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ENDORSED FILED
 SUPERIOR COURT
 COUNTY OF SAN FRANCISCO
 OCT 24 2003
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6 Attorneys for Defendant and Respondent,
 California Board of Chiropractic Examiners
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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 9 **FOR THE COUNTY OF SAN FRANCISCO**

11 **LAURENCE TAIN, D.C., DONALD NIELSEN, D.C.,**
ROBERT BITTERS, D.C., STEPHANIE
 12 **WATTENBERG, D.C., and LORI PRESCOTT, D.C.,**

13 Plaintiffs and Petitioners,

14 vs.

15 **STATE BOARD OF CHIROPRACTIC EXAMINERS,**
CALIFORNIA ACUPUNCTURE BOARD,
 16 **COUNCIL ON CHIROPRACTIC EDUCATION,**
 and DOES 1 to 20,

17 Defendants and Respondents.

Case No. CGC-03-419378

**CALIFORNIA BOARD OF
 CHIROPRACTIC EXAMINERS'
 REPLY TO PLAINTIFFS'
 OPPOSITION TO DEMURRER
 TO SECOND AMENDED
 COMPLAINT FOR
 DECLARATORY RELIEF,
 INJUNCTIVE RELIEF,
 AND WRIT OF MANDATE**

Date: October 29, 2003
 Time: 9:30 a.m.
 Department: 502

19 **INTRODUCTION**

20 **COMES NOW** Defendant and Respondent, California State Board of
 21 Chiropractic Examiners ("Chiropractic Board"), and makes and files this reply to the opposition
 22 of plaintiffs and petitioners to the Chiropractic Board's demurrer to plaintiffs and petitioners'
 23 Second Amended Complaint ("Opposition"). For all the reasons set forth herein, plaintiffs
 24 and petitioners' ("plaintiffs") opposition fails, and the demurrer of the Chiropractic Board
 25 should be sustained without leave to amend.

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COPY

ARGUMENT

I

PLAINTIFFS' ATTACK ON TITLE 16,
CALIFORNIA CODE OF REGULATIONS SECTION 302
IS CONTRARY TO THE BASIC PRINCIPLE OF STARE DECISIS
AND THEREFORE FAILS TO STATE A CAUSE OF ACTION

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At some point candor must prevail over artful pleading, and the Chiropractic Board maintains that the time for such candor has arrived. Although plaintiffs rehearse again to the court that they "are not engaged in the vane [sic] pursuit of seeking to have this court expand the scope of chiropractic practice" (Opposition at p. 1) and that they are "well aware of the limits of the courts' jurisdiction" (*ibid.*), the plain purport of plaintiffs' lawsuit is to persuade the court to disregard the holding of *People v. Fowler* (1938) 32 Cal.App.2d (Supp.) 737, which is dispositive of all issues presented in plaintiffs' first cause of action. (See Opposition at pp. 11-13.) Should plaintiffs succeed in this quest to avoid *Fowler's* controlling precedent of 65 years' duration, the court will have embarked on a journey of legislative revision of unforeseeable dimensions, whose goal is nothing less than to install a philosophical perspective which has continually failed to command persuasive professional or legislative support. (See plaintiffs' Attachment 4b to Case Management Statement at p. 1.)¹

As the Chiropractic Board previously pointed out to the court, plaintiffs actually concede that Title 16, California Code of Regulations section 302 ("Rule 302"), which is the object of their attack in their first cause of action, is consistent with the decision of the court in *Fowler*. (Chiropractic Board's Points and Authorities in Support of Demurrer ["Points and Authorities"] at p. 5, fn. 6, citing plaintiffs' Second Amended Complaint ["SAC"] at p. 16, ¶ 47.) Nevertheless, plaintiffs continue, by indirection, their attack on the scope of chiropractic practice enunciated in the *Fowler* rule, which has been followed consistently for 65 years by all

1. Defendant and respondent Board of Chiropractic Examiners hereby adopts and incorporates herein all relevant arguments of defendant California Acupuncture Board in its reply brief to plaintiffs' opposition to the Acupuncture Board's demurrer to plaintiffs' fourth cause of action in their Second Amended Complaint.

2.
Laurence Tain, D.C., et al., v. State Board of Chiropractic Examiners, et al. Case No. CGC-03-419378
California Board of Chiropractic Examiners' Reply To Plaintiffs' Opposition To Demurrer To Second Amended Complaint
For Declaratory Relief, Injunctive Relief, And Writ Of Mandate

1 California courts and numerous opinions of the Attorney General, and which forms the basis for
 2 Rule 302. (See Opposition at p.8, citing *Evans v. McGranaghan* (1935) 4 Cal.App.2d 204, p. 10,
 3 citing *In Re Hartman* (1935) 10 Cal.App.2d 213.)

4 Plaintiffs' attack on the Chiropractic Board's interpretation of the scope of
 5 chiropractic practice under Rule 302 is prohibited by the rule of *stare decisis*. As Witkin states:

6 "The doctrine of *stare decisis* expresses a *fundamental policy* of
 7 common law jurisdictions, that a rule once declared in an appellate
 8 decision constitutes a precedent that should normally be followed
 9 by certain other courts in cases involving the same problem. It is
 10 based on the assumption that certainty, predictability, and stability
 11 in the law are *major objectives of the legal system*; i.e., that parties
 12 should be able to regulate their conduct and enter into relationships
 13 with reasonable assurance of the governing rules of law."

14 (9 Witkin, *California Procedure*, 4th ed. 1997, § 917, pp. 953-954, emphasis added.)² A lower
 15 court that refuses to follow binding precedent of a higher court acts in excess of jurisdiction and
 16 is subject to correction by mandate. (Witkin, *op. cit.*, pp. 956-957, citing *Auto Equity Sales v.*
 17 *Superior Court* (1962) 57 C.2d 450.) The rule is almost invariably followed in the construction
 18 of statutes because of "the utmost importance that the statutory law be of certain meaning and
 19 fixed interpretation." (16 *California Jurisprudence*, 3d ed. 2002, § 303, pp. 822-823.) A major
 20 factor in determining the applicability of the rule of *stare decisis* is the long acceptance of a rule
 21 of decision by other cases, the legal profession, and the general public. (Witkin, *op. cit.*, § 951,
 22 pp. 995-997.)³

23 The decision in *Fowler* interprets the 1922 Chiropractic Initiative Act and
 24 determines that the scope of chiropractic practice does *not* allow the penetrating or severing of

25 2. See also 16 *California Jurisprudence*, 3d ed. 2002, p. 765: *Stare decisis* is a
 26 fundamental jurisprudential policy directed toward harmony and predictability of the law.

27 3. Long acceptance of a court decision is a "potent argument" in favor of allowing it
 28 to stand. (Witkin, *loc. cit.*) Cf. *Gardiner v. Royer* (1914) 167 C. 238, 242 (rule of 20 years
 standing and uniform adherence will not be disturbed); *Broadway-Locust Co. v. Industrial
 Acc. Comm.* (1949) 92 Cal.App.2d 287, 293 (rule of 30 years followed on basis of consistent
 administrative and case law interpretation and adjustment of industry to rule).

1 human tissue because chiropractic is defined as a system of spinal adjustment performed by hand
2 only, with limited adjunctive practices permitted that do not amount to the practice of medicine.
3 (Points and Authorities at p. 4, citing Fowler at p. 745 and sources found therein.) The Fowler
4 rule, which is the basis of and is clearly set forth in Rule 302, has been followed consistently
5 by courts and agencies for 65 years. (See Points and Authorities at p. 4, fn. 4, setting forth cases
6 and Opinions of the Attorney General following Fowler.)

7 Since this court cannot disregard the Fowler decision, and since Rule 302 follows,
8 and agrees and is consistent with, the Fowler decision, there is no legal or factual question as to
9 the chiropractic scope of practice despite plaintiffs' wishes that it had been otherwise historically.
10 Therefore, plaintiffs' first cause of action fails to state sufficient facts to constitute a cause of
11 action because (1) a cause of action for declaratory relief does not lie when there is no showing
12 that there actually is "more than one answer" to the asserted dispute (*Gillies v. La Mesa, etc.,*
13 *Irrigation Dist.* (1942) 54 Cal.App.2d 756, 762; and (2) injunctive relief is not available where
14 no independent cause of action for relief exists. (5 Witkin, *California Procedure*, 4th ed. 1997,
15 §779, p.236.)

16 II

17 NO CASE OR CONTROVERSY EXISTS AS TO "ADDITIONAL PRACTICE 18 RIGHTS" PURPORTEDLY DERIVED FROM AMENDMENTS 19 TO THE CHIROPRACTIC INITIATIVE ACT

20 Plaintiffs argued in their SAC that the 1948, 1970 and 1976 amendments to the
21 Chiropractic Initiative Act of 1922 ("Act") created "additional practice rights" to be effectuated
22 by course work designed to expand the scope of chiropractic practice. (SAC at pp. 19-22.)
23 Plaintiffs also contended that the Chiropractic Board is under a duty to write regulations to define
24 such course work as well as the expanded practice rights that would follow upon completion of
25 the course work. (*Id.* at pp. 22-23.) The Chiropractic Board in its Points and Authorities showed
26 that (1) no additional practice rights were created by any amendments to the Act; (2) that there
27 was no ambiguity in any of the amendments so as to bring them within the interpretative rule of
28 *Legislature v. Eu* (1991) 54 Cal.3d 492; and (3) that the administrative construction placed

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1 on the amendments by the Chiropractic Board contrary to the plaintiffs' contentions was entitled
2 to great weight and deference by the court. (Points and Authorities at pp. 7-9.)

3 Plaintiffs now shift their argument and state that the ambiguity resides not
4 in the amendments themselves, but in the phrase of the Act, "as taught in chiropractic schools
5 or colleges." (Opposition at p. 14.) Plaintiffs, however, in attempting to evade the force of
6 the Chiropractic Board's argument that there is *simply no mention* of "increased practice rights"
7 in the amendments themselves, forget that the *Fowler* case clearly determined the meaning of
8 that phrase and eliminated any ambiguity as to its possible meaning.

9 In *Fowler* the court stated:

10 "Section 7 is the only provision of the Chiropractic Act
11 which undertakes either to define or describe chiropractic or to
12 declare what is authorized by a license issued under the act [sic].
13 The authorization is in two parts. 1" 'to practice chiropractic . . .
14 as taught in chiropractic schools or colleges,' and 2d 'to use all
15 necessary mechanical, and hygienic and sanitary measures incident
16 to the care of the body.' . . . The practice authorized must be
17 'chiropractic,' and it must also be 'as taught in chiropractic schools
18 or colleges.' Neither of these expressions can rule the meaning
19 of the statute, to the exclusion of the other." (*Id.* at p. 745.)

20 After showing that the meaning of "chiropractic" was well defined and established
21 at the time of the passage of the Act in 1922 (see *id.* at pp. 745-746), the *Fowler* court then
22 turned its attention to the meaning of the phrase "as taught in chiropractic schools or colleges."

23 The court explained the meaning of the phrase as follows:

24 "Were the word 'chiropractic' of unknown, ambiguous or
25 doubtful meaning, this clause 'as taught,' etc., might serve to
26 provide a means of defining or fixing its signification, but there
27 is no such lack of clarity. The scope of chiropractic being well
28 known, the schools and colleges, as far as the authorization
of the chiropractor's license is concerned, *must stay within its
boundaries; they cannot exceed or enlarge them.* The matter left
to them is merely *the ascertainment and selection of such among
the possible modes of doing what is comprehended within that term
[sc. chiropractic] as may seem to them best and most desirable,*
and so the fixing of the standards of action in that respect to be
followed by chiropractic licensees. (*Id.* at p. 747, emphasis added.)

29 The *Fowler* court then approved the following instruction of the trial court:

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"It is thus seen that the authority granted to a chiropractor to practice the arts taught in chiropractic schools and colleges is limited by the restriction that *such practice may not invade the field of medicine or surgery*, nor may the chiropractor use any drug or medicine in *materia medica* (italic in original), *even though certain phases of the practice of medicine or surgery or the use of such drugs or medicines may have been taught in chiropractic schools or colleges*. In other words, the chiropractor is limited to the practice of chiropractic and the use of mechanical, hygienic and sanitary measures incident to the care of the body, which do not invade the field of medicine and surgery, irrespective of whether or not additional phases of the healing art, including medicine or surgery or the use of drugs may have been taught in chiropractic schools or colleges." (*Id.* at p. 748, emphasis added.)

In concluding its treatment of the meaning of this phrase, the *Fowler* court

concluded:

"Neither as to the described 'measures' authorized by section 7,⁴ nor as to the limitations upon them by the proviso,⁵ does the statute confer any *selective function* upon chiropractic schools or colleges. They cannot, by teaching any measures which are properly a part of the practice of medicine, or otherwise banned by the proviso, prevent them from being such [sc. excluded from the practice of chiropractic], or otherwise authorize chiropractors to make use of them." (*Id.* at p. 750, emphasis added.)

Thus, contrary to plaintiffs' latest argument, there is no ambiguity in the Act itself as to the phrase "as taught in chiropractic schools or colleges" since that phrase has been thoroughly construed and explained by the *Fowler* decision. Moreover, the Chiropractic Board showed in its Points and Authorities that there is no ambiguity in the amendments themselves as to the creation of any "additional practice rights" to be gained by chiropractors. As the law does not support plaintiffs' claims and the Chiropractic Board's interpretation is entitled to deference from the court, plaintiffs have failed to state sufficient facts to constitute a cause of action as to

4. The "measures" referred to are those "necessary mechanical, hygienic, and sanitary measures incident to the care of the body" permitted to the chiropractor by Section 7 of the Act.

5. The "proviso" is the restriction on the authority granted by the Act that such authority does not include "the practice of medicine, surgery, osteopathy, dentistry, or optometry, or the use of any drug or medicine now or hereafter included in materia medica." See Bus. & Prof. Code section 1000-7.

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1 their second cause of action, and the Chiropractic Board's demurrer thereto should be sustained.⁶

2 III

3 NO CASE OR CONTROVERSY EXISTS AS TO PLAINTIFFS' ATTACK
4 ON THE ROLE OF THE COUNCIL ON CHIROPRACTIC EDUCATION
5 IN ACCREDITING CHIROPRACTIC PROGRAMS

6 Plaintiffs' Opposition mischaracterizes the Chiropractic Board's argument
7 in support of its demurrer to plaintiffs' third cause of action as "picking up some catch phrases
8 from the case of *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 which it then misapplies
9 to the facts of this case." (Opposition at p. 18.) To the contrary, the Chiropractic Board has
10 identified the gravamen of the Supreme Court's analysis in the *Calfarm* case and applied it
11 accurately to show that plaintiffs' contentions are specious and misplaced.

12 Plaintiffs' challenge to the provision of national standards to the practice of
13 chiropractic in California by the Board through the Council on Chiropractic Education ("CCE") is
14 based on the provisions of Article II, section 12 of the California Constitution, which provides that

15 "No . . . statute proposed to the electors by the Legislature or
16 by initiative, that . . . names or identifies any private corporation
17 to perform any function or to have any power or duty, may be
18 submitted to the electors or have any effect." (*Id.*)

19 In *Calfarm, supra*, the Supreme Court signaled that something more than
20 simple-minded literal application of the constitutional language was required. In fact, a searching
21 inquiry into the interests protected by the provision and the evils to be avoided thereby was
22 necessary. The Court identified those evils as follows:

23 "The evil which the constitutional prohibition seeks to prevent—the
24 conferring of special privilege upon *some organization sponsoring*
25 *the initiative*—is most easily perpetrated by referring to an existing
26 entity. But if the prohibition were limited to existing entities,
27 it could easily be evaded by conferring a privilege upon some
28 future corporation, describing its formation and governance
29 so as to ensure its control by the *proponents of the initiative*."
30 (*Id.* at p. 833, emphasis added.)

31 6. This conclusion is strengthened by the fact that plaintiffs do not counter the Chiropractic
32 Board's showing that no reasonable elector could have thought that additional practice rights
33 were created by any of the amendments. (See Points and Authorities at p. 9, fn 9.)

34 7.

1 The Chiropractic Board has shown that a proper inquiry that examines the role of the CCE
 2 in light of the above language leads to the conclusion that the presence of the CCE in
 3 the initiative does not implicate the evils to be avoided by the constitutional prohibitions and,
 4 further, that no constitutional violation is established. (See Points and Authorities at p. 13.)

5 Furthermore, subsequent cases have followed the path of careful analysis
 6 of an organization's actual activities under the initiative statute as set forth by the *Calfarm* case.
 7 In *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, the court
 8 examined whether a named organization did, in fact, "perform any function" or "have any power
 9 or duty" under a popularly enacted statute. It is worth setting forth the court's analysis of the
 10 organization's role *in extenso*:

11 "... The proposition defines the 'Project' as a 'recycling collection
 12 center and landfill and associated structures and improvements
 13 as described in Section 3 of this initiative measure *as subsequently*
 14 *modified by a detailed site plan submitted by Applicant to the*
 15 *Integrated Waste Management Board as part of the solid waste*
 16 *facilities permit.'* (Citation omitted.) Thus the proposition
 17 provides the applicant (defined as Servcon) with the sole
 18 responsibility of preparing and submitting the site plan that
 19 will ultimately define the precise nature of the project created
 20 by the proposition. *This imposes functions, powers, and duties*
 21 *on Servcon within the meaning of article II, section 12. . . .*

22 [¶] Further, the initiative repeatedly states that the applicant
 23 'shall consult' with federal and state agencies and 'shall secure'
 24 numerous specified permits and approvals required by state or
 25 federal law. (Citation omitted.) The proposition also recognizes
 26 the applicant will be the operator of the solid waste facility and
 27 imposes on the applicant numerous duties and powers related
 28 to the operation of the facility. (Citation omitted.) For example,
 the initiative states the applicant (1) 'shall widen and realign
 State Route 76' (citation omitted); (2) 'shall . . . implement'
 a landscaping plan prepared by a licensed architect (citation
 omitted); (3) 'shall submit a mitigation and monitoring program
 meeting state and federal law to the Integrated Waste Management
 Board' (citation omitted); (4) 'shall maintain trained, full-time
 personnel engaged exclusively and continuously in the inspection
 of incoming refuse loads for hazardous waste' (citation omitted);
 and (5) 'shall retain a qualified archaeologist to investigate
 and recommend appropriate mitigation measures' and 'shall'
 implement these mitigation measures. (Citation omitted.) . . .

[¶] The initiative specifies functions and duties that Servcon
must perform in operating the facility and gives Servcon *exclusive*
authority to prepare a site plan, apply to operate, and operate
 the project." (*Id.* at p. 584-585, emphasis added only at lines

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15.5, et seq., and lines 26, et seq., *supra*.)

Thus, in addition to the fact that the CCE's presence in the initiative does not implicate the reasons for the enactment of Article II, section 12, the CCE's presence does not amount to the performance of any function or the possession of any power or duty as a result of the amendments, under the analysis of *Pala Band, supra*. Rather, the CCE, through its *independently* existing accrediting activities, serves merely as a resource or point of reference for determinations of the Chiropractic Board as to the qualifications of candidates for licensure. (See Points and Authorities at p. 12.) Of itself, the CCE actually does *nothing*, and is *required* to do nothing, as a result of its presence in the amendments.

Nor does the CCE, as a result of the amendments, possess or exercise *exclusive authority* as to the Chiropractic Board's determinations concerning qualifications of applicants for licensure. (Cf. *Pala Band, supra*, at p. 585.) Candidates for licensure may establish their qualifications through educational paths accredited by entities, other than the CCE, that are recognized by the U. S. Commissioner of Education or deemed equivalent by the Chiropractic Board. (Points and Authorities at p. 12, citing Bus. & Prof. Code section 1000-4(g).)⁷

Plaintiffs have failed to show a violation of California Constitution Article II, section 12 on the facts pled. Therefore, the Chiropractic Board's demurrer as to plaintiffs' third cause of action for declaratory relief must be sustained.⁸

7. The Chiropractic Board again notes that plaintiffs' construction of the role of the CCE under the amendments would produce the absurd result of a restriction of the Board's ability to apply nationally-recognized accreditation standards to a nationally practiced profession at a time of severely reduced public financing. Such an absurd result in constitutional interpretation is to be avoided. (*Stanton v. Parish* (1980) 28 Cal.3d 107, 115.)

8. Plaintiffs' second and third causes of action sounding in mandate are subject to demurrer despite plaintiffs' erroneous attempt to characterize their defects as going merely to a requested remedy. (See Opposition at pp. 4, 14, 17, 20.) Insofar as the Chiropractic Board has shown that plaintiffs' second and third causes of action in mandate fail to show a ministerial duty of the Board to act as plaintiffs demand, plaintiffs have failed to plead facts sufficient to constitute a cause of action in mandate. (Points and Authorities at pp. 9, 10, 14.)

9.

CONCLUSION

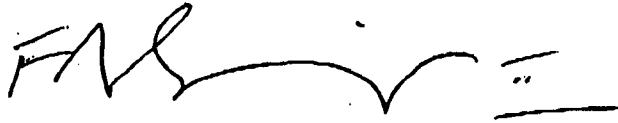
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For all the reasons appearing herein as well as the reasons set forth in the
Chiropractic Board's Points and Authorities in support of demurrer previously filed, defendant
and respondent California Board of Chiropractic Examiners requests that its demurrer to
plaintiffs' first, second and third causes of action in their Second Amended Complaint be
sustained without leave to amend.

DATED: October 24, 2003

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California



FRED A. SLIMP II
Deputy Attorney General

Attorneys for Defendant and Respondent
Board of Chiropractic Examiners

PROOF OF SERVICE

Page 1 of 2

CASE NAME: Laurence Tain, D.C., et al., v. State Board of Chiropractic Examiners, et al.**CASE NO.:** CGC-03-419378 In the Superior Court of California, County of San Francisco

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On October 24, 2003, I served the following document(s):

**CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS' REPLY TO
PLAINTIFFS' OPPOSITION TO DEMURRER TO SECOND AMENDED
COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF,
AND WRIT OF MANDATE**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Certified Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Messenger Service:** I caused each such envelope to be delivered by a courier, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (E) **By Facsimile:** I caused each such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (F) **By E-mail:** I caused each such document to be served via electronic equipment transmission (E-mail) on the parties in this action by transmitting a true copy to the following E-mail addresses listed under each addressee below.

PROOF OF SERVICE

Page 2 of 2

TYPE OF SERVICE

ADDRESSEE

(A)

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(A)

Michael J. Schroeder, Esq.
1851 East First Street, Suite 1160
Santa Ana, CA 92705

**Attorney for
COUNCIL ON CHIROPRACTIC EDUCATION**

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 24, 2003, at Oakland, California.

DAVID B. MOSS
(Typed Name)


(Signature)