revising the Fictitious Business Name Statute so that data processing equipment may be used. We have attached a copy of the revised tentative recommendation.

We distributed copies of the tentative recommendation of May 31, 1966, to a substantial number of interested persons. We attach to this memorandum 26 exhibits, consisting mostly of letters containing comments on the tentative recommendation.

At the direction of the Commission, we have invited county clerks, a representative of the office of the Secretary of State, and representatives of the newspaper industry to be present at our September meeting when we discuss this matter.

STATISTICS CONCERNING FICTITIOUS BUSINESS NAME FILINGS

A compilation of information obtained by a survey of the county clerks is attached as Exhibit XXII. The compilation shows that about 40,000 fictitious business name filings are made annually. Of these filings, approximately one-half are made in Los Angeles County.

The extent to which the number of filings would be increased if the proposed legislation were enacted cannot be determined. We do not know the extent to which persons now fail to comply with the statute. Since the present sanction is completely ineffective, we suspect that a significant number of persons do not file. Some increase in filings might result from the enactment of a more effective penalty, especially when such penalty is included in a statute the enactment of which will attract the attention of the bar.

You also will find of interest the information concerning Los Angeles County set out in Exhibit XXVI: "The county clerk tells us that 21,000 certificates were filed and published in this county during 1965. He also reports that during 1965, his office received 32,000 inquiries regarding fictitious firm names over the counter and 43000 by telephone, plus 2,400 by mail."

The aggregate burden that the present statute imposes on small businessmen is significant. For Los Angeles County alone, the annual cost of publication is approximately $400,000 ($378,000 if the 21,000 publications were billed at the minimum publication cost of $18). The staff estimates

that the total cost of publication each year at about $750,000-$800,000, a truly significant exaction from small businessmen.

GENERAL ANALYSIS OF COMMENTS

The following is a general analysis of the comments received on the tentative recommendation dated May 31, 1966. We have already considered a number of letters when we prepared the tentative recommendation and we do not again consider those letters in this memorandum. See also the letters attached to the First Supplement to this memorandum.

Publication requirement

The newspaper industry objects to the elimination of the publication requirement. See the letters attached to the First Supplement to Memorandum 66-52 and Exhibit XXVI attached to this memorandum. The apparent basis of the objection is loss of revenue to the newspapers and a claim that the cost of publication is not a significant business cost.

A substantial number of individuals and organizations report that the publication requirement is useless. In addition to the letters already considered when the tentative recommendation dated May 31, 1966, was prepared, see the following exhibits to this memorandum: Exhibit I (State Business and Commerce Agency), Exhibit II (Richard D. Agay, Los Angeles attorney), Exhibit III (Morris Schwartz, Hollywood, California), Exhibit IV (The Jewelers Board of Trade, San Francisco), Exhibit VI (Associated Credit Bureaus of California), Exhibit VII (Dun & Bradstreet, Inc.), Exhibit VIII (L.M.S. Enterprises (Finance), Culver City), Exhibit IX (Melvin E. Mensor, San Francisco attorney), Exhibit X (Informative Research, Los Angeles), Exhibit XI (Credit Bureau of San Francisco, Inc.), Exhibit XII (The Doctors Business Bureau of Southern California, Los Angeles), Exhibit XIII (Bank of America),

Exhibit XIV (Sidney R. Rose, Beverly Hills attorney), Exhibit XVI (James H. Flanagan, Jr., Fresno attorney), Exhibit XVIII (John W. Brooks, Long Beach attorney), Exhibit XX (Stephen S. King, Los Angeles attorney), Exhibit XXI (Assets Research).

A few persons suggested retention of the publication requirement for various reasons. Mr. John Healy, Collection & Contract Agency, Oakland, California (Exhibit V) suggests that there is a need to provide a notice of the forming of new businesses. He would like a listing of some type of short notice stating that a business operating in a fictitious business name has been formed and the address at which it is operating and the principals in the business. The revised tentative recommendation contemplates that the Secretary of State would provide daily or less frequent compilations or summaries of filings for particular areas which would be available at cost to legal newspapers and others. These summaries could be published if the newspaper concludes that enough readers desire this type of information to justify the cost of its publication. In short, Mr. Healy does not want the present form of publication, but an abbreviated form similar, we suspect, to the publication of the summaries of financing statements that some legal newspapers have under provisions of the Commercial Code. See Exhibit XXIV for a sample of the summary information provided newspapers by the Secretary of State.

The Credit Bureau of Santa Clara County (Exhibit V) suggests that the publication requirement be continued to avoid the need for a manual search of the clerk's records to obtain information on new businesses. The statute contemplates that the Secretary of State would provide information on new businesses for any particular area at cost to any person who requested it. This would eliminate the need for a manual search of the county clerk's records

and should meet the requirements of the Credit Bureau of Santa Clara County. Incidentally, we have been advised that Santa Clara County is one of the counties that do not maintain an adequate index of the fictitious business name certificates and that it is necessary in that county at the present time to check all certificates in order to find a particular one. The revised tentative recommendation would provide an accurate and convenient index at the county level and this, too, would meet the requirements of the Credit Bureau of Santa Clara County. In this connection, it should be noted that the Associated Credit Bureaus of California take the position that there is no need for publication. See Exhibit VI.

Mr. W.J. Kumli, McCords Daily Notification Sheet, takes the position in Exhibit XIX that the publication requirement should be retained so that a credit reporting organization will be in the position where it can easily obtain a copy of the fictitious name filing and forward it to clients. "The only practical way to do this is through the publication and I strongly recommend the retention of it." As we have noted above, the revised tentative recommendation provides a number of simple, inexpensive, and effective ways of obtaining fictitious business name information. The alternative is to search through each paper in the particular county to determine when and if a fictitious name certificate was published. If the principal place of business is in another county, it will be necessary to search newspapers in other counties as well. The recommended alternative appears to be far superior. In this connection, see Exhibit XXIV which is a sample of the summary provided by the Secretary of State of filings of financing statements in particular cities or counties.

In summary, we consider it significant that a substantial number of responsible persons and organizations have been willing to take the time to

write us that the publication requirement serves no useful purpose. Except for the newspaper industry, the few others who believe that publication is useful would probably find that the revised recommendation better serves their needs.

The central filing requirement

A number of persons who have reviewed the tentative recommendation of May 31, 1966, advise us that the central filing requirement is desirable. Many persons who reviewed the tentative recommendation approved it as drafted, and we assume that that approval goes to the central filing requirement as well as the other provisions of the tentative recommendation. A few persons specifically approved the central filing requirement. See Exhibit VI (Associated Credit Bureau of California), Exhibit VII (Dun & Bradstreet, Inc., which recommended central filing in a prior letter), Exhibit XI (Credit Bureau of San Francisco), Exhibit XVIII (John W. Brooks, Long Beach attorney). See also Exhibit XXV (John R. Jacobson, San Francisco attorney) who commented on the Tentative Recommendation on Suit By or Against an Unincorporated Association and suggested that there be a central filing in the office of the Secretary of State of the fictitious business name statements. Mr. Jacobson did not have our tentative recommendation on the Fictitious Name Statute when he made this comment.

It is apparent that the central filing requirement would be helpful to various state agencies. See Exhibit I (Business and Commerce Agency). In addition, it would make it possible to use data processing equipment to process and index this substantial workload and should result in increased accuracy and reduced administrative costs. Several persons who originally objected to the central filing requirement withdrew their objections after the purpose

of the provision was explained to them. See Exhibit V (Collection & Contract Agency, Oakland, California) and Exhibit XIX (McCords Daily Notification Sheet). The Credit Bureau of Santa Clara County questioned the desirability of the central filing, but indicated that the system would be useful if such information were made available by the state. Exhibit XV. The revised tentative recommendation, as previously indicated, provides for several methods of making this information available to interested persons.

Duplicate index in office of county clerk

The tentative recommendation dated May 31, 1966, contemplated a duplicate filing by the business firm with the county clerk and the Secretary of State. The revised recommendation eliminates the need to file in two places, the only filing required being with the Secretary of State. However, the Secretary of State is required to furnish the county clerks with a data processing equipment "print out" of the fictitious business name information and this will permit the county clerks to provide the same service that they now provide.

You will recall that when we prepared the tentative recommendation of May 31, 1966, we considered a number of comments that persuaded us that the information should continue to be available on the county level as well as on the state level. In this connection, see the statistical data for Los Angeles County contained in Exhibit XXVI. The Los Angeles County Clerk has advised us that he plans to attend the September meeting. Mr. R.C. Kopriva, Legislative Chairman of the Associated Credit Bureau of California, comments personally that he considers the filing at the county level to be a filing that should be eliminated to avoid the cost involved.

Based on the information we have received, the staff recommends that the Commission include provisions in the recommended legislation that will

require the Secretary of State to provide the county clerks with the information concerning fictitious business names used by businesses having a principal place of business in the county and that the statute further provide that the Secretary of State remit a sufficient portion of the filing fee to the county clerks to cover the cost of maintenance of the fictitious business name information on the county level. The revised recommendation includes such provisions.

ANALYSIS OF COMMENTS PERTINENT TO SPECIFIC SECTIONS

OF REVISED TENTATIVE RECOMMENDATION

All references below are to the revised tentative recommendation--pink cover.

Section 1 (Repeal of Chapter (commencing with Section 2466))

No comments. See, however, Exhibit XII suggesting that "the law should not be relocated and become a part of the Business and Professions Code, but, instead, should remain in the Civil Code where people have been accustomed to finding it for many years." You will recall that the present statute is located in the Civil Code title on "Partnership" and is the only remaining portion of that title, the remainder of the title having been recodified in other codes. We believe that the location in the Business and Professions Code is appropriate and highly desirable.

Section 17900

Mr. Agay (Exhibit II) suggests that the coverage of the statute be broadened to cover any business "where there is absentee ownership." Even if absentee ownership were not included, he suggests that the statute apply to any business operated under a name which does not include both the surname

and given name of each person who is an owner of the business. The Commission has discussed this matter at length on previous occasions and decided not to broaden the coverage as suggested.

Mr. Brooks (Exhibit XVII) points out that, in order to create a limited partnership, a certificate must be recorded in the county of its principal place of business. The staff has, in response to this comment, limited subdivision (b) of Section 17900 to include only "a name that does not include the surname of each general partner." If a person is interested in the limited partners, that information is available in the county recorder's office. We have also revised Section 17903(d) to require only the names of the general partners.

Section 17901

No comments.

Section 17902

Mr. Agay (Exhibit II) questions the time period of 40 days used in this and other sections. He suggests that the time could be made 100 days without prejudice to persons dealing with the business. You will recall that we selected the 40-day period because that is the time provided in Corporations Code Section 15700 for designating an agent to receive process on behalf of a foreign corporation.

Mr. Agay also points out that nothing in the statute authorizes a permissive filing merely to change the name or address of the person to whom the expiration notice is to be sent. We had considered the comment to Section 17906 to be sufficient to authorize such a filing. Moreover, there is nothing in the statute that permits the Secretary of State to reject any filing that is in proper form and accompanied by the required fee. In the interest of clarity, however, we have changed this section to state explicitly

that a new statement may be filed to reflect a change in information that would not cause the existing statement to expire under Section 17906. The comments to both sections have been changed accordingly.

Mr. Mensor (Exhibit IX) suggests that the comment to this section be revised to indicate that the chapter is applicable only to a person who "transacts business" in California. See Exhibit IX for his reason for making this suggestion. We do not believe that the suggested change is a desirable one; it would cause more confusion than it would eliminate. Moreover, it would prevent a filing by a person prior to the time he begins to transact business, and this would, we believe, be an undesirable limitation.

Mr. Flanagan (Exhibit XVI) suggests that the word "regularly" be defined. We used the word to exclude persons who only occasionaly transact business in California and have so stated in the comment. We do not see how we can provide a more meaningful definition. In doubtful cases, the matter is best left to the courts to decide in light of the facts of each particular case.

At the Commission's direction, we communicated with the United States general counsel for Lloyd's of London to determine whether the elimination of the exception for foreign commercial or banking partnerships (Civil Code Section 2467) would create any problems for Lloyd's of London. We have been advised that the elimination of this exception would not create any problems. See Exhibit XVII.

Section 17903

We have revised this section to eliminate the requirement that the complete residence address of the individual or members of the partnership be included in the fictitious business name statement. To require such information would result in significant additional cost and the information

would not be accurate since we did not propose to require a new filing each time the residence address of the individual or a partner is changed. See Exhibit XXIII wherein the office of the Secretary of State suggests this change.

We have also revised Section 17903 to require the complete residence address of an individual who does not have a place of business in this state or the complete residence address of all partners where the partnership does not have a place of business in this state. This also is in accord with the suggestions of the office of the Secretary of State. See Exhibit XXIII.

Where the address of the principal place of business in this state is given, the plaintiff will have sufficient information to file a complaint in any action against the person operating in a fictitious business name. He will also know the names, but not the addresses, of the individuals interested in the business. He can discover the addresses by discovery procedures if the business is not willing to provide that information upon request directed to the principal place of business in this state. We see no significant detriment suffered by not requiring the residence addresses where the business has a principal place of business and we anticipate considerable savings if this information is not required.

We have revised this section to require only the names of the general partners. See Exhibit II and Exhibit XVII.

In the interest of clarify, we have indicated in the statute that only one place of business may be included in the statement. This is in accord with a suggestion of the office of the Secretary of State. See Exhibit XXIII.

We have deleted the language "shall be on a form prescribed by the Secretary of State" as unnecessary in view of Section 17905 (which is based on provisions of the Commercial Code relating to filing of financing statements).

Mr. Agay (Exhibit II) suggests that, with respect to a corporate registrant, the statement should include the names and residence addresses of all officers authorized to accept service or if there be none, then that such fact be stated. "Then by amendment of certain other provisions it should be provided that if the fictitious name certificate at the time of filing of a law suit either be not on file or if the certificate does not list officers and addresses of such officers, then service may be made upon the Secretary of State." Section 3301 of the Corporations Code requires a filing of a statement of corporate officers and designation of agent for service of process by domestic corporations. Section 6403 of the Corporations Code requires a foreign corporation to file a statement designating an agent for service of process. We see no need for the suggested information which would largely duplicate the requirements of the Corporations Code.

Mr. Flanagan (Exhibit XVI) suggests that the statement include "if the person has no place of business in this state, the complete address of his principal place of business elsewhere." This might be a desirable addition to the statement, but we have not added this requirement in the revised tentative recommendation. Mr. Flanagan also suggests that a new statement be filed each time there is a change in any residence address, but the Commission decided (when this matter was previously considered) that this would be too burdensome a requirement and the revised tentative recommendation omits the requirement of a residence address whenever a principal place of business in this state is included in the statement. We have, however, added a provision to Section 17906(b) that a statement expires if there is a change in any residence address included in the statement.

Section 17904

Mr. Agay (Exhibit II) objects to the provision that changes prior law in that it requires that a fictitious business name statement be executed by one or more, rather than all the members of the partnership. We see no merit to his objection. A person who would file a false verified statement would be just as likely to sign the other purported partners names to the statement. Considering the burden of obtaining a verification and acknowledgement for all members of the partnership, we believe that the benefits of the change we propose to make in the law far outweigh any possible detriment Mr. Agay believes may result from the change.

Mr. Agay also suggests that the section make clear that limited partners need not be listed nor need they sign the statement. We agree that this is desirable, and, as previously indicated, have revised Section 17900 (which defines fictitious name). See Section 17900(b). We have also revised Section 17903(d) to require only the names of the general partners. The same point is made by Mr. Brooks (Exhibit XVII). We see no need, however, to revise Section 17904.

Section 17905

This is a new section which is based on a provision of the Commercial Code relating to the filing of financing statements. Unlike the Commercial Code provision, the section requires that the statement be presented in duplicate. This is necessary so that the Secretary of State can return the copy to the person making the filing after noting on the copy the file number and the date of the filing of the original. This procedure is optional under the Commercial Code provision, but an examination of the instructions provided by the office of the Secretary of State indicates that it is the standard practice under the Commercial Code.

Section 17906

We have revised this section to provide that the statement expires at the end of five years from January 1 of the year following the date it was filed (instead of 10 years as in the tentative recommendation). This revision substantially restates the effect of the 1966 amendment which enacted Civil Code Section 2469.2 (see text in sections listed to be repealed under Section 1 of proposed legislation).

We have also revised subdivision (b) to provide that the statement expires "40 days after there is any change in any residence address included in the statement." This is a conforming change to the staff recommendation that a residence address be required only if there is no principal place of business in this state and, in such case, the residence address is necessary information that must be kept up to date in the files of the Secretary of State.

Mr. Agay (Exhibit II) suggests that the residence addresses be kept up to date and that a statement expire upon change of residence address. We have adopted this suggestion to the extent that we recommend that the statement include a residence address.

Informative Research (Exhibit X) suggests that the registrant should not be required to make a new filing merely because the principal place of business has been changed unless the change is to a different city, perhaps to a different county. We believe it essential that this information--address of the principal place of business--be kept up to date and believe that the statement should expire 40 days after a change in the address of the principal place of business (as provided in the original and revised tentative recommendations).

Section 17907

Mr. Agay (Exhibit II) states: "I am uncertain as to the purpose of Section 17907. I feel that it will only lead to ultimate litigation on the basis of estoppel notwithstanding the fact that the section says that the Secretary of State cannot be estopped. If there is to be no effect from a breach of the section, then I feel it would be better to either leave the matter totally up to the discretion of the Secretary of State or at least to provide that the Secretary of State shall be entitled to no civil penalty should he fail to mail the notice as provided. Of course, in such instance the Secretary of State would have to mail the notices by certified mail to provide a proof of the mailing."

We believe that Section 17907 is desirable in its present form.

Section 17908

Mr. Mensor (Exhibit IX) suggests that a person should be permitted to file a certificate of abandonment of use of a fictitious business name upon ceasing to "transact business in this state under that fictitious business name" rather than merely upon ceasing to "use that fictitious business name." This is a desirable change and we have made the change in the revised tentative recommendation.

In response to a suggestion from the Secretary of State, we have added paragraph (2) to subdivision (a) of Section 17908. See Exhibit XXIII. The information required by this paragraph is contained on the duplicate copy of the fictitious business name statement returned to the person filing the statement. See Section 17912(a).

Section 17909

This is a new section. Note that we permit the Secretary of State to destroy the statement four years after the statement expires or four years

after the statement of abandonment of use of fictitious business name is filed. The 1966 legislation does not permit destruction of such statements unless a microfilm copy is permanently retained. We see no need to require such copies to be retained forever.

Mr. Flanagan (Exhibit XVI) suggests that the statements be retained for 10 years following expiration or earlier termination. He notes that Civil Code Sections 2469.2 and 2469.3 (added in 1966 and set out in sections to be repealed in the revised tentative recommendation) "provide for a five-year expiration and for destruction only if microfilm copies are made (excellent idea)."

Mr. Agay (Exhibit II) suggests that the statements be retained for five years after the statement has expired.

We have provided what we believe is a minimum period. The period could be five years or even 10 years, but we believe it desirable not to retain the statements (or even microfilm copies) forever.

Section 17910

The comments relative to Section 17909 (which authorizes destruction of obsolete records) also apply to this section, which deals with maintenance of the index by the Secretary of State. Generally, this section provides for deletion of information from the index in keeping with the provisions made in the preceding section for the destruction of the record. If the preceding section is changed to lengthen the period during which records must be kept, then this section should be changed to provide for a parallel maintenance of the indices.

Section 17911

Mr. Kopriva (Exhibit VI), Legislative Chairman of the Associated Credit Bureaus of California, offers his personal suggestion that provisions for

maintenance of an index by the county clerks be eliminated. He mentions the facts that only central filing is provided in such cases as the registration of motor vehicles. He also points out that it is virtually as easy to obtain the information from Sacramento as it is to check with the local county clerk's office. See the discussion of the duplicate index, above. In view of the fact, however, that information can be obtained from the county clerk without fee, and that the fictitious name legislation has traditionally been regarded as a "local matter," we have included provisions for an index in the office of the county clerk in the revised tentative recommendation.

In response to a suggestion from the office of the Secretary of State (Exhibit XXIII), subdivision (b) has been added to Section 17911 to provide for the furnishing to county clerks of information concerning expirations and abandonments and for the incorporation of this information by the clerks into the indices to be maintained by them.

Section 17912

This section is new. It incorporates various suggestions of the office of the Secretary of State (Exhibit XXIII).

With respect to this section providing for the information obtainable from the Secretary of State, Mr. Kumli of McCord's Daily Notification Sheet (Exhibit XIX) refers to his earlier suggestions and states that "from a 'grass roots level' it is important for a credit reporting organization to be in the position where it can easily obtain a copy of fictitious name filing and forward it to clients." In short, the suggestion appears to be that publication makes possible a "clipping" service. See the discussion of the publication requirement above. However, as the information is available from either the county clerks or the Secretary of State, we do not feel that publication should be required merely to reduce copy work for that purpose.

Section 17913

This is a new section. It authorizes the Secretary of State to furnish summaries or compilations of filings of business names statements. See the discussion of information obtainable from the Secretary of State's office, above. The provision is taken from Commercial Code Section 9407(3) which confers an identical authority as to financing statements. See Exhibit XXIV for an example of the format and content of such compilations of information as to the filing of financing statements. The authorization should at least partially satisfy suggestions that such compilations should be available, especially in view of the elimination of the publication requirement. See Exhibits XV and XIX.

Section 17914

This section is new. The lower fee for a statement on a form approved by the Secretary of State is based on a similar distinction in the amount of the fees under various Commercial Code sections. See the Comment to Section 17914. The difference in fees is justified because of the savings realized by the office of the Secretary of State in card punching for data processing equipment if the statement is on an approved form.

Section 17915

The office of the Secretary of State has advised us that they have no legal staff to enforce the civil penalty provided in this section. For this reason, we have imposed the enforcement responsibility upon the county civil legal officer, rather than upon the Secretary of State.

Section 17915, which provides the civil penalty for noncompliance with the statute, has been the subject of several thoughtful suggestions. There appear to be none, however, that have not been considered by the Commission.

Mr. Agay (Exhibit II) suggests a penalty of costs and reasonable attorney's fees to the prospective plaintiff. He also questions whether a late filing should not be made to "cure" past violations in order to provide an additional incentive to filing. Although the suggestion has logic, we believe that its adoption would tend to diminish the incentive for timely compliance and therefore suggest that it not be incorporated in the statute. Mr. Agay also suggests that subdivision (e) be moved and added to Section 17902. However, as the question of late filing inevitably arises in connection with a violation, we believe the provision to be appropriately placed.

Mr. Hartnett of Informative Research (Exhibit X) suggests that the $500 penalty may be excessive in view of the real possibility of an oversight as to the need for filing a new statement upon expiration of the prior statement. In view of the elasticity of the term "wilfully" used in the section, and notification of expiration by the Secretary of State, we recommend no change in the penalty.

Mr. Elder of the Doctors Business Bureau (Exhibit XII) believes the new penalties to be appropriate, but also suggests retention of the existing sanction. You will recall that finding a satisfactory sanction has been a major part of the Commission's past efforts. Although the existing sanction is oblique and ineffective in effectuating the purposes of the statute, that penalty may have some value in being a simplified form of discovery available to a defendant in a suit brought by the fictitiously named enterprise. Since the existing scheme contemplates the fictitiously named enterprise as a defendant or potential defendant, we do not believe that retention of the existing sanction, in addition to the civil penalty provided, would add a great deal to the recommendation. However, if the Commission believes that the presently

authorized "plea in abatement" is desirable, it would be a simple matter to add a section retaining the effect of the existing sanction.

Mr. Johnson of the Bank of America (Exhibit XIII) specifically suggests a dollar penalty in lieu of the existing sanction.

Mr. Flanagan (Exhibit XVI) suggests that the court be given a discretion as to the amount of the penalty. He would have the statute state a maximum, such as the figures already proposed.

On the other hand, Mr. King (Exhibit XX) believes that the $500 would be inadequate. Rather than increasing that amount, however, he suggests a civil penalty payable to the other litigant. He also suggests that compliance with the statute be made a condition to the issuance of a business or regulatory license by the state agencies or by any of the local governments. In its previous considerations, the Commission has discussed and rejected similar suggestions because we feared persons would institute actions merely to collect the penalty and because of the greatly enhanced burden that would be imposed upon the business licensing activities of both the state and local governments.

Sections 3 through 7 of the proposed legislation

Minor editorial revisions (making no substantive changes) have been made in these sections. Section 7 and Section 1 have been made to repeal existing fictitious name provisions as amended by Chapter 120 of the Statutes of 1966.

Section 8 of the proposed legislation (effective date)

This section has been changed to make the act become operative on July 1, 1968, but to permit filings at any time after January 1, 1968. This change accords with the suggestion of the Secretary of State (Exhibit XXIII). That

office notes that if the measure is passed at the 1967 Legislative Session and an effective date of January 1, 1968, is retained, only six months would be allowed in which to acquire the necessary staff and set up the computer programs. That office suggest an effective date of July 1, 1968. That suggestion has been incorporated in the statute, but filings have been permitted for a period of six months prior to that date.

Miscellaneous Suggestions

Mr. Lawson (of L.M.S. Enterprises (Finance)(Exhibit VIII) mentions the problem of the usurpation by another of an established trade name. He suggests that the initial registrant be given a period of grace following the expiration of the statement in which period no other statement of the same business name could be filed. The fictitious name legislation, however, has never had the effect of trade name registration or of corporate name reservation. Also, under our proposal, the Secretary of State is not authorized to reject statements on the ground that the name is already in use. It would be inappropriate, therefore, to add any provisions calculated to prevent "usurpation" of an existing registered name.

Mr. Elder of the Doctors Business Bureau (Exhibit XII) suggests that any partnership that has complied with the statute be permitted to sue in the registered fictitious name. Permitting suit by an association in its common name is, of course, one of our recommendations relative to unincorporated associations. The suggestion raises the question whether, to be permitted to sue in its common name, a partnership or other association should be required to have registered the fictitious name in which suit is brought. The suggestion might be considered in connection with the suit in common name recommendation, but that recommendation is more inclusive than this fictitious name recommendation. In other words, associations not "regularly transacting business" would be permitted to sue in the common name, but would not be required to register a fictitious name.

Respectfully submitted,

John H. DeMoully

EXHIBIT I

STATE OF CALIFORNIA—BUSINESS AND COMMERCE AGENCY

EDMUND G. BROWN, Gov

DEPARTMENT OF INVESTMENT
DIVISION OF CORPORATIONS

JERALD S. SCHUTZBANK
Commissioner

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San Francisco, California
April 1, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

The Commissioner has referred to me, for attention and reply, your letter of March 23, 1966 in which you indicate your further interest in the results of our determination as to whether our investigators are making extensive use of the fictitious name statute in its present form.

As a result of discussing this matter with our Supervising Special Investigator, who canvassed the personnel of the investigation section, I am in a position to advise that the filing of fictitious names with the county clerk is of assistance in our work. The index of fictitious names is used primarily for identification and information, and we make frequent reference to that source. However, it is the view of our investigators that the requirement of publication is of no assistance to them.

Very truly yours,

Hans A. Mattes
Assistant Commissioner

HAM:MES

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SANFORD M. GAGE
OF COUNSEL

TELEPHONE
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June 16, 1966

IN REPLY PLEASE REFER TO:

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Gentlemen:

I should like to offer my comments and suggestions with respect to the Tentative Recommendation Relating to the Fictitious Name Statute.

Let me preface my remarks by stating that I believe your basic revision is most sound and brilliantly conceived. The elimination of the publication requirment, I feel, would be most beneficial.

My comments and suggestions are as follows:

1. I feel that the purpose of Fictitious Name Statutes would be better served by broadening the coverage. Preferably, I feel, the concept should not be limited to fictitious names, but rather should apply not only to businesses operating under fictitious names but also to businesses even if not operating under a fictitious name, where there is absentee ownership. If the purpose is to permit locating the owner of the business, then that purpose would be served equally well in either instance. I think that the nature of businesses has so changed since 1872 or 1873 that there is a far greater incidence of absentee ownership which would justify such a new requirement.

2. Even if absentee ownership were not deemed to be a proper grounds for requiring the filing of a Certificate, I think that the definition of fictitious name does not go far enough. I can conceive quite readily that a person seeking to locate the owners of a bakery operating under the name Smith-Jones in the city of San Francisco in 1873, would have no difficulty in locating Mr. Smith and Mr. Jones even though their first names were not included in the name of the business. On the other hand, I think that the mere inclusion of the surname in 1966 is of relatively little value in locating or ascertaining the owners or owner of a business in many of the communities in the State of California and especially in Los Angeles. I would, therefore, prefer, whether or not absentee ownership is to be covered, that a fictitious name be defined as any name which does not include both the surname and given name of each person who is an owner of the business.

3. Starting in Section 17902, a time period of 40 days is used throughout the sections. At first blush, this time period, especially for a new business appears to me to be somewhat short. I do not think that any person dealing with the

business would be too greatly hurt if the time period were 100 days.

4. Under Section 17904 and with respect to a corporate registrant, I believe that there should be added to the certificate the names and residence addresses of all officers authorized to accept service or if there be none then such fact be stated. Then by amendment of certain other provisions it should be provided that if the fictitious name certificate at the time of filing of a lawsuit either not be on file or if the certificate does not list officers and addresses of such officers, then service may be made upon the Secretary of State.

5. In connection with 17905, I can understand your position that you feel verification by one partner can satisfy the requirement of signing by all partners. I disagree, however. Is it not the very person who would lie about who are owners of a particular business who would likewise feel no compunction against lying under oath? If he did so, what value would his verification be to a third person. Surely it could not estop the person purportedly listed as an owner from claiming that he had no interest in the business. I do not think that it is too onerous to require each person to sign the fictitious name certificate.

6. Still in connection with 17905, perhaps it would be wise to provide that limited partners need not be listed nor need they sign such certificate.

7. In connection with Section 17906, I have previously commented on my feelings as to a 40-day time limit.

8. Still in connection with Section 17906, if my proposed addition to Section 17904 concerning the names and addresses of officers authorized to accept service were to be added, then another provision would have to be added Section 17906 to provide for expiration of certificate upon change of officers authorized to accept service.

9. Still in connection with Section 17906, if there be any purpose in requiring the residence address of certain persons (owners) under Section 17904, then shouldn't a change in those residence addreses be a cause for requiring a expiration of the certificate which lists an improper address? I personally feel that the entire purpose of these sections is lost with ten year old addresses. Again I point out that if the purpose is to make location of owners easier, then the failure to require current addresses in a public record is in conflict with that purpose. May I also point out that duplication of names is an ever increasing problem as our population expands so that merely having someone's name is not generally sufficient for identification purposes.

10. Under your comment to subdivision (e) of Section 17906, you state that "even when not required to do so, however, a person may file a new certificate at any time." Is there another provision to which this comment could be applicable other than Section 17912 (e)? I could find no other section authorizing a permissive filing.

11. I am uncertain as to the purpose of Section 17907. I feel that it will only lead to ultimate litigation on the basis of estoppel notwithstanding the fact that the section says that the Secretary of State cannot be estopped. If there is to be no effect from a breach of the section, then I feel it would be better to either leave the matter totally up to the discretion of the Secretary of State or at least to provide that the Secretary of State shall be entitled to no civil penalty should he fail to mail the notice as provided. Of course, in such instance the Secretary of State would have to mail the notices by certified mail to provide a proof of the mailing.

12. In connection with Section 17910 (b) I feel that the destruction of records is provided at a time far too soon. A certificate does not become obsolete merely because it has expired. Transactions many years prior to the expiration can still form the basis of causes of action or claims after the expiration. I realize that some time period must be provided and I would suggest that the section read that the destruction may occur five years after the expiration. For instance, a business fearing a large lawsuit might immediately file a notice of abandonment which, depending upon the information which the Secretary of State and County Clerk chooses to put in his index might totally eliminate the information desired by the prospective plaintiff. While the ordinary statute of limitations may be only one year for personal injuries, or three years for property damage, it can extend further for written contracts and even further in the case of minors. That is why I have suggested five years.

13. I totally agree that the present sanction is inadequate. I do not feel, however, that under Section 17912 the new sanctions are too much improved. First I have some doubt as to whether or not it will be worthwhile monetarily for the Secretary of State to pursue these recoveries of $500.00 or $1,000.00. Secondly, the parties suffering by reason of the lack of compliance is still not being protected or aided by the sanctions. The party who loses is the prospective plaintiff who is unable to find the information he seeks. A more logical sanction, it would appear to me, is to provide that if at the time of the accrual of a cause of action a certificate which should have been filed was not on file (or if the requirement for filing arose after the cause of action arose, then at the time that the requirement for filing arouse) then the prospective plaintiff should be entitled to all costs and reasonable attorney's fees in investigating and ascertaining the names and whereabouts of the owners of the business involved. This sanction should be applicable

regardless of the ultimate victor in the litigation and indeed I would provide for some sort of summary procedure to determine whether or not the plaintiff is entitled to this compensation. Of course, if such suggestion were adopted, it should be made clear under Section 17907 that the failure of the Secretary of State to mail notice shall not in any sense affect the rights of the plaintiff.

14. Still in connection with 17912, I see no harm in retaining the present sanction.

15. I believe that Section 17912 (e) is misplaced. It appears to me that it should either be a separate section or perhaps preferably should be a subsection under section 17902. Your concluding comment with respect to it, as the sections now read, leads me to inquire why bother to file a late certificate if by so doing nothing is gained. I think that it would be better to provide in Section 17912 that a defense to the claim of the Secretary of State shall be the permissive filing prior to the receipt of any notice of default from the Secretary of State or County Clerk (it is conceivable that some County Clerks might wish to take over this function) and prior to any filing of suit by the Secretary of State (or County Clerk). As indicated before, I would suggest the expansion of the right to collect the penalty to both the Secretary of State and the County Clerks with some sort of provisions for agreeement between the two or apportionment of any proceeds received. In this same connection, if my suggestions regarding the payment of attorney's fees and costs as an additional sanction were to be adopted, then the defense to that sanction should be the permissive filing prior to the accrual of the cause of action. Of course, there would still be an incentive to file a permissive certificate later because by so doing one might be able to reduce any possible costs and attorney's fees to prospective plaintiffs.

I hope that my comments and suggestions may be of some assistance.

Yours very truly,

RICHARD D. AGAY

RDA:mg

Memo 66-52

EXHIBIT III

6252 Hollywood Blvd.
Hollywood, Calif. 90028
June 11, 1966

Calif. Law Revision Commission
30 Crothers Hall,
Stanford, Calif. 94305

Dear Sir:

Re: Fictitious Name Statute
(Civil Code Section 2466-2471)

I believe you have the right approach to this problem; I hope you may do something about it. Your few recommendations are proper, that is the ones I read in the Independent Review Tuesday June 7 1966.

Please send me full copy of your recommendations.

Yours truly

s/ Morris Schwartz

Memo 66-52

EXHIBIT I

THE JEWELERS BOARD OF TRADE

ESTABLISHED 1884

COLLECTION DEPARTMENT
ADJUSTMENT DEPARTMENT
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209 NORTH WABASH AVE., CHICAGO 2
[illegible] MARKET ST., SAN FRANCISCO 5

March 9, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Fictitious Name Statute

Gentlemen:

In reply to the questions raised in your letter of March 4, 1966, please be advised that we see no proper purpose served by the publication requirement of the fictitious name statute, and we would favor its elimination.

However, we are of the opinion that the filing requirement should be continued in that it is useful and proper for suppliers and other commercial organizations to know the true identity of those with whom they deal.

In short, we favor repeal of the publication requirement and retention of the filing requirement of the fictitious name statute.

Very truly yours,

A.L. May

WCH:mln

Memo 66-52 EXHIBIT V

COLLECTION & CONTACT AGENCY

LICENSED - COLLECTION AGENCY - BONDED

CONTACT CALLS - COLLECTIONS - CREDIT REPORTING

577 - 14th STREET • OAKLAND 12, CALIFORNIA • Glencourt 2-8140

July 6, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Gentlemen:

Receipt is acknowledged of your June 20th form-letter wherein was solicited, through using the writer's dba title, comment upon your endeavors to effect substantial revisions in Sections 2466-71, Civil Code, State of California.

Herewith my recommendations:

PUBLICATION REQUIREMENTS: These must be retained. The very real reasons for these requirements exist today; just as they existed circa 1872 when the statutes were framed. The public is entitled to know with whom they must do business. An improvement in the requirements, which would more clearly reflect the spirit and intent behind the publication requirements, would be to close the loopholes wherein "special" legal publications usurp the function of newspapers of honestly constructed general circulation. What the courts now construe it, of course, ludicrous. Another improvement would be the elimination of legal argot from printed notices as, of course, this is clearly intended as "eye-torture" to prevent citizens wading through such notices. May the writer suggest you obtain a copy of the "Alameda, California, Independent"? This newspaper publishes a daily compendium of all area legal activities. It's excellent.

CENTRAL FILING WITH SECRETARY OF STATE: Can you be serious? Fictitious names are largely local-interest affairs and you'll find "Acme Dredging Companies" and "Mahir Steeplejack Services", to employ "non-controversial" public domain business names, in every town and city throughout the State. Few are interstate businesses; many aren't even truly intra-state. What is appalling is the new bureau. I conjecture, within 10 years, your bright little boondoggle will have cost the taxpayers a million bucks and returned an absolute zero in services. The enabling act which sets up such committees as yours should stipulate one Irishman. A little Celtic prescience and humor would save a lot of after-grief. Visualize your Secretary of State's completely (over)staffed new department; its water coolers, its retirement plans, its tenure, its staff meetings, its darling office romance . . . but . . . . above all . . . its "product". There's no public clamor for the information now and the writer can't extrapolate a need. If one develops, I think the writer could volunteer to provide the "urgently" and "direly" required data for a paper name. Parkinson's Law need fear no anarchists.

California Law Revision Commission

The writer notes your form-letter inferentially excludes comment upon anything extraneous to the mentioned Civil Code Sections. It would, therefore, be fatuous for the writer to state he is wholly without sympathy for any attempt to erode our State Constitution and is anxious that the section which clearly interdicts "lease-purchase" not be tampered with in any manner affording "ex-post-facto" ratification of widespread civic "hanky-panky" in the bond election evasion racket.

Regretting there's no Dennis Kearney in our era, again to restore state government to the Popular Sovereign and to estop the sly derogation of the people's common law rights, the writer remains

Your humble, obedient and quite sincere servant,

John Henley

for COLLECTION & CONTACT AGENCY

— Collections — Process Serving

CONTACT AGENCY

[illegible] Collectors Ass'n., Inc.

[illegible] St. • Oakland 12, Calif. • GL 2-0148

July 11, 1966

Mr. John E. Healy
Collection & Contact Agency
577 Fourteenth Street
Oakland 12, California

Dear Mr. Healy:

Thank you for your letter of July 8 commenting on our tentative recommendation on the Fictitious Name Statute.

You stated that you believe that the publication requirement must be retained. Almost all of the credit agencies that have responded to our request for comments have indicated that they do not use the published fictitious name certificates. Inasmuch as the certificate may be published in any newspaper in the county, we wonder how you make use of the certificates in your business. We have been advised by most of the credit agencies that they check the fictitious name index in the county clerk's office on occasion and that this is a better way to obtain the information on a continuing basis than the publication requirement. Accordingly, it would be helpful to us to know what use you make of the fictitious name certificates in your business.

We appreciate your comment on the central file with the Secretary of State. A number of credit agencies had suggested that this would be a desirable requirement and would permit a central file of all persons doing business under a fictitious name in California. We had felt that there would be no expense to the state inasmuch as the filing fee would cover any expense. Moreover, the expense to the person doing business under a fictitious name would be reduced below the present expense since we would eliminate the requirement of publishing the fictitious name certificates. It is helpful to us to know, however, that your agency would not find a central filing of fictitious name certificates useful.

Thank you again for your letter. We hope that you will expand on your comments on why you find the published certificates useful in your business.

Very truly yours,

[redacted]
Secretary

[redacted] COLLECTION & CONTACT AGENCY

LICENSED - COLLECTION AGENCY - BONDED

CONTACT CALLS - COLLECTIONS - CREDIT REPORTING

7-14th STREET • OAKLAND 12, CALIFORNIA • [redacted]

July 12, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Gentlemen:

Responding to what appears to be a rebuttal of my basic letter regarding Fictitious Name safeguards:

While the consensus of my competitors is of interest to me, it could have no validity to you inasmuch as you did not obtain the number of daily, monthly or yearly inquiries or whether the person supplying the information was, in fact, a skip tracer or a bookkeeper. Since I could not canvass my competitors, I . . . before composing my basic letter, inquired at the offices of three contiguous counties and found the requests for this information and data to be rare. Today, I telephoned the Alameda County Clerk's office and a young lady says she recalls days of no inquiries as well of days of many inquiries, indicating a fluctuating demand. I may have been subjective, but the figure "30" seems to have been the maximum. What is important is what she mentioned that the inquirers visited the offices of the County Clerk. If you are successful, will they have to journey to Sacramento or hire a Sacramento correspondent?

I again refer you to the daily compendium of civil and criminal matter published in the "Richmond (California) Independent". I'm afraid that your commission and the writer do not agree upon the meaning of the word "publication" and the value ascribed to it by the framers of the public protection statutes. "Publication" to me means to inform the public. You must be aware that there are means for the public to seek out information and there were means when the statutes were written. "Inform," however, means to give the public information. It is a negation of the spirit of what I consider "informing the public" to permit people to engage in business ventures and to hide their names in a remote bureau.

Thanking you for informing me that my competitors do not read legal notices; it's too bad I can't divulge this information in soliciting new customers. I applaud the happy forecast, especially that it is cast in the past-perfect tense, "no expense to the State".

There is an undertone of "putting me down" in your letter. I suggest you telephone Mr. Rogers or Mr. Rivas of the Oakland Redevelopment Agency (Mr. Rivas has been recently transferred to the San Francisco office) and question them closely upon my experience and abilities as an archivist.

Very truly yours,

[redacted]

July 13, 1966

Mr. John E. Healy
Collection & Contact Agency
577 Fourteenth Street
Oakland, California 94612

Dear Mr. Healy:

Thank you for your prompt response to my letter of July 11 asking for additional information.

Your letters will be reproduced and distributed to each member of the Law Revision Commission so that they can read them prior to the time the Commission determines what changes are needed in the tentative recommendation that we distributed for comment. Incidentally, the publication I was referring to is the publication of the fictitious name certificate, which is required to be published four times in a newspaper. The cost of such publication may run over $200 and a new publication is required each time there is any change in one of the partners in the firm.

We did not propose to eliminate the filing in the office of the county clerk. We merely propose to provide the information in a more useful form. In this connection, we are advised that in many counties there is substantial use of this information in the county clerk's office. For example, in Los Angeles county there are many, many telephone calls and persons who visit the county clerk's office to check the fictitious name information that is there available. In other counties, such as Santa Clara county, few people ever refer to the information in the office of the county clerk because it is not kept in a usable form. We tentatively concluded that we could improve the law in this respect by spelling out in the statute in more detail the form in which the information should be kept by the county clerk.

We have written to the Richmond (California) Independent asking them for a copy of the daily compendium of civil and criminal matters published in that newspaper and we will reproduce copies for the

Commission so that they will have that material also available when we discuss your letters.

I did not intend in my letter to "put you down." I merely was attempting to find out exactly how you use the published fictitious name certificates so that we would have that information when we consider the other comments on the tentative recommendation, the great majority of which--as I indicated in my prior letter--suggested that the publication requirement was an "unfair tax on the small businessman."

If you have any further comments we would, of course, like to receive them since the Commission makes every effort to solicit comments from persons who may be affected by legislation it is considering for recommendation to the Legislature.

Very truly yours,

John H. DeMoully
Executive Secretary

JHD:lb

Room 217, 577 - 14th Street
Oakland, California

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University, Stanford, California

Dear Mr. DeMoully:

Thanks for you letter. In retrospect, I believe my exasperation at my colleagues pontificating about researching "dba's" when, by the very nature of our business, it is seldom necessary, may have caused me to read an affront into your courteous letter. As "atonement", I've clipped out and am enclosing the "Richmond (California) Independents Official Records". This method of publication is no innovation; I've noted a similar format in publications circa the Napoleonic Wars. What it does suggest is that an extract or synopsis of a dba filed with the County Clerk could be publicised.

I concur in your committee's efforts to reduce printing costs which, not only in the case of dba's but other "ritualistic" legal notifications, are costly and, if you'll refer to my basic letter, you'll note a plea that all such notices be shorn of their redundant legal argot.

I think publication of dba's has functioned as a deterrent and has prevented a lot of [illegible] swindlers from repeatedly mulcting the long-suffering public. [illegible] simply abhor the limelight. Don't let the "McKesson [illegible] be a [illegible] file where, instead of millions of the public being [illegible], individuals can only seek out information, paying(as you mentioned)a [illegible] fee.

Assuring you, again, that I made a bonafide effort to honestly serve the public in this matter and assuring you of my willingness to assist your committee, I am

Very truly yours,

JOHN HEALY

SUGGEST STUDY OF THE BELOW CRUDE CONDENSATION:

"The MEDUSA BEAUTY SALON, doing business since July 5, 1966, at 1313-5th St., Oakland, is owned by Jane Doe and Mary Hart, each separately declaring she never before has been a principal in a fictitious trade style enterprise except _____.
For details, consult Document 303899, County Clerk's Office."

Publication mandatory in newspaper of largest audited county circulation.

Memo 66-52

CREDIT BUREAU OF PALO ALTO
MERCHANTS' ASSOCIATION OF PALO ALTO, INC.

CREDITS – DAVENPORT 6-4500
COLLECTIONS – DAVENPORT 3-9077

June 24, 1966

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall, Stanford University
Stanford, California 94304

Re: Fictitious Name Statute

Dear Mr. DeMoully:

I want to thank you for your letter of June 20 and its enclosure regarding the recommended changes in the Fictitious Name Statute.

As legislative chairman of the Associated Credit Bureaus of California, I want to take this opportunity to commend your Commission on the excellent study and recommendations you have made. Speaking for the Associated Credit Bureaus of California, I am in accord with the recommended changes, partitcularly as to the deletion of the requirement of publishing a proposed fictitious name. Further I feel that the centralization of filing all fictitious names in the office of the Secretary of State will be beneficial to all firms and persons interested in filings on a state-wide basis.

I offer the following as my own personal suggestion for your consideration: Would it not possibly be more economical merely to have one place of filing all fictitious names by centralization of such filings in the office of the Secretary of State rather than have each county maintain an index also of those fictitious names whose places of business are in the respective counties. It seems to me that if the California populous was aware that all fictitious names were filed with the Secretary of State, it would be duplicative to have each county go to the expense of maintaining a limited index in each county. As an example, when a person registers a motor vehicle in California, such registration is centralized in the Department of Motor Vehicles and even though the individual may use his car 99% of the time in one county, that county has no record of such motor vehicle registration.

Does it not seem plausible then that by centralized filing of fictitious names in Sacramento, we could avoid the duplicate filing in the respective counties which certainly costs the taxpayers money to maintain.

Credit Bureaus and similar organizations who need this information could check the office of the Secretary of State for the pertinent data they need regarding fictitious filings with not much more difficulty than checking with the County Clerk's Office in their respective counties, and accordingly I offer this suggestion for your consideration.

Very truly yours,

R. C. Kopriva
Legislative Chairman ACBofC

RCK/jd

Memo 66-52

EXHIBIT VII

LOUIS M. MARZLUFT
REGIONAL REPORTING MANAGER
P. O. BOX 2232 TERMINAL ANNEX
LOS ANGELES, CAL. 90054
TELEPHONE: AREA CODE 213 626-1930

Dun & Bradstreet, Inc.

PUBLICATIONS AND SERVICES FOR MANAGEMENT

July 8, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

We have had an opportunity to review the "Tentative Recommendation relating to The Fictitious Name Statute".

It fairly well follows the thoughts expressed in our previous communication. At that time the need of the newspaper publication requirement was questioned.

The recommendation in other respects seems to be quite complete.

Sincerely,

Louis M. Marzluft
Regional Reporting Manager

LMM:klp

Memo 66-52 EXHIBIT VIII

L. M. S. ENTERPRISES
(FINANCE)
10550 VENICE BOULEVARD
CULVER CITY, CALIFORNIA • UPton 0-6438

July 8, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

RE: Tenative Recommendation relating to
The Fictitious Name Statute

Gentlemen:

I received by mail, under date of June 20, 1966, considerable literature relating to the proposed changes in the law pertaining to the Fictitious Name Statute, to which you have urged comments be made regarding said proposals.

I have reviewed the proposed changes and although I read the documents twice, I am unable to find therein anything to protect someone who has filed his fictitious name certificate in the county where he does business as to keep a stranger from taking and/or usurping that name when the ten year proposed statutory period expires. In other words, in example, someone filed under the fictitious name statute, a name with which, over a ten year period, through advertising media, etc., they have become and are widely known. The ten year proposed statutory period expires but before a new certificate can be filed (which would thereby renew for a period of ten years), another individual rushes in and files an identical fictitious firm name.

I urge you to review the possibility of a stranger usurping a fictitious firm name at the end of a ten year period where the user during the preceding ten years desires to renew for another ten years. My suggestion would be that anyone who has filed a fictitious firm name under the statute should have a thirty day grace period, at the end of a ten year expiration period, within which to refile the same fictitious name for another ten year period and that only after the lapse of a ten year period plus the thirty day grace period could a stranger adopt, usurp and file under that same fictitious firm name.

L. M. S. ENTERPRISES
(FINANCE)
10550 VENICE BOULEVARD
CULVER CITY, CALIFORNIA • UPton 0-6438

Fictitious Name Statute, continued from Page One

As you can conceive, not only is a fictitious name peculiar to the type of business engaged in, but it is conceivable that a firm may spend thousands of dollars while engaged in business under that fictitious name only to face the prospect that unless they refile at the end of the ten year expiration period before someone files under that identical fictitious name, they stand to lose the opportunity to use that fictitious name for a future ten years and possibly for all future time and this is clearly inequitable.

Other than the above, I am in accord with your remaining recommendations.

Very truly yours,

L. M. S. ENTERPRISES (Finance)

BY:_____
Martin W. Lawson
Owner

MWL:nm

Memo 66-52 EXHIBIT IX

MELVIN E. MENSOR
ATTORNEY AT LAW
216 FREMONT STREET
SAN FRANCISCO 19

July 7, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Attention of Mr. John H. DeMoully, Executive Secretary

Gentlemen:

Subject: Fictitious Name Statute

This will acknowledge receipt of and thank you for the memorandum containing the Tentative Recommendation of the Commission with respect to the above matter.

I commend the Commission on the results of its labors to revise the law in this field. I have a few suggested changes which I would appreciate being considered by the Commission (references are to proposed sections of Chapter 5 of Part 3 of Division 7 of the Business and Professions Code):

17902. At least by comment to this section, I believe it would be highly desirable to indicate that the chapter is applicable only to a person who "transacts business" in California.

17908. I suggest that the word "use" in the second line of subparagraph (a) be replaced by the words "transact business in this State under". This likewise would tie in with the language in 17902.

These changes are suggested for the following reasons:

1. It has come to my attention that there are persons in the packaged food industry who market lower grade products under packages containing a fictitious name. Although this likely is a violation of Section 26491 of the Health and Safety Code, I see no reason why the Fictitious Name Statute might be used as a crutch to such parties. They likely could take the position that said statute recognizes the propriety of using a fictitious name. In some manner it should

be made clear that mere use of a fictitious name on an article does not necessarily constitute "transacting business" entitling such a person to file a fictitious name certificate. In this regard, I note your comment to Section 17905 states that "The verification requirement is new and is included primarily to prevent a person from executing a false certificate . . . ." Since it is obviously the desire of the Commission to prevent to the extent practical the filing of false certificates, the statute should make it as clear as possible that merely using a fictitious name, unless such use is a part of "transacting business", does not entitle such person to file a fictitious name certificate.

2. In view of the fact that Section 17911 creates a rebuttable presumption of the truth of the information listed in the certificate, etc., it is all the more urgent that the statute be made clear that merely the use of an alias without the accompanying requirement that it be used in "transacting business" does not entitle the user to the benefits of the statute.

3. Under Section 17912 the only person subject to civil penalty for violation of the chapter is one "who regularly transacts business". Hence, if the user of an alias files a fictitious name certificate for such collateral benefit as it may be to him, he is not even subject to penalty if he fails to file a new certificate on or before the expiration date, nor is he subject to penalty in any other way under the statute.

Incidentally, I wonder whether the word "chronological" in Section 17910(a) should not be "alphabetical". Would it not be a lot easier to ask for certificates from the file by the name of the registrant rather than the date?

Thank you for considering these remarks.

Very truly yours,

Melvin E. Monsor

MEM:ba

Memo 66-52 EXHIBIT X

Informative Research

981 S. Western Ave. Suite 201 Los Angeles, Calif. 90006

J. F. HARTNETT, JR., GENERAL MANAGER, SOUTHERN DIVISION

July 1, 1966

Mr. John H. DeMoully, Executive Secty.
California Law Revision Commission
30 Crothers Hall, Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for directing a copy of the contemplated changes recommended relating to Fictitious Name Statute under date of June 20, 1966.

Your commission asked for recommendations concerning this change in Fictitious Name Statute, and I would like to put forth a couple of such recommendations at this time.

Basically, I feel that this revision is an improvement and would be helpful, however, in some instances it appears to be too stringent.

Under 17906 - Expiration of certificate, section (b), the applicant should not be required to have his certificate expire as a result of a change of address, unless he moves to a different city or, perhaps, even a different county, as such a move should not affect his registration with the clerk of the county where he was originally registered.

Under 17912 - Civil penalty for violation of chapter, it seems to me that on renewal of this registration fines of $500.00 for failure to renew is rather excessive, particularly in view of the fact that under section 17907 - Notice of impending expiration, it sets forth that "Neither the state nor any officer or employee of the state is liable for damages for failure to mail the notice as required by this section". It is quite possible that an oversight as to the date of renewal could easily be made by the holder of a certificate who was not properly notified by the State, and under these circumstances it seems that a $500.00 penalty would be excessive.

It is hoped that these suggestions will be considered. Other changes in this statute seems to be well taken.

Yours very truly,

J. F. Hartnett, Jr.
General Manager
Southern Division

JFH/jk

Memo 66-52

EXHIBIT XI

THE CREDIT BUREAU OF SAN FRANCISCO, INC.

15 STOCKTON STREET

SAN FRANCISCO 8

June 24, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully, Executive Secretary

Gentlemen:

Thank you for your circular letter of June 20 directed to Credit Bureaus and similar organizations requesting an opinion on the tentative recommendations re the laws relating to the use of fictitious names.

It is our opinion that the tentative recommendations are appropriate. We see no harm in eliminating the publication requirement.

NOTE: (If there is substantial opposition to the elimination of publication, we suggest that publication once, rather than four times, would overcome objections and reduce the expense.)

We consider that the filing of a fictitious style with the Secretary of State is desirable. We have no objection to a secondary filing with the County Clerk. One index at the State level would, in our opinion, be more comprehensive.

Yours very truly,

Charles J. Benson
General Manager

CJB:fr

cc: Mr. Robert C. Kopriva
Mr. E. F. Hodge

Memo 66-52 EXHIBIT XII

THE DOCTORS BUSINESS BUREAU
OF SOUTHERN CALIFORNIA

617 SOUTH OLIVE STREET
LOS ANGELES 14, CALIFORNIA
TELEPHONE MADISON 7-1252

July 11, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Re: THE FICTITIOUS NAME STATUTE

Gentlemen:

Thank you for inviting us to contribute our thoughts to the proposed revision. We have consulted with our attorneys and offer the following:

1. We believe that the proposed new penalties for failure to file a fictitious name certificate are appropriate, but in addition, we suggest that the existing penalties be also retained.

2. Our attorneys believe that the law should not be relocated and become a part of the Business and Professional Code, but, instead, should remain in the Civil Code where people have been accustomed to finding it for many years.

3. It is urged that the section be amended to permit the filing of an action wherein the plaintiff may be described by his registered fictitious name, instead of under the names of the partners. In our particular case, we had, at one time, four partners, so that we are very conscious of the additional work involved in reciting the partners' names in all actions wherein we are plaintiffs.

Sincerely,

GWE/n

GEORGE W. ELDER
Manager

cc: Gall and Gall

Memo 66-52 EXHIBIT XIII

Cable Address - BANKAMERICA

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION

SAN FRANCISCO HEADQUARTERS

KENNETH M. JOHNSON
VICE PRESIDENT AND COUNSEL

SAN FRANCISCO, CALIFORNIA 94120

March 18, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Fictitious name statute (Civil Code Sections 2466-2471)

Dear Mr. DeMoully:

This is in reply to your letter of March 16 relating to the possible revision or repeal of the California Fictitious Name Statute.

Insofar as the bank is concerned, it would have no objection to the complete repeal of this legislation. I cannot see that it serves any real purpose insofar as we are concerned.

On the other hand, I think that the statute or something similar serves some purpose insofar as the general public is concerned. For example, if I am hit by a truck bearing the name XYZ Supermarket, it would be helpful to me if I could find out quickly the names of the persons who in fact constitute XYZ Supermarket. A similar situation is where the ABC Laundry ruins my wife's evening gown.

My specific suggestion would be to retain the section in modified form but eliminate the requirement for publication.

Also I am not very fond of the only sanction imposed i.e. the inability to file suit in a fictitious name. As you point out, this can be eliminated at the time legal action is

desired. Possibly, the statute might provide for a dollar penalty where a fictitious name is used, and there is no filing.

In practice, under the present statute it has been difficult at times to determine what is a fictitious name. i.e. For example, Smith & Sons.

Incidentally, I find your project rather interesting and would appreciate your keeping me informed as to developments.

Sincerely,

Kenneth M. Johnson
Vice President and
Counsel

KMJ:sb

Memo 66-52 EXHIBIT XIV

LAW OFFICES
VALENSI AND ROSE

STEPHEN G. VALENSI
SIDNEY R. ROSE
JAMES STOTTER II
DONALD FEINBERG

8665 WILSHIRE BOULEVARD
SUITE 312
BEVERLY HILLS, CALIFORNIA 90211
OLEANDER 5-5650
OLYMPIA 7-2822

June 13, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Re: Proposed revision of fictitious firm name procedure (Civil Code Sections 2466-71)

Gentlemen:

In the June 6, 1966, issue of the Los Angeles Metropolitan News I had occasion to note an article announcing that the above revisions are under consideration by you.

As a lawyer who represents a number of business men I am most interested in obtaining whatever information you have available regarding the recommended revisions. In this regard I trust that the recommendations will include the elimination of the costly and cumbersome publication procedure.

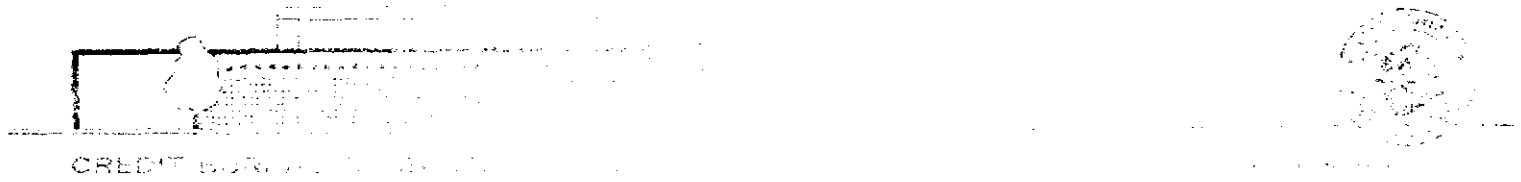
Thank you very much for your efforts in this area, which has long required legislative revision.

Yours sincerely,

Sidney R. Rose
for Valensi and Rose

SRR:rsw

Memo 66-52 EXHIBIT XV



July 1, 1966

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California 94305

Subject: Comments on California Fictious Name Statute Revision

Gentlemen:

Below are listed comments regarding above from the Credit Bureau of Santa Clara Valley.

1. Elimination of publication requirements would require a manual search of clerks records to obtain information on new business.

2. If publication requirements are eliminated it appears an additional burden will be placed on county and state offices in making such public information available.

3. A central file system would be more acceptable if publication of such information were made by the State. Having a central file might indicate that interested parties would have to subscribe to more lists or publications and possible items included in such publication would not be of specific interest. A central file system would be more acceptable if publication were made in the county in which the subject tends to operate.

4. There is no apparent provision made for the Secretary of State to make copies or to provide distribution on any list to interested parties.

Thank you for providing the opportunity to us to make comments.

Sincerely,

CREDIT BUREAU OF SANTA CLARA VALLEY

Roger R. Hocken
Reporting Division Manager

RRH/ld

Memo 66-52 EXHIBIT XVI

PETTITT, BLUMBERG & SHERR
ATTORNEYS AT LAW
2605 MERCED STREET
FRESNO, CALIFORNIA 93721

BLAINE PETTITT
STEPHEN M. BLUMBERG
MORRIS M. SHERR, LL.B., C.P.A.
JAMES H. FLANAGAN, JR.

AREA CODE 209
TELEPHONE 237-4783

July 22, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Re: Fictitious Name Statute

Dear John:

Please put me on the Commission's mailing list. The following are my comments on the Commission's Tentative Recommendation on the Fictitious Name Statute. I only had a brief opportunity to review it, but I hope my suggestions are of some help.

In general I am in favor of the proposed revision. It is good and long overdue. My brief constructive criticism is directed to a definitional problem in coverage, the information required in the certificates, the sanction for non-compliance, and the destruction of certificates.

A definitional problem will undoubtedly arise under the proposed Section 17902 concerning "regularly." Perhaps the Commission intends that exact definition of the term as used here should be delineated by the courts case by case. However, if the Commission has a specific standard or definition in mind, it should be included at least by reference in order to minimize litigation and uncertainty.

As for the information required in the certificates, I would suggest additions to proposed Sections 17904 and 17908. To Section 17904(b) should be added "if the person has no place of business in this state, the complete address of his principal place of business elsewhere." Furthermore, there should be a requirement of a new certificate or an amendment of the existing one if there is any change in the information given, including even any change in any address given. In Section 17909(b) (4) the complete address of the corporation's principal place of business should also be required. A related suggestion, in line with the Commission's aim to "make the information concerning fictitious names more accessible to the public," would be to amend Section 17909 to provide for indexing under the names of the individuals, partners, partnerships, and corporations;

I realize that this would be burdensome, but that might well be outweighed by the benefit to the public (it also is required in the present Civil Code Section 2470).

Concerning the sanction provisions in Section 17912, I have two suggestions. While the idea of a more effective sanction in order to compel compliance is basically sound and vitally needed, the proposed provisions may well be too strict and limiting. I would suggest that the actions may be brought by local county counsel and that the penalty only be set at a maximum. The former suggestion would take the burden off the Secretary of State's office and perhaps would expedite compliance. The latter suggestion would allow the trial court some discretion in levying the penalty depending on the circumstances. A high maximum, such as the figure already proposed, should be a sufficient deterrent to non-compliance.

I strongly disagree with the proposal in Section 17910(b) for allowing destruction of the certificates at such early dates. Instead I would suggest ten years after expiration or earlier termination. The reason for such a suggestion is that these filings are often used to determine proper names of the persons and entities involved for filing of lawsuits and proper service of process. Furthermore, mere expiration or other termination of the certificates do not mean termination of the businesses involved and destruction of the files immediately on expiration or other termination of the certificates would defeat the purpose for making the files available to the public. I note that Civil Code Sections 2469.2 and 2469.3, added this year, provide for a five-year expiration and for destruction only if microfilm copies are made (excellent idea).

Give my regards to all on the Farm.

Very truly yours,

James H. Flanagan, Jr.

JHF:bg

Memo 66-52 EXHIBITXVII

LAW OFFICES OF
LEBOEUF, LAMB & LEIBY
ONE CHASE MANHATTAN PLAZA
NEW YORK, N.Y. 10005

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
CAMERON F. MACRAE
JAMES O'MALLEY, JR.
LUKE D. LYNCH
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD
JAMES G. McELROY
ALFRED E. FROH
H. RICHARD WACHTEL
TAYLOR R. BRIGGS
DOUGLAS W. HAWES
RONALD D. JONES
CARL D. HOBELMAN
HAROLD M. SEIDEL
JOHN J. TARPEY
GEORGE G. D'AMATO, JR.

ARVIN E. UPTON
EUGENE B. THOMAS, JR.
1801 JEFFERSON PLACE, N. W.
WASHINGTON, D. C. 20036

CABLE ADDRESS:
LEBWIN, NEW YORK

NEW YORK TELEPHONE
212-HA 2-6262

July 28, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30
Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

We are general counsel in the United States for Underwriters at Lloyd's, London, and in that capacity have had forwarded to us your letter dated June 21, 1966 addressed to Mr. Perry H. Taft, 315 Montgomery Street, San Francisco.

We appreciate your thoughtfulness in alerting our clients to this contemplated change in the California "fictitious name" statute, and your consideration in seeking any comments our clients may have on this tentative recommendation.

Section 17903 of the proposed statute would make the provisions of the fictitious name statute applicable to every person who "regularly transacts business in this State" under a fictitious name. Our clients, Underwriters at Lloyd's, do not "regularly transact business" in California; indeed they do not transact any business in California at all. A California surplus line broker or special line broker, acting for a prospective insured, may obtain insurance coverage for his insured through a broker in London, England, and any Lloyd's policies would be issued by Lloyd's Policy Signing Office in England in accordance with the provisions of the pertinent acts of Parliament.

Accordingly, it would be inappropriate for us to comment with respect to the Commission's proposal.

Very truly yours,

Taylor R. Briggs

Memo 66-52

EXHIBIT XVIII

JOHN W. BROOKS
ATTORNEY-AT LAW
4047 LONG BEACH BOULEVARD
LONG BEACH 7, CALIFORNIA
GARFIELD 4-0417
MAILING ADDRESS: P. O. BOX 7447

August 1, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

In re: Recommendations relating to Fictitious Name Statute.

Gentlemen:

I have studied, in detail, the proposed revision of the statutes relating to Fictitious Names; and I am heartily in agreement with the Commission's recommendations, having had some experience with the archaic provisions of the present law, and with the wholly unnecessary expense of publication.

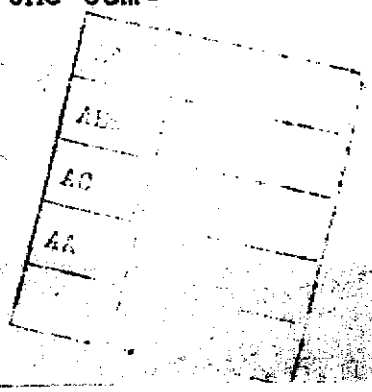
At first I was rather inclined to feel that the filing of a Certificate of Fictitious Name really is superfluous, insofar as it pertains to limited partnerships; since, in order to create a limited partnership, a Certificate must be recorded in the County of its principal place of business. I feel, however, that the benefits which would result from the establishment, by the Secretary of State and by each of the County Clerks of an index of Fictitious Names are sufficient to overcome my objection.

I should like to be added to the Commission's mailing list.

Very truly,

John W. Brooks

JWB:jr



PORTLAND Memo 66-52 EXHIBIT XIX SEATTLE LOS ANGELES

McCORDS DAILY NOTIFICATION SHEET

Published by McCord Company • Established 1910

1561 MISSION STREET • SAN FRANCISCO 3, CALIFORNIA • TELEPHONE MARKET 1-4674

June 23, 1966

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Many thanks for the letter of June 20th and the copy of your tentative recommendations regarding the fictitious name statute.

I still stand on my comments as expressed in my letter of March 15th, but would not object to the additional filing in the Secretary of States office. However from a "grass roots level" it is important for a credit reporting organization to be in the position where it can easily obtain a copy of fictitious name filing and forward it to clients. The only practical way to do this is through the publication and I strongly recommend the retention of it.

Sincerely

MC CORD COMPANY

W. J. Kumli
President

WJK/ofc

Memo 66-39 EXHIBIT XX

G. K. HIRSCHBERG
MAX A. GOODMAN
STEPHEN SCOTT KING
GILBERT G. LIPMAN
FLORENCE PESSAH ROSENBERG

GOODMAN, HIRSCHBERG AND KING
ATTORNEYS AT LAW
3850 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90005

TELEPHONE
AREA CODE 213
389-2174

July 26, 1966

California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Re: Fictitious Name Statute

Gentlemen:

Thank you for the tentative recommendation relating to the Fictitious Name Statute.

It has been my belief that the Fictitious Name Statute, as it now reads, has no "teeth" in it. In the event a party fails to abide by the statute, the sanctions are minor. Your tentative recommendation suggests that a person failing to comply with the statute be subject to a civil penalty of $500.00, prosecuted by the Secretary of State. I do not believe this would be adequate, in that it might be difficult to get the Secretary of State to prosecute such an action.

I would suggest that, in any litigation concerning a party who has failed to comply with the Fictitious Name Statute, that party should be required to pay the other litigant a civil penalty. I believe that a private litigant would be more likely to enforce such a remedy, than would the Secretary of State. Also, my suggestion would abrogate the necessity having the Secretary of State become involved with numerous items of litigation. The knowledge that any litigant might recover this penalty would act as a strong impetus to all persons to abide by the Statute.

In addition, I would suggest the following. Most persons doing business under a fictitious name must also acquire some form of public license created either by the city clerk, state board, or some other similar agency. Before such a license is created, the party should be required to present proof to such agency that the party has complied with the Statute. Perhaps a certified copy of the filing of the fictitious name should be presented to the agency.

Thank you for the opportunity of making the above suggestions.

Very truly yours,

STEPHEN SCOTT KING

SSK/pc

Memo 66-52 EXHIBIT XXI

ASSETS RESEARCH

A DIVISION OF NATIONAL BUSINESS FACTORS

March 18, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California

ATTENTION: John H. DeMoully

Dear Sir:

In answer to your letter of March 4, 1966. We are not aware of any purpose served by the fictitious name statute. Also, the requirement of publication does serve a useful purpose and would be sufficient if the information were merely required to be filed with county clerk.

We do not use the fictitious name statute and would not object to the repeal of this statute.

Very truly yours,

C. Shaber

CS/kk

Memo. 66-52

EXHIBIT XXII

Based on a survey of the county clerks, the number of Fictitious Name Certificates filed during a calendar or fiscal year in each county is estimated below:

County	Number	County	Number
Alameda	861	Orange	2,900
Alpine	2	Placer	85
Amador	no reply	Plumas	20
Butte	113	Riverside	973
Calaveras	12	Sacramento	528
Colusa	9	San Benito	32
Contra Costa	400	San Bernardino	870
Del Norte	25	San Diego	2,726
El Dorado	132	San Francisco	1,110
Fresno	323	San Joaquin	256
Glenn	8	San Luis Opispo	110
Humboldt	no reply	San Mateo	425
Imperial	91	Santa Barbara	437
Inyo	24	Santa Clara	1,000
Kern	411	Santa Cruz	108
Kings	16	Shasta	237
Lake	55	Sierra	0
Lassen	19	Siskiyou	67
Los Angeles	20,958	Solano	151
Madera	30	Sonoma	261
Marin	279	Stanislaus	160
Mariposa	no reply	Sutter	42
Mendocino	49	Tehama	32
Merced	145	Trinity	11
Modoc	24	Tulare	146
Mono	20	Tuolumne	26
Monterey	300	Ventura	633
Napa	50	Yolo	74
Nevada	29	Yuba	33
		TOTAL=	37,838

Memo 66-52

EXHIBIT XXIII

FRANK M. JORDAN
SECRETARY OF STATE

OFFICE OF THE

Secretary of State

UNIFORM COMMERCIAL CODE DIVISION

P. O. BOX 1738
SACRAMENTO, CALIFORNIA 95808

August 24, 1966

John H. DeMoully, Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

I have read the revised draft of the proposed statute concerning fictitious business names and present the following comments relative thereto:

It is assumed that the Secretary of State's Office would have no responsibilities for determining whether a fictitious business name statement is filed within 40 days from the time a person commences transacting business in this State under a fictitious business name.

Section 17903 provides that if the person filing is an individual or a partnership, the statement must contain both a principal place of business address and a residence address. Is there any particular reason for requiring both a principal place of business address and a residence address for individuals and partnerships? If two addresses do not serve any important purpose, it is suggested that only the principal place of business address be required. In the event there is no principal place of business in this State then the residence address could be required. Carrying only one address in the index will make indexing, as well as retrieving and comparing information for certification purposes, through the use of a computer, easier and less costly.

Perhaps it would be well to define the term "principal place of business". Many times we encounter situations where a person will insist he has two or more principal places of business. It has always been our contention that there can only be one principal place of business.

It appears as though it would be difficult to administer Section 17906 (b) (c) & (d). These sections provide that 40 days after certain changes take place, the filed statement expires. Our office would have no way of knowing, for example, when there has been a change in the registrant's principal place of business, or when there has been a change in a partnership, or when a corporation has changed its name. If such a change occurs and a new statement is not filed, the Secretary of State has no way of knowing when the filed statement should be marked as having expired. This would in turn cause the Secretary of State to perhaps issue a certificate stating that a particular fictitious business name statement is presently effective when in effect it has expired.

There does not appear to be any section which specifically covers the filing of a new statement. Wouldn't it be desireable to include language in the statute indicating that a new statement is to be filed when any of the changes mentioned in Section 17906 take place?

It is suggested that a statement of abandonment include, in addition to the information called for in Section 17908, the file number which was assigned to the fictitious business name statement by the Secretary of State's Office and the date on which it was filed in the Secretary of State's Office. The additional information would enable our office to more positively identify the statement to which the abandoned name applies.

Section 17911 provides that the county clerk shall maintain an index of information concerning fictitious business names and that such index shall consist of cards, with the information imprinted thereon, and furnished by the Secretary of State's Office. So that the counties can maintain a relatively current index, shouldn't our office also provide them with information as to expirations and abandonments?

Section 17912 (b) provides for the Secretary of State to issue a certificate showing whether there is on file as of a certain date, any presently effective fictitious business name statement, etc. It is suggested that Section 17912 (b) be changed to read:

> "Upon request of any person, the Secretary of State shall issue his certificate showing whether <u>according to his records</u> there is on file, <u>in his office</u>, on the date and hour stated therein, any presently effective fictitious business name statement for:" (Underscoring denotes wording which has been added)

This change is suggested because if a person having filed a statement has a change of address, or there is a partnership change and the Secretary of State is not notified of the change within 40 days, the statement will in effect expire. The Secretary of State's records however will not reflect the expiration because it is unaware of the change. Therefore, it seems necessary to add the key words "according to his records" to Section 17912(b).

Section 17912 (b) (1) seems to be practically the same as Section 17912 (c).

There does not appear to be any provisions for the Secretary of State to furnish copies of filed statements upon request. If you feel that copies should be furnished upon request, we suggest a fee of $1 per copy.

The proposed statute does not specifically indicate what action, if any, would be necessary on the part of those persons who, as of the effective date of the statute, are transacting business in California under a fictitious business name and who have already filed a fictitious business name certificate with the county clerk under present statutes. It is assumed that they would have to file a new statement with the Secretary of State's Office, within a given period of time. If this is the intent, perhaps it should be more specifically covered.

We cannot at this time give you any indication as to whether the fees proposed in the draft are too low or too high. Until we have some indication of workload volumes, it is difficult to make any cost evaluations.

We may be quite concerned with the effective date of such a statute from an operational standpoint.

If the legislation is introduced at the 1967 legislative session and it provides for a January 1, 1968 effective date, we may encounter problems. Any monies budgeted for the program would not be available to us until July 1, 1967. Six months is hardly enough time in which to acquire the necessary staff, write, test and debug computer programs and to obtain any additional data processing equipment which may be necessary. Perhaps an effective date of July 1, 1968 would be more realistic.

I have made a copy of the draft available to Mr. Martig and perhaps he will have other suggestions.

My apologies for not having answered your letter sooner. What with vacation schedules and a number of other projects with high priorities, the days are just not long enough. If we can help in any other way, please let us know.

Very truly yours,

FRANK M. JORDAN
Secretary of State

By: R. J. Nannini
Assistant to the Secretary of State

RJN:ic

cc: Mr. Ralph Martig
Legal Counsel

EXHIBIT XXIV

SAMPLE OF INFORMATION PROVIDED BY
SECRETARY OF STATE CONCERNING FINANCING STATEMENTS
UNDER THE CALIFORNIA COMMERICAL CODE

CALIFORNIA FINANCING STATEMENT FILINGS, SD PAGE 1

ANAHEIM, CALIF.

BALLMAN WILLIAM 122 W BROADWAY - TO GENERAL MOTORS ACCEPTANCE CORP 2323 N GLASSELL ST SANTA ANA, CALIF.
07/28/66 - UCC 2-6F 65-001722

CASEY-BECKHAM PONTIAC INC 801 S ANAHEIM BLVD - TO GENERAL MOTORS ACCEPTANCE CORP 2323 N GLASSELL ST SANTA ANA, CALIF.
07/28/66 - UCC 2-6F 65-001716

CONE BROS 215 S ANAHEIM BLVD - TO GENERAL MOTORS ACCEPTANCE CORP 2323 N GLASSELL ST SANTA ANA, CALIF.
07/28/66 - UCC 2-6F 65-001714

FOSTER CONSTRUCTION COMPANY 280 N WILSHIRE - TO SECURITY-FIRST NATIONAL BANK 347 W LINCOLN AVE ANAHEIM CA 92805
EQUIPMENT 07/29/66-065900

HARDIN OLDSMOBILE 1300 S ANAHEIM BLVD - TO GENERAL MOTORS ACCEPTANCE CORP 2323 N GLASSELL ST SANTA ANA, CALIF.
07/28/66 - UCC 2-6F 65-001708

RESCO DONALD 554 S ROSE - DBA VERDUN PLATING CO 554 S ROSE - TO THE UDYLITE CORP 3628 E OLYMPIC BLVD LOS ANGELES, CALIF.
EQUIPMENT MACHINERY 07/29/66-065892

SCHAEFERS TELEVISION CENTER INC 2138 E LINCOLN - DBA SCHAEFERS DISCOUNT TV & APPLIANCES 2138 E LINCOLN - TO EMERSON-DUMONT SOUTHERN CALIF INC 2211 S DAVIE AVE LOS ANGELES, CALIF.
APPLIANCES 07/29/66-065841

STANDLEY CORPORATION 405-A WEST KATELLA - DBA LIBERTY LEASING 405-A WEST KATELLA - TO FIRST WESTERN BANK & TRUST CO 587 EAST COLORADO BOULEVARD PASADENA CA 91101
INVENTORY 07/29/66-066094

STEFFY BUICK CO 953 S ANAHEIM BLVD - TO GENERAL MOTORS ACCEPTANCE CORP 2323 N GLASSELL ST SANTA ANA, CALIF.
07/28/66 - UCC 2-6F 65-001696

WILSON PETE 1200 N EAST ST - DBA PETE WILSON UNION 1200 N EAST ST - TO EQUIPMENT DISTRIBUTORS OF CALIF 7300 S AVALON BLVD LOS ANGELES, CALIF. - ASGN TRI FINANCIAL CORP 3777 GAINES ST SAN DIEGO, CALIF.
EQUIPMENT 07/29/66-065717

BRAWLEY, CALIF.

VALLEY TV & APPLIANCE SERVICE INC 518 E ST - TO PHILCO FINANCE CORP 6393 E WASHINGTON BLVD LOS ANGELES, CALIF.
APPLIANCES AFTER ACQUIRED PRPRTY PROCEEDS
07/29/66-066092

BREA, CALIF.

GUARDIAN CHEVROLET 146 S BREA - TO GENERAL MOTORS ACCEPTANCE CORP 2323 N GLASSELL ST SANTA ANA, CALIF.
07/28/66 - UCC 2-6F 65-001701

Memo 66-52 EXHIBIT XXV

LAW OFFICES
LOWENTHAL & LOWENTHAL

MORRIS LOWENTHAL
JULIET LOWENTHAL
JEROME H. FIELD
JOHN R. JACOBSON
REED H. BENENT

405 MONTGOMERY STREET
SAN FRANCISCO 94104
TELEPHONE 986-5366
AREA CODE 415

August 23, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Tentative Recommendation on Suit By or Against an Unincorporated Association

Dear Mr. DeMoully:

Your letter of August 22, 1966 and its enclosure are greatly appreciated.

The approach taken in the tentative recommendations is one which I believe is highly desirable. It will provide a central point at which to discover the existence and proper persons to serve to reach unincorporated associations, including partnerships, where such information often depends upon the fortuitous circumstance of knowing the identities of the real parties owning the partnership or association and being able to locate them.

There are two aspects which come to mind that it is suggested ought to be considered for further revisions of existing law.

At common law (as discussed in 37 Cal. Jur. 2nd, pp. 664-667) all of the real partners must be named as parties plaintiffs in an action on an obligation owned by the association or entered into in the name of the association or owned by the association at the time the obligation was made. However, there is authority (37 Cal. Jur. 2d, pp. 696-698) that the partnership may not maintain an action on the firm obligation unless it has first complied with Sections 2466 and 2471 of the Civil Code. It seems an anomaly to say that the members of a partnership must comply with the statute concerning publication of a Certificate of Doing Business Under a Fictitious Name yet must sue in the names of the partners rather than in the name of the firm.

It would seem appropriate to change the place for filing the Certificate of Doing Business Under Fictitious Name from the many different counties where the principal office could be to the same central point with the Secretary of State under the proposed CCP §395.2 and Corporation Code §24003.

The fact that an unincorporated association would be allowed to sue and be sued under its common name under the proposed CCP §388(b) would not necessarily cause a court to conclude that compliance with the fictitious name provisions of Civil Code sections mentioned above is no longer required because those sections are in terms of whether or not the action may be "maintained".

The proposed CCP §388(a) could raise the question of whether a "person" included a limited partnership, a general partnership, a corporation or other form of organization as a member of the "unincorporated association." No case has been found where this question arose under the present CCP §388. The fact that it has not arisen is not too surprising since the present Code section deals with naming such unincorporated associations as defendants rather than stating a statutory qualification for the exercise of a right or privilege by the unincorporated association. No doubt there are some judges who would hold that a statutory right to sue in an artificial name is in derogation of the common law requirement that the action be maintained in the names of all of the partners of a partnership, and then proceed to hold that a particular "unincorporated association" could not strictly comply with the proposed CCP §388 because at least one member of the unincorporated association was not a natural person. Perhaps this point would be obviated by adding a subdivision to the proposed CCP §388 along the following lines:

> "(c) A 'person' includes natural person, general partnerships, limited partnerships, corporations, and other unincorporated associations or organizations."

An interesting side effect of the proposed CCP §388 is that it is broad enough to settle one point concerning limited partnerships which does not appear to have been settled by any decision that has come to my attention. That point is whether all of the actual members of a limited partnership must be named as plaintiffs where an action is brought on the claim of the limited partnership. Present law, from one point of view, could be said to require naming all of the partners, including the limited partner members on the theory that the law applicable to general partners applies to limited partnerships where

necessary to provide the law applicable to the relations of limited partnerships and to the extent not inconsistent with the Limited Partnership Act. Such a conclusion would tend to expose a limited partner to liability other than as provided in the Limited Partnership Act if there were a counter-claim or cross-complaint resulting in liability over and above the plaintiff's claim and there were a failure to plead and a failure to prove the limitation of liability of plaintiff limited partners. It is small comfort to say that the limited partners thus exposed to an excessive liability would have the recourse against the general partners or partner.

It is suggested that the foregoing speculations upon the state of the law and consequences justify some attention to the areas outlined. I regret that I am unable to analyze the recommendations in any degree of depth or to pursue the consequences of the above suggestions to any greater detail at this time. It is hoped that the recommendation is successful whether or not any of the thoughts expressed in this letter are adopted.

It would be appreciated if you could put me on your mailing list for any further developments in this area of legislation as the matter progresses.

Very truly yours,

JOHN R. JACOBSON

JRJ/s

MEMBERSHIP (INCOMPLETE)
(ALHAMBRA) POST-ADVOCATE
(ALTADENA) THE ALTADENAN
ANGELES MESA (LOS ANGELES) NEWS-ADVERTISER
THE ARCADIA TRIBUNE
ARTESIA NEWS
(AVALON) THE CATALINA ISLANDER
AZUSA HERALD AND POMOTROPIC
BALDWIN PARK BULLETIN
BELLFLOWER HERALD-ENTERPRISE
BELL-GARDENS REVIEW
(BELL-MAYWOOD) INDUSTRIAL POST
THE BELVEDERE CITIZEN
BEVERLY HILLS CITIZEN
BURBANK REVIEW
CALIFORNIA (Los Angeles) EAGLE
CANOGA PARK HERALD TRIBUNE
CHATSWORTH HERALD TRIBUNE
CLAREMONT COURIER
COMPTON HERALD AMERICAN AND THE COMPTON HERALD
THE COVINA ARGUS-CITIZEN
(Culver City) EVENING STAR NEWS
DOWNEY LEADER
DOWNEY LIVE WIRE
THE DUARTEAN AND DUARTE DISPATCH
EAGLE ROCK SENTINEL
EAST LOS ANGELES GAZETTE
EAST LOS ANGELES TRIBUNE
EASTSIDE (Los Angeles) JOURNAL
EAST WHITTIER REVIEW
EL MONTE HERALD
EL SEGUNDO HERALD
EL SERENO STAR
(FIRESTONE PARK) SOUTHEAST NEWS-PRESS AND FIRESTONE PARK NEWS
THE FLORENCE MESSENGER
GARDENA VALLEY NEWS
GLENDALE NEWS-PRESS
GLENDORA PRESS
GRIFFITH PARK NEWS
HAWTHORNE PRESS
HERMOSA BEACH REVIEW
HIGHLAND PARK NEWS-HERALD & JOURNAL
(HOLLYWOOD) CITIZEN NEWS
HUNTINGTON PARK DAILY SIGNAL
INGLEWOOD DAILY NEWS
(LANCASTER) ANTELOPE VALLEY LEDGER-GAZETTE
LA VERNE LEADER
LAWNDALE TRIBUNE & NORTH MONEYA GARDEN-LANDS TRIBUNE
LENNOX CITIZEN
LINCOLN HEIGHTS (Los Angeles) BULLETIN-NEWS
LOMITA NEWS
LONG BEACH INDEPENDENT
LONG BEACH PRESS TELEGRAM
LOS ANGELES SENTINEL
THE LYNWOOD PRESS
THE MALIBU TIMES
MANHATTAN BEACH NEWS
THE MAYWOOD JOURNAL
(MONROVIA) DAILY NEWS-POST AND MONROVIA DAILY NEWS-POST
THE MONTEBELLO NEWS
MONTEREY PARK PROGRESS
(MONTROSE) THE LEDGER
NEWHALL SIGNAL AND SAUGUS ENTERPRISE
THE NORTHWEST (Los Angeles) LEADER
NORWALK CALL
(PACIFIC PALISADES) THE PALISADIAN POST
(PALMDALE) ANTELOPE VALLEY PRESS
THE PALOS VERDES NEWS
THE PARAMOUNT JOURNAL
PASADENA INDEPENDENT
PASADENA STAR-NEWS
THE PICO (Los Angeles) POST
PICO-RIVERA TIMES POST
(POMONA) PROGRESS-BULLETIN
(PUENTE) LA PUENTE VALLEY JOURNAL
(REDONDO BEACH) SOUTH BAY DAILY BREEZE
REDONDO HERALD TRIBUNE
THE ROSEMEAD REVIEW
SAN DIMAS PRESS
THE SAN FERNANDO VALLEY SUN
(SAN FERNANDO VALLEY) VALLEY TIMES
SAN GABRIEL SUN
SAN GABRIEL VALLEY INDEPENDENT
SAN GABRIEL VALLEY DAILY TRIBUNE
THE SAN MARINO TRIBUNE
SAN PEDRO NEWS-PILOT
(SANTA MONICA) EVENING OUTLOOK
THE SIERRA MADRE NEWS
SIGNAL HILL TRIBUNE
SOUTH GATE PRESS
SOUTH PASADENA REVIEW
SOUTHWEST (Los Angeles) TOPICS-WAVE
SOUTHWEST (Los Angeles) WAVE
TARZANA HERALD TRIBUNE
TEMPLE CITY TIMES
TOPANGA JOURNAL AND MALIBU MONITOR
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(WATTS) LOS ANGELES STAR REVIEW
WESTCHESTER NEWS-ADVERTISER
WESTLAKE (Los Angeles) POST
WEST LOS ANGELES INDEPENDENT
WESTWOOD HILLS PRESS
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(WILMINGTON) PRESS-JOURNAL AND HARBOR MAIL
THE WILSHIRE PRESS

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Los Angeles Newspaper Service Bureau
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COOPERATIVELY OWNED AND OPERATED BY
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ESTABLISHED 1934
220-224 WEST FIRST STREET
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TELEPHONE MADISON 5-2561

August 25, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Crothers Hall, R-30
Stanford University
Stanford, California

Dear Mr. DeMoully:

Thank you for your thoughtful invitation but I shall not be able to be at your commission hearing September 16, as on that date I am scheduled for a hearing in Reno before the Federal Bureau of Land Management. However, I take this opportunity to record my disagreement with you and the commission that publication of fictitious firm name certificates places "an unfair burden on the small business man who cannot afford to incorporate."

I am a small businessman and it cost me $500 in lawyer's fees to incorporate. This expense was in addition to filing and corporate book costs and a $100 minimum annual corporate franchise tax which Governor Brown three years ago raised from the previous $25 fee.

If I had not chosen to incorporate I could have done business under the fictitious firm name law in this county for a county clerk's fee of $2.00, plus the going publication cost of $18.00. You must agree that this is something less than the $500-$600 incorporation cost.

The county clerk tells us that 21,000 certificates were filed and published in this county during 1965. He also reports that during 1965, his office received 32,000 inquiries regarding fictitious firm names over the counter and 43,000 by telephone, plus 2,400 by mail. Of course the credit reporting and listing agencies must have received many too. I think this indicates to some extent the interest of the public in fictitious names.

I have personally this date run a cost study on most of the fictitious name certificates that were published in Los Angeles County during the past month of July. This month is reasonably typical of all months.

On my personal check of the records of 100 weekly and daily community newspapers of our association, I found that 550 certificates were published at a charge not exceeding $18 each. The largest number was in the Van Nuys News, which printed 108 certificates at a maximum charge of $18 each.

The Gardena Valley News printed one certificate at a charge of $20; the Glendale News-Press an overlength certificate at a charge of $35.52; the West Los Angeles Independent, a single certificate at $27. In addition, the Redondo Beach Daily Breeze printed 31 certificates at a maximum charge of $21 each, and the Lynwood Press 10 at a maximum charge of $19 each.

The Los Angeles Daily Journal, which as you know is owned by the Los Angeles Newspaper Service Bureau, Inc., printed 320 certificates during the month of July and, of these, 299 were at the going rate of $18, while 21, due to extra length, were charged out at an average price of $43 each, the peak price being $110.50 for a voluminous partnership document, and a second costly publication being $103.00. The Daily Journal has on its ledgers no comparable record of a $204 charge for a two-column certificate such as I mailed you several months ago in answer to your request.

The point I am making is that 957 certificates during the month of July, cost their sponsors $18 each for publication, while the 65 certificates that were charged at more than the $18 cost an average price of $28 each. This study does not include all the publications made in the county, but it does cover 90 percent of publications made, and I am positive that the same price pattern prevails for all newspapers in the county, with the possible exception of the metropolitan newspapers which once in a while, are sent a fictitious firm name certificate for publication at their rate of approximately $20 per column inch or $200-$300 for the standard notice. It seems possible that it was one such complaint that has stirred up your commission research staff to quote the assertion in your letter of August 3, that "it is almost the unanimous agreement of all persons who use the fictitious name information that the publication requirement is, in effect,'an unfair burden on the small business man who cannot afford to incorporate.'"

My guess is that should you go ahead with the repeal plan on this particular publication requirement, you are going to have a tough time convincing the members of the legislature that the $18 charge for a fictitious firm name certificate published for the information of the public, imposes very much of a burden on any businessman filing and publishing a trade name as compared with the cost of forming a corporation. No comparison could be more ridiculous than this one.

If the lawyers of the state, as we have been told, are concerned about the newspapers distributing free certificate forms and offering free filing and checking service to the public, and thereby engaging in unlawful practice of law and cutting the legal fraternity out of legitimate consultation fees, they should take that complaint up directly with the representatives of the newspaper industry. We do not think that the approach of attacking the publication of the fictitious firm name certificate is the proper way to correct a situation which they may feel is doing them an injury.

Our organization will support the suggested program of imposing penalties on those who fail to file and publish, as was attempted unsuccessfully many years ago by the Oakland Board of Trade. In that instance, the Oakland group introduced legislation which got through both houses and proposed as a penalty the loss of the business license for any failure to file and publish. We will not support, but neither will we oppose an amendment to require localized publication of the certificates within judicial districts, as is now the requirement for publication of Uniform Commercial Code notices, foreclosure notices, liquor license notices, etc.

As I wrote you before, our organization is unalterably opposed to repeal of the certificate publication requirements which have been on the California statute books since 1872, with the publication requirement since 1911, and which publication requirements are similar to the trade name certificate requirements in the laws of Florida, Montana, South Dakota, and other states.

Respectfully yours,

LOS ANGELES NEWSPAPER
SERVICE BUREAU, INC.

By: Telford Work
Secretary-Treasurer

cc: Mr. Ben D. Martin

P.S.

I am enclosing copy of my Nevada Press Association talk on "Who Attacks Public Notices?", which I promised in a former letter to send you. I am also enclosing for your information specimen of the Fictitious Name Certificate forms which are provided by the newspapers in our county free to lawyers and others. You will note that the form is in colors arranged in quadruplicate.

T.W.