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October 25, 2004

Honorable William G. Polley
Tuolumne County Superior Court
41 West Yaney Avenue
Sonora, California 95370

RE: Alameda Boy Scouts Foundation Inc. v. Odd Fellows, et al.
Case No. CV 49802

Dear Judge Polley:

This is to provide the Court with the letter brief we were authorized to file when the Court granted the Alameda Boy Scouts' application to file their closing brief six weeks late. Having timely submitted a thorough post trial brief, we will briefly respond to, and point out the defects and omissions in the Boy Scouts' most recent brief.

I.
PLAINTIFF FAILED TO ADDRESS ARGUMENTS RAISED IN DEFENDANTS' BRIEF

In our post trial brief, Defendants raised a number of arguments which the Boy Scouts have completely ignored in their late reply. Since the Boy Scouts had a chance to rebut these arguments and failed to do so, it must be assumed they have no reply and have conceded the points.

A. No Evidence Against Defendant Del Wallis

In Defendants' post trial brief, we pointed out that the amended complaint claims no wrongdoing by Mr. Wallis, seeks no relief against Mr. Wallis and no evidence of any individual liability by Mr. Wallis was ever produced. We argued the same points in opposition to the Boy Scouts' application to file an amended complaint to conform to proof and previously in our pre-trial brief to the Court. The Boy Scouts had an opportunity to amend the complaint to conform to proof, yet they still did not allege any wrongdoing by Mr. Wallis nor did they seek any monetary penalties against him in their prayer.

The Boy Scouts' only reply to our argument is a general conclusion that Mr. Wallis is liable for damages, yet they utterly failed to address the pleading deficiency and they failed to cite any evidence in the record to support their contention that he has personal liability. Mr. Wallis was the President of the corporation, but the Boy Scouts have not alleged nor have they proved any basis for piercing the corporate shield and imposing personal liability against Mr. Wallis. Under these circumstances it is wrong and mean spirited for the Boy Scouts to cling to their demand that Mr. Wallis remain a party defendant to this action and he should be dismissed outright.

B. No Strict Necessity at the Time of the Severance From Common Ownership

The Boy Scouts have not addressed their failure to prove strict necessity existed at the time their property was severed from common ownership. Our legal argument is ignored completely in the Boy Scouts' briefs and their silence is a concession of the point.

The Boys Scouts seem to apply city standards to an historic public mountain road. They mistakenly assert that a mountain road is impassable simply because it is made of dirt, or because inclement weather sometimes drops trees across it, or because it occasionally becomes rutted. When the parcels were severed from common ownership in 1929, Bottini Apple Ranch Road and Long Barn Sugar Pine Road were the equivalent of today's highways. Long Barn Sugar Pine Road had been the main thoroughfare through the area since at least the 1850's. Inconvenience is not strict necessity and the Boy Scouts have cited no authority to the contrary. There is no evidence of a strict necessity at the time of severance, nor even today.

The Boy Scouts' arguments are a naked attempt to confiscate a valuable easement to which they have no legal entitlement for purely economic reasons. The Scouts wish to take advantage of the Odd Fellows' industry, investment and continuing maintenance of superior private roads in a transparent ruse. The claim to an easement by necessity should be rejected.

C. Camp Cedarbrook is Not Landlocked

The Boy Scouts have also failed to address our arguments that there is no evidence Camp Cedarbrook is "landlocked." The reply brief does not argue nor cite to any evidence suggesting that Camp Cedarbrook is landlocked. The most that could be said about their arguments in this respect is that they claim their alternate access is less convenient than the private roads through Odd Fellows Park. This is insufficient to support a claim to an easement by necessity.

D. The Boy Scouts Easement Claims Were Extinguished by Abandonment

The Boy Scouts also failed to address our arguments that the re-routing of Wheeler Road in 1948 caused any pre-existing easement claims to be extinguished. They simply did not mention the issue and accordingly, they have conceded this point as well. The Scouts also failed to address our argument that the County's abandonment of the County Road as it passes through Odd Fellows Park served to abandon the Scouts' easement claims over that portion of the road. This issue has also been conceded by the Boy Scouts by their failure to address it.

II.
THE COMPLETE LACK OF EVIDENCE OF PRE-EXISTING USE OF ODD FELLOWS' ROADS NEGATES THE CLAIMS TO AN EASEMENT BY NECESSITY OR BY IMPLICATION

The Boy Scouts acknowledge our argument that the record is devoid of evidence of any pre-existing use of Odd Fellows' roads prior to the severance of the Camp Cedarbrook parcel from common ownership in 1929. The Boy Scouts fail to show any evidence to rebut our argument and have therefor conceded the point.

The Boy Scouts also continue ignore the requirement that an easement by necessity can only be established by proving strict necessity at the time of the original severance of the parcels from common ownership. On Page 6 of their brief, the Boy Scouts continue to argue *present conditions* of the roads as evidence of necessity, but they ignore the condition of the roads in 1929. That is understandable, but not excusable, because there is no evidence of necessity in 1929 nor even that any private roads existed at that time. Interestingly, in their reply brief, the Boy Scouts only mention pre-existing use in their arguments about implied easements. The element of pre-existing use is absolutely required to be proved to establish an easement by necessity yet the Scouts only discuss present conditions. Such misdirection is as misleading as it is unavailing.

The Boy Scouts argue at page 1, lines 25-26 that the Boy Scouts and their predecessors made continuous and uninterrupted use of Wheeler Road and Jordan Way since at least the 1930's. This naked assertion is completely unsupported by any evidence, documentary or testimonial. As before, the Boy Scouts seem to be making these things up as they go along. We challenged similar bald assertions by the Boy Scouts in our post trial brief at pages 13-14, but without citing any evidence in the record, the Boy Scouts continue, undaunted, to make the same false claims.

Now the Boy Scouts argue they need not present evidence of pre-existing use if they can show what uses "the facts and circumstances show were within the reasonable contemplation of the parties at the time of conveyance." The problem with this argument is that there is absolutely no evidence of any facts or circumstances from which the Court could reasonably find what, if any, uses were within the reasonable contemplation of the parties at the time of the original conveyance.

In the place of evidence, the Boy Scouts have resorted to guesswork, speculation, hypotheses and conjecture. They argue the Boy Scouts' property was transferred to "a Boy Scouts group *shortly after the severance*." Transfers *after* the original severance are immaterial. Since Mr. Sylvester did not convey the parcel to "a Boy Scouts group" any later transfer could not possibly help discern Mr. Sylvester's original intent. The Scouts argue, without any supporting evidence whatever, that "It was within Mr. Sylvester's 'reasonable contemplation' that the Boy Scouts' predecessors would need to gain access to the property in such a manner that allowed full use of the property. Thus, any roads in existence at the time of severance were impliedly granted for use by the Boy Scouts and their predecessor." (Scouts Brief, 8:28-9:3)

There are two problems with this argument. First, there is no evidence from which to conclude what, if any, uses were within the reasonable contemplation of Mr. Sylvester in 1929. Next, there is no evidence of any private roads on what is now the Odd Fellows' property in 1929 nor at any subsequent time until at least 1948.

The Scouts argue (Scouts Brief 9:4-9) that because Ed Smith saw Old Wheeler Road in 1948, the road must have also existed in 1929. How is this leap of faith to be made? There is absolutely no evidence of any private roads on the Odd Fellows' parcel prior to 1948 and the Boy Scouts cannot make it otherwise. Claims and argument are no substitute for evidence. We labeled this Boy Scouts' claims as "balderdash" in our post trial brief, and they remain balderdash.

The Boy Scouts continue to argue that *current conditions* of the various roads requires the Court to grant them an easement by implication over the private roads of the Odd Fellows. They ignore the central purpose of an easement by implication which is to ascertain the original intent of the grantor at the time of severance from common ownership. Current conditions say nothing about Mr. Sylvester's intent. Current conditions simply show that the Odd Fellows have spent more time, money and labor to improve their internal roads and access than have the Boy Scouts. The fact that one's neighbor has a better road is no excuse for taking a valuable property right from the neighbor. If it were otherwise, the law would encourage landowners to allow their roads to disintegrate so they could usurp the right to use their neighbors' superior roads. This would be very bad public policy and simply is not the law.

III.
DEFENDANTS MET THEIR BURDEN OF PROVING THE BOY SCOUTS USE OF THEIR PRIVATE ROADS WAS PERMISSIVE

The Boy Scouts attempt to impeach the testimony of Ed Smith, Del Wallis and Ron Hawke. The thrust of their argument is that the Court cannot accept their sworn testimony unless there is some piece of paper to corroborate it. The Boy Scouts argue that the absence of minutes memorializing the Boy Scouts' request for access should render the sworn testimony of three witnesses unbelievable. If that were true, courts could do away with witnesses entirely and simply try cases on the paper documents offered in evidence. Of course sworn testimony is good evidence and the Court is quite competent to evaluate the truthfulness of witnesses.

There was no evidence to contradict the testimony of these witnesses. No witness testified that a request was *never* made by the Boy Scouts to use the Odd Fellows' roads. The most any of the Boy Scouts' witnesses could say is that the testifying witness did not make such a request. That does not proves that nobody else requested access.

In fact, Mr. Anderson, President of the Alameda Boy Scouts Foundation, testified that he believed Lou Steele approached the Odd Fellows about access issues. (TT 52:19-53) Ed Smith, former President of the Odd Fellows also testified that Mr. Steele came to board meetings to ask for permission to access

their property through Odd Fellows' roads. As a result, the evidence actually shows that the Boy Scouts corroborated testimony of Mr. Smith.

The testimony of Ed Smith, Del Wallis and Ron Hawke was credible, unimpeached, uncontradicted and fully sufficient to meet the Odd Fellows' burden of proving the Boy Scouts access was permissive. Accordingly, the Boy Scouts failed to prove an essential element of their prescriptive easement claim, that their use was "hostile."

The Boy Scouts next argue that even if the Court assumes the Scouts use of the roads was permissive during the time periods discussed by the witnesses, that is from about 1972 to the present, there is no evidence of permission going back to 1929. The problem with this argument is that there is no evidence that the Scouts or their predecessors actually used Odd Fellows' roads from 1929 to 1972. Moreover, there is no evidence that such roads even existed prior to 1948. Mr. Anderson testified that the Boy Scouts began using Camp Cedarbrook in 1972 and that their easement claims began at that point.

A preponderance of the evidence proves that the Odd Fellows gave permission for the Boy Scouts to use their private roads and that the Boy Scouts' use was never hostile, within the meaning of the doctrine of prescriptive easements, for the required five year period. Accordingly, neither the Boy Scouts nor their predecessors in interest ever acquired a prescriptive easement and this claim should be rejected.

IV.
THE COMPLETE ABSENCE OF EVIDENCE OF A CLEAR AN UNAMBIGUOUS PROMISE REQUIRES THE PROMISSORY ESTOPPEL CLAIM TO BE REJECTED

The Boy Scouts agree that there must be a "clear and unambiguous promise" to support a claim for promissory estoppel. There is no question what words are alleged to comprise the promise: "It has never been our position to deny the Scouts access to their property, via our roads." The parties disagree whether this sentence is a clear and unambiguous promise or simply a statement of historical fact.

The Boy Scouts' attempt to distinguish the *Lange v. TIG Insurance* case (68 Cal.App.4th 1179 (1998).) was ineffective and unavailing. The significance of the case is that the court found a very similar expression of historical fact to be just that, and not a clear and unambiguous promise. The case is very clearly on point and the similarity in the language of the claimed promise to the one at issue here is absolutely striking. Just as in *Lange*, there is nothing in the words which could be construed as a promise.

Lange is also controlling because of the Boy Scouts' attempt to use extrinsic evidence to bolster their claim that the words constitute a promise. But in *Lange*, the court held, "It follows that if extrinsic evidence is needed to interpret a promise, then obviously the promise is not clear and unambiguous." (*Lange v. TIG Insurance* (1998) 68 Cal.App.4th 1179, 1186.) The more the Boy Scouts try to use extrinsic evidence and other circumstances to make their claim of a promise, the more certainly they prove that there was no "clear and unambiguous promise."

V.
THE EVIDENCE STILL DOES NOT SUPPORT EQUITABLE ESTOPPEL

Just as with promissory estoppel, the Boy Scouts must prove that the Odd Fellows led them "to do what he would not otherwise have done...." (See our Post Trial Brief, p. 30:8) This is another way of saying that there must be some proof of detrimental reliance. In our Post Trial Brief at pages 25-29 and again at page 30, we argued and cited to the evidence which shows there was no detrimental reliance. While most of the argument was located in a section dealing with promissory estoppel, it has equal application to the doctrine of equitable estoppel.

The evidence cited by the Boy Scouts consists of sentence fragments, speculation and conclusions taken out of their natural context and re-combined in a strained effort to show detrimental reliance where none exists. A careful reading of the Boy Scouts argument on pages 12 and 13 of their brief shows that they must rely upon a twisted reading of extrinsic facts to make any argument about a promise. The Scouts use a letter from the President of the *Boy Scouts Council* (not the owner of the land) which claims, but does not prove, easement rights as proof of reliance. But reliance by the *Council* is not reliance by the plaintiff, Foundation. The Scouts then argue that Mr. Smith's letter to Mr. Kidder, not to Mr. Thomas, is somehow evidence that the Odd Fellows "acknowledged" the existence of Council's easement claims. The letter does nothing of the sort and this argument is another example of the Boy Scouts attempts to mislead the Court. On this point, we respectfully ask the Court to refer to our original arguments found at pages 25-29 for a full refutation of this argument.

However, in summary, the Boy Scouts had their own informal request to close Bottini Apple Ranch Road to the West of Camp Cedarbrook and it is to this request that most of the evidence they rely upon pertains. Next, Exhibit 28 states that the *Alameda Council* had no objection so long as some unspecified easement rights were protected. However, the *Alameda Council* never owned the property, is not a party to this lawsuit, and its assumptions and reliance is irrelevant.

The county records do not specify what the Boy Scouts' representative said at the Board of Supervisors hearing on the road closure. However, since their letters concern their own request for a road closure and the county records refer to the same thing, it is reasonable to conclude that they appeared to argue for their own road closure. The Boy Scouts now claim that it would make little sense for the Boy Scouts to seek the abandonment of the County Road, yet the county records show that is exactly what they sought. The evidence shows the Scouts sought and obtained the closure of the County Road each year from 1984 through 1991 and in 1992 the County Road was abandoned through

Odd Fellows. After 1992, there is no evidence the Scouts ever again sought closure of the County Road to the West, presumably because their purpose of stopping through traffic was accomplished.

It is particularly misleading for the Scouts to argue, as they did at page 13, lines 19-20, that "Nonetheless, the Odd Fellows represented that *they would not* 'deny the Scouts access.'" (Emphasis added.) The placement of the internal quotation marks and the use of the word "would" suggests a promise that never existed and tries to change the entire meaning of the sentence. The sentence actually states: "It has never been our position to deny the Scouts access to their property, via our roads." This sentence refers to the past not the future. This is another blatant attempt to mislead the Court and it casts a shadow of doubt on the Scouts other arguments as well.

VI.
CONCLUSION

The Boy Scouts had six weeks to prepare their reply brief, but they have still not made their case. The evidence still fails to establish the essential elements of the Boy Scouts' claims. The Defendants' Post Trial Brief challenged the Boy Scouts to cite evidence in support of their arguments but they continue to make naked claims, arguments and conclusions without a shred of evidence to support them.

The Boy Scouts appear to have conceded or abandoned many of their claims, presumably recognizing that they have no basis in fact. However, the Scouts continue to obfuscate and mislead the Court by their misuse of evidence and by claiming that documents say things which they do not say.

There is no evidence of any personal liability by Mr. Wallis nor any allegation that he did anything wrong; no evidence of the existence of any private roads on what is now Odd Fellows' property in 1929 or at any time until at least 1948; no evidence of any pre-existing use of private roads (if they existed) prior to severance from common ownership; no evidence from which the reasonable contemplation of Mr. Sylvester could be ascertained; no evidence of the grantor's (Mr. Sylvestor) intent; no evidence of any strict necessity now or ever; no evidence the property is landlocked; no evidence of any reasonable necessity; no evidence that Plaintiff ever used Odd Fellows' roads prior to 1972; no evidence of any promise and certainly no clear and unambiguous promise; no evidence of detrimental reliance, and; no evidence of any inequitable conduct by the Odd Fellows.

The Odd Fellows have proved that they gave permission to the Boy Scouts to use their roads year after year after year. Three credible witnesses testified on these points, Del Wallis, Ed Smith and Ron Hawke. There was no evidence to contradict or impeach them and to some extent, Mr. Anderson actually corroborated them.

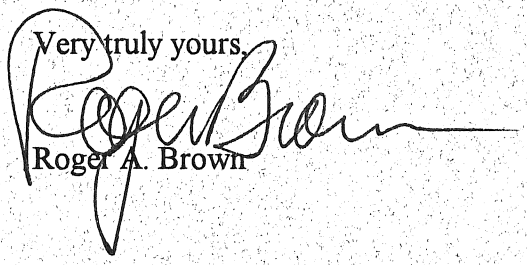
The Boy Scouts claim easements for access to a camp they do not even use much anymore. The claimed easements were abandoned when Old Wheeler Road and the County Road through Odd Fellows Park were abandoned. The Boy Scouts rejected the Odd Fellows' offer of a license for as long as they owned the property because
they want to sell it. The Boy Scouts know that the property would command a higher price with paved access rights through Odd Fellows Park and that is what this case is really about. The Boy Scouts simply want to gain a right of access they can pass along to a downstream buyer. The Boy Scouts want to profit from the industry, prudence, investments and diligence of the Odd Fellows at no expense to themselves.

The Odd Fellows' internal roads are superior to the access roads otherwise available to the Boy Scouts and their successors in interest. However, that is no reason to award the Scouts a windfall easement to which they are not entitled. The Odd Fellows should not be punished because the Boy Scouts allowed their roads to deteriorate while the Odd Fellows improved their own. Such a result would turn public policy on its head.

The Boy Scouts have the burden of proof and they failed utterly to sustain that burden. The Court has exercised its discretion repeatedly to give the Boy Scouts every possible opportunity to make its case and yet they still fail to do so. The time has come to bring this case to an end.

Defendants respectfully ask this honorable Court to find for the Defendants on all causes of action and to thereby obviate the need for any further proceedings on the Boy Scouts' spurious claims of damages.

Very truly yours,



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