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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT G. WRIGHT, JR. PLAINTIFF(S), v. FEDERAL BUREAU OF INVESTIGATION, et al. DEFENDANT(S).	CASE NUMBER: CV 05-1223-RGK (JTLx) **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Robert G. Wright, Jr. hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(b)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(c)(5)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

☒ Order (specify):
Denial of Motion to Compel; Denial of Motion for Review
☐ Judgment (specify):

☐ Other (specify):

Entered in this action on June 10 and August 12, 2005.

A copy of said judgment or order is attached hereto.

September 8, 2005
Date

Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT G. WRIGHT, JR., Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, ET AL., Defendants.	NO. MISC. CV 05-1223-RGK(JTLx) ORDER RE PLAINTIFF'S MOTION TO COMPEL NON-PARTY JOURNALIST JAMES CROGAN TO TESTIFY AT DEPOSITION AND PRODUCE DOCUMENTS (Civil Action No.: 03C-5876 United States District Court, Northern District of Illinois, Judge Charles R. Norgle)

On April 12, 2005, the Court heard argument on plaintiff's Motion to Compel Non-Party Journalist James Crogan to Testify at Deposition and Produce Documents, which the parties filed on February 17, 2005. Thereafter, the Court took the matter under submission. Upon review of the pleadings filed in this matter and the argument presented by counsel, the Court rules as follows:

On August 21, 2003, plaintiff filed an action in the United States District Court, Northern District of Illinois, entitled Wright v. FBI, et al., No. 03C-5776. In that action, plaintiff alleges that the Federal Bureau of Investigation ("FBI") and U.S. Department of Justice ("DOJ") violated his rights under the Privacy Act, 5 U.S.C. §

10

552a (2000). The action is premised upon a claim that FBI Special Agent (SA) Royden Rice disclosed information about plaintiff that was protected under the Privacy Act to journalist James Crogan, a freelance journalist. Plaintiff claims that Crogan then had a conversation with plaintiff and his attorney, Douglas Schippers, and discussed with them the confidential information that SA Rice had disclosed to Crogan.

Plaintiff now seeks information from Crogan, who is not a party to this action, by taking his deposition and requesting documents regarding his contacts with SA Rice. Crogan objected to the deposition subpoena and request for documents and informed plaintiff that he would refuse to answer any questions regarding his conversations with SA Rice, Schippers, or plaintiff, and that he would assert the journalist's qualified First Amendment privilege. Crogan also objected to plaintiff's request for documents, asserting that the documents were protected by the qualified privilege. (Joint Stip. at 3-4).

A qualified privilege exists for journalists that protects them against compelled disclosure of information gathered in the course of their work. Schoen v. Schoen, 5 F.3d 1289, 1292 n. 5 (9th Cir. 1993) ("Schoen I"). "Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice. Schoen, 5 F.3d at 1292. In Schoen v. Schoen, 48 F.3d 412, 416 (9th Cir. 1995) ("Schoen II"), the Ninth Circuit clarified the test for determining whether a civil litigant's

interest in disclosure was sufficient to override a journalist's privilege. The Court noted that the test it adopted must ensure that compelled disclosure was the exception, not the rule. Id. at 415. The Court reasoned that frequent court-compelled disclosures could encourage destruction of research materials soon after publication. Id. Moreover, "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Id. (quoting Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981). The Court then held that a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a nonparty only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. Furthermore, there must be a showing of actual relevance; a showing of potential relevance was not sufficient. Id. at 416.

In this case, the first two elements of the test set forth in Schoen II have been satisfied. Plaintiff has already taken the depositions of SA Rice, Schippers, and plaintiff. Second, an issue exists as to what SA Rice specifically told Crogan during their conversations. Thus, Crogan's testimony, and the information sought by the document requests, would not be cumulative. The third factor that plaintiff must address is whether the information sought is clearly relevant to an important issue in the case. It is here that the court must closely examine the arguments raised by both parties. Plaintiff contends that the information SA Rice disclosed to Crogan pertains to a major issue in the case and, therefore, Crogan's

testimony is clearly relevant. On the other hand, Crogan argues that the information is not protected under the Privacy Act, which is the crux of plaintiff's action, because plaintiff, himself, disclosed the information earlier and it was already in the public domain.

Information that is already made public is not protected by the Privacy Act. See Barry v. U.S. Department of Justice, 63 F. Supp. 2d 25, 28 (D.C. Cir. 1999) (plaintiff had no protectable privacy interest in a report posted on the Internet because it had already been released to the media); Ash v. United States, 608 F.2d 178, 179 (5th Cir. 1979) (disclosure of information in proceeding that was open to Navy personnel was in that sense public and was not a "disclosure" under the Privacy Act). Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-495 (1975) ("even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record").

The Complaint filed in this action alleges that defendants violated plaintiff's rights under the Privacy Act, 5 U.S.C. § 552a. (See Complaint, Exh. D to Joint Stip). As set forth in the Complaint, the Privacy Act allegations revolve primarily around the claim that SA Rice disclosed information pertaining to plaintiff's involvement in Internal Affairs ("IA") investigations and an investigation being conducted of the Office of Professional Responsibility ("OPR"). (See Complaint at ¶s 9, 11, 19, and 20). A violation under the Privacy Act requires the following: (1) the agency "disclosed" information; (2) the information "disclosed" a "record" contained within a "system of records;" (3) an adverse impact resulted from the disclosure; and (4) the agency's disclosure was willful and intentional. 5 U.S.C. § 552a.

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Plaintiff also alleges that in addition to the information protected by the Privacy Act, SA Rice made other statements of fact that he knew were misleading or blatantly false. (See Complaint at ¶s 11-15). In the Joint Stipulation, plaintiff contends that SA Rice disclosed the following information to Schippers: (1) plaintiff had been involved in ten internal affairs investigations, indicating he had a poor record as an agent; (2) there were a number of agents in plaintiff's squad who could provide adverse information about plaintiff; and SA Rice would recommend that Crogan be permitted to interview these agents; (3) plaintiff currently was under internal investigation by the FBI; (4) plaintiff maintained a side business and operated a website as part of that side business; and (5) the United States Attorney in Chicago closed criminal and civil cases against a terrorist suspect because plaintiff had not produced sufficient evidence to support any charges.

More specifically, however, plaintiff has testified in his deposition that the following four items form the basis of his Privacy Act claim: (1) a 1999 investigation by the FBI's Office of Equal Employment Opportunity Affairs ("EEO") in response to another agent's racial discrimination complaint; (2) a 1999 investigation by OPR concerning a sexual harassment complaint made against him by SA Karen Medernach; (3) the June 2003 investigation by OPR relating to an unauthorized press conference that plaintiff held on June 2, 2003; and (4) plaintiff's website called "Little Bobby Creations" relating to plaintiff's business of selling baby furniture. (Exh. D at 211:7-212:5 to Joint Stip). Thus, it appears that the Privacy Act claim, which is the sole claim in the Complaint, revolves around these four claims only.

Yet information regarding these topics had already been placed in the public domain by plaintiff himself, through press conferences or on his own website, and, in the case of the sexual harassment complaint, as a result of a publicly filed lawsuit. (See Joint Stip. at 6-7). The fact that the information that forms the crux of plaintiff's Privacy Act claims was already in the public domain undermines plaintiff's claim. Thus, plaintiff's argument that the information is crucial to establishing his claim is not persuasive.[1] Moreover, the facts in this case do not involve public information that could have only been found in isolated public records. See Barry, 63 F. Supp. 2d at 28 (distinguishing cases involving information that may have been "public" but that could be found only in isolated public records and finding that "[t]here was nothing isolated or obscure about the [] in this case").

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[1] Plaintiff filed a Second Supplemental Memorandum in which he referred to two cases, Quinn v. Stone, 978 F.2d 126, 134 (3d Cir. 1992) and Gowan v. Dep't of the Air Force, 148 F.3d 1182, 1193 (10th Cir. 1998)(relying upon Quinn) in support of his argument that information disclosed as a matter of public record is not a defense to a Privacy Act violation. The court in Quinn found that making available information which is readily accessible to members of the public is a disclosure under the Privacy Act. Quinn, 978 F.2d at 134. Notwithstanding this, both Quinn and Gowan are distinguishable. Neither case involved a situation where the complaining plaintiff was responsible for putting forth the information in the public domain. Here, plaintiff issued press releases, held press conferences, and established a website discussing the information of which he now complains. Furthermore, the court in Quinn observed that several courts have held that there is no violation under Section 552a if each individual member of the public is presumed to know the information at issue. Id. at 135 (court found that one cannot presume that the public knows of addresses and telephone numbers of all persons listed in a local telephone book). In this case, the public domain into which the subject information was presented was far more reaching (i.e., through a press release, a press conference, and the Internet).

Finally, upon balancing plaintiff's request against the strong policy considerations in favor of upholding the journalist's privilege, see, e.g., Zerilli, 656 F.2d at 712, this Court cannot find that plaintiff has met his burden in establishing the clear and actual relevance of the information sought to the claims. Accordingly, plaintiff's Motion to Compel is DENIED without prejudice.[2]

DATED: June 9, 2005

JENNIFER T. LUM
UNITED STATES MAGISTRATE JUDGE

[2] Because plaintiff's Privacy Act claim may evolve in the future as a result of additional discovery or pre-trial motions and rulings, this Court's Order is without prejudice to plaintiff renewing his discovery request in the future.

P-SEND

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 05-1223-RGK (JTLx) Date August 12, 2005

Title *ROBERT G. WRIGHT, JR. v. FEDERAL BUREAU OF INVESTIGATION, et al.*

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE		
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) PLAINTIFF'S MOTION FOR REVIEW OF MAGISTRATE'S JUNE 10, 2005 RULING (DE 12)**

I. FACTUAL BACKGROUND

Robert Wright ("Plaintiff") filed an action in the United States District Court, Northern District of Illinois. In the action, Plaintiff alleges that the Federal Bureau of Investigation ("FBI") and U.S. Department of Justice ("DOJ") violated his rights under the Privacy Act, 5 U.S.C. § 552a. Plaintiff's action is premised upon a claim that FBI Special Agent Royden Rice ("Agent Rice") disclosed information from Plaintiff's FBI personnel records to journalist James Crogan ("Crogan") without Plaintiff's consent.

Plaintiff served Crogan, who is not a party to this action, with a subpoena *duces tecum* requiring him to appear for a deposition and produce documents. Crogan objected to the deposition subpoena and request for documents based on a qualified First Amendment privilege that protects journalists against compelled disclosure of information gathered in the course of their work.

Plaintiff moved to compel, and on February 17, 2005, Plaintiff and Crogan submitted a Local Rule 37-2 Joint Stipulation and supporting documentation to the Court in which Plaintiff contends that Agent Rice disclosed the following information: (1) Plaintiff had been the subject of ten FBI internal affairs investigations, thus indicating that he had a poor record as an agent; (2) there were a number of agents in Plaintiff's squad who could provide adverse information about Plaintiff, and Agent Rice would recommend Crogan be permitted to interview the agents; (3) Plaintiff was currently under investigation by the FBI; (4) Plaintiff maintains a side business and operates a website as part of that side business; and (5) the United States Attorney in Chicago, not the FBI, closed criminal and civil cases against terrorist suspect Mohammed Salah because Plaintiff had not produced sufficient evidence to support any charges.

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Magistrate Judge Jennifer T. Lum denied Plaintiff's motion to compel. Judge Lum held that the information that formed the crux of Plaintiff's Privacy Act claim was already in the public domain, and thus was not crucial to establishing Plaintiff's claim. (Order at 6.) Furthermore, in balancing the policy considerations that favor upholding the journalist's privilege, Judge Lum found that Plaintiff did not meet his "burden in establishing the clear and actual relevance of the information sought to the claims." (Order at 7.)

Plaintiff now asks the Court to review Judge Lum's order. For the following reasons, Plaintiff's Motion is denied.

II. JUDICIAL STANDARD

The district court's review of nondispositive decisions by a magistrate judge is limited to a determination of whether the decision is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A).

III. DISCUSSION

A qualified privilege exists for journalists to protect themselves against compelled disclosure of information gathered in the course of their work. *Schoen v. Schoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) ("*Schoen I*").

> Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.

Schoen I, 5 F.3d at 1292 (citation omitted).

In *Schoen v. Schoen* ("*Schoen II*"), the Ninth Circuit set forth the following test to determine whether the civil litigant's interest in disclosure overrode the journalist's qualified privilege. 48 F.3d 412, 416 (9th Cir. 1995). The *Schoen II* court noted that the test makes disclosure the exception rather than the rule. *Id.* at 415. "Indeed, if the privilege does not prevail in all by the most exceptional cases [the privilege's] value will be substantially diminished." *Id.* (quoting *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). The civil litigant's interest overrides the journalist's privilege if the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. The litigant must show actual relevance; a showing of potential relevance is not sufficient. *Id.* at 416.

In Plaintiff's Motion to Compel, Judge Lum found that Plaintiff satisfied the first two elements of the *Schoen II* test, but did not satisfy the third element. Judge Lum found that Plaintiff's lawsuit revolved around four factual assertions set forth in Plaintiff's deposition. Since the four assertions were already in the public domain, Judge Lum found that the evidence Plaintiff sought was not clearly relevant to an important issue in the case.

A. Judge Lum's Evaluation of Plaintiff's Four Specific Allegations is not Erroneous.

Plaintiff asserts that Judge Lum erred in finding that Plaintiff's "suit revolved around only four factual assertions." (Order at 5-6.) In a Supplemental Memorandum of Law ("Supplemental Memorandum") filed under Local Rule 37-2.3, Plaintiff argues that he clarified his Privacy Act claims. The Supplemental Memorandum asserts claims beyond those specified in his deposition and relied upon by Judge Lum. Thus,

Plaintiff argues that Judge Lum's findings are clearly erroneous because Judge Lum did not evaluate Plaintiff's true factual contentions. Plaintiff contends that Agent Rice disclosed that Plaintiff was the subject of ten internal investigations, not merely the three investigations that Plaintiff discussed in his deposition.

Crogan argues that Judge Lum did not err in relying on Plaintiff's own sworn deposition testimony. Crogan further asserts that Plaintiff cannot rewrite his claims in a supplemental memorandum. The Court, Crogan asserts, should follow the Ninth Circuit's rule for motions for summary judgment that states that "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). Crogan asserts that the *Kennedy* rule should guide judges when evaluating other motions. Thus, in light of *Kennedy*, Judge Lum properly relied upon Plaintiff's deposition testimony.

Judge Lum's evaluation of the four specific claims asserted in Plaintiff's deposition is not erroneous. The Supplemental Memorandum contends that Agent Rice disclosed to Crogan that Plaintiff was the subject of ten internal investigations. In an attempt to evaluate Plaintiffs' claims more specifically, Judge Lum elected to review the more specific claims set forth in the deposition testimony. Plaintiff has not provided sufficient legal authority to demonstrate that Judge Lum erred in evaluating the claims set forth in Plaintiff's deposition. Plaintiff failed to provide case law supporting the proposition that Judge Lum should have focused on the claims outlined in Plaintiff's Supplemental Memorandum rather than the deposition testimony. Courts have held that "in reviewing discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused." *Litton Indus. Inc. v. Lehman Bros. Kuhn Lobe, Inc.*, 125 F.R.D 51 (S.D.N.Y. 1989) (quoting *Citicorp v. Interbank Card Ass'n*, 478 F.Supp 756, 765 (S.D.N.Y. 1979)); *see also Geophysical Sys. Corp. v. Raytheon Co., Inc.*, 117 F.R.D. 646, 647 (C.D. Cal. 1987) (abuse of discretion standard appropriate when reviewing discovery matter concerning issue of relevancy). Judge Lum is therefore afforded a broad discretion in evaluating Plaintiff's own sworn testimony. Thus, the Court finds that Plaintiff failed to provide sufficient support to find that Judge Lum's evaluation of Plaintiff's deposition is either clearly erroneous, or contrary to law.

B. <u>Judge Lum Correctly Held that Crogan's Testimony and Notes are Not "Clearly Relevant" as the Information is in the Public Domain.</u>

Plaintiff does not dispute that *Schoen II* governs whether Crogan's assertion of the qualified First Amendment privilege for journalists may survive. 48 F.3d 412. However, Plaintiff contends that Judge Lum improperly applied the third prong of the test—that the testimony must be clearly relevant to an important issue in the case. *Id.* Plaintiff argues that whether or not information is a matter of public domain is not a defense to a Privacy Act claim. Furthermore, Plaintiff argues that Crogan is the only source of direct evidence as to what Agent Rice said to Crogan during their 2003 telephone call. Thus, Plaintiff argues that the information Plaintiff seeks from Crogan is clearly relevant.

Crogan asserts that Judge Lum correctly held that Crogan's testimony and unpublished notes are not "clearly relevant" because Plaintiff had already placed the information in the public domain.

The Court finds that Judge Lum did not err in finding that Plaintiff's claims were already in the public domain. Thus, Plaintiff's argument that the information is crucial to establishing his claim is not persuasive. To allege a Privacy Act violation, the plaintiff must first show that the agency disclosed information. *Barry v. United States Dep't of Justice*, 63 F. Supp. 2d 25, 27 (D.D.C. 1999). Courts have held that there is no disclosure under the Privacy Act when the information is already placed in the public record. *See e.g., id.* at 28; *Krowitz v. Dep't of Agric.*, 641 F. Supp. 1536, 1545 (W.D. Mich. 1986) ("if the information disclosed is previously known, the disclosure does not violate the Privacy Act); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 497 (1975) (television station could not be held liable for invasion of privacy for publishing the name of a rape victim whose identity had been revealed in a public record). Judge Lum

evaluated each claim to find that Plaintiff himself revealed the information to the public through press conferences, his own website, and in a publicly filed lawsuit. (*See* Join Stipulation at 6-7.) Thus, Judge Lum did not err in finding that information from Agent Rice's was already in the public domain.

Judge Lum did not err in distinguishing *Quinn* and *Gowan* in finding that Agent Rice's conversation did not amount to a disclosure. Both cases are distinguishable as neither "involve[s] [a] situation where the complaining plaintiff was responsible for putting forth the information in the public domain." (Order at 6 n.1.); *Quinn*, 978 F.2d 126, 134-35 (3d Cir. 1992) (holding that the plaintiff's home address published in a local telephone directory did not support a presumption that the public knew of the information); *Gowan*, 148 F.3d 1182 (10th Cir. 1998) (holding that even though the information was a topic of conversation on a military base, the Air Force was liable for Privacy Act "disclosure"). Here, Plaintiff himself disseminated information to the press and public. Plaintiff issued press releases, held press conferences, and established a website discussing the information of which he now complains. (Order at 6 n.1.) The public domain into which Plaintiff presented the information was far more reaching than a public phone directory or the confines of a military base. Furthermore, *Quinn* observed that several courts held that there is no violation under Section 552a if each individual member of the public is presumed to know the information at issue. *Id.* at 35. Thus, Judge Lum found that Agent Rice's conversation did not amount to a disclosure since the information was already available to the widespread public. Given these distinguishing factors, Judge Lum did not err in finding that Crogan did not witness a Privacy Act violation. Thus, Crogan's testimony is not relevant to the issue in this case. *Schoen II*, 48 F.3d at 416.

Judge Lum, in evaluating the policy considerations, was not erroneous in finding that Plaintiff failed show a necessity to overcome Crogan's constitutional protection. Thus, the privilege is not waived. Judge Lum's ruling is neither clearly erroneous nor contrary to the controlling law.

IV. CONCLUSION

In light of the foregoing, Plaintiff's Motion to Review is **denied**.

IT IS SO ORDERED.

Initials of Preparer slw

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2540 Huntington Drive, Suite 201, San Marino, California 91108.

On September 9, 2005, I served the foregoing document described as

NOTICE OF APPEAL

by placing a true and correct copy thereof in a sealed envelope addressed as follows:

Counsel for Defendants Federal Bureau of Investigation and U.S. Department of Justice:

Matthew Lepore
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044

Linda A. Wawzenski
Assistant United States Attorney
U.S. Attorney's Office
219 S. Dearborn Street, Fifth Floor
Chicago, IL 60604

Counsel for Non-Party Journalist James Crogan:

Alonzo Wickers, IV
Susan E. Seager
Davis Wright Tremaine LLP
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Los Angeles, CA 90017-2566

I caused such envelope to be deposited in the U.S. mail, with postage thereon fully prepaid, at San Marino, California. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at San Marino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. and that this declaration was executed on September 9, 2005 at San Marino, California.

CONSTANCE S. RUFFLEY