

9/22/69

Memorandum 69-112

Subject: Study 44 - Fictitious Business Name Statute

At the last meeting, after considerable discussion, the Commission decided to recommend that the fictitious business name statute be dropped from its agenda. The Commission took this action because it was unwilling to recommend that the sanction suggested by the representatives of the newspaper industry--requiring banks to police the statute--be enacted as law. At the same time, the Commission directed the staff to prepare a revised tentative recommendation that would make the various clarifying changes and changes designed to improve the administration of the statute but would keep the existing publication requirement and sanction. The attached tentative recommendation is prepared in response to this directive. The staff believes that a careful reading of the new tentative recommendation prior to the meeting will demonstrate that it would considerably improve the law.

Also attached as Exhibit I are the revisions of the proposed tentative recommendation that would be necessary to include those suggestions of the newspaper industry that have not already been included in the tentative recommendation.

The staff suggests that the Commission go through the tentative recommendation section by section at the meeting. This would not take a great deal of time since most of it has previously been reviewed.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

Section 1. Section 17917 of the Business and Professions Code, as added by Senate Bill No. ___, as enacted at the 1970 Regular Session, is amended to read:

17917. (a) Within 30 days after a fictitious business name statement has been filed pursuant to this chapter, the registrant shall cause the statement to be published pursuant to Government Code Section ~~6064~~ 6063 in a newspaper of general circulation in the county in which the principal place of business of the registrant is located or, if there is no such newspaper in that county, then in a newspaper of general circulation in an adjoining county. If the registrant does not have a place of business in this state, the notice shall be published in a newspaper of general circulation in Sacramento County.

(b) Subject to the requirements of subdivision (a), the newspaper selected for the publication of the statement should be one that circulates in the area where the business is to be conducted.

(c) Where a new statement is required because the prior statement has expired under subdivision (a) of Section 17920, the new statement need not be published unless there has been a change in the information required in the expired statement.

(d) An affidavit showing the publication of the statement shall be filed with the county clerk within 30 days after the completion of the publication.

Sec. 2. Section 862 is added to the Financial Code, to read:

862. Before any person required to comply with Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code is permitted to open an account in a fictitious business name, such person shall furnish evidence that he has complied with the requirements of that chapter. For the purposes of this section, a copy of a newspaper containing the published fictitious business name statement, or a proof thereof, is sufficient evidence of compliance.

Sec. 3. This act shall become operative only if Senate Bill No. is enacted by the Legislature at its 1970 Regular Session, and as enacted adds Section 17917 to the Business and Professions Code, and in such case at the same time as Senate Bill No. takes effect.

Revised September 15, 1969

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

FICTITIOUS BUSINESS NAMES

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
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WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION

relating to
FICTITIOUS BUSINESS NAMES

BACKGROUND

Since its enactment in 1872, the California Civil Code has contained provisions regulating the use of "fictitious" names¹ for business purposes. Although the filing and publication requirements imposed by the so-called "fictitious name statute"--Civil Code Sections 2466-2471--have undergone minor changes over the years, the essential features of the system have endured for almost a century.

¹ A "fictitious" name is one that does not include the names of all the partners or the name of the individual owner of the business. A name is not "fictitious" if it includes the surname of each partner or of the individual owner. See *Flora v. Hankins*, 204 Cal. 351, 268 P. 331 (1928) (partners doing business under the name "Flora & Mahedy"); *Pendleton v. Cline*, 85 Cal. 142, 24 P. 659 (1890) (partners doing business under name "Pendleton & Williams"); *Kohler v. Stephenson*, 39 Cal. App. 374, 178 P. 970 (1919) (individual doing business as "Kohler Steam Laundry"). The cases are not completely consistent, but it appears that a name is not a fictitious name merely because it includes the word "company." Compare *Wetenhall v. Chas. S. Mabrey Constr. Co.*, 209 Cal. 293, 286 P. 1015 (1930) (individual doing business as "W. S. Wetenhall Company" is not using a fictitious name); *Vagin v. Brown*, 63 Cal. App. 2d 504, 146 P. 2d 923 (1944) (individual doing business as "Vagin Packing Company" is not using a fictitious name); with *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928) ("Andrews-Cordano Plumbing Company"); *Collection Service Corp. v. Conlin*, 98 Cal. App. 686, 277 P. 749 (1929) ("Alles Printing Company"). See 3 Witkin, *Summary of California Law Partnership* §3 at 2265 (1960).

The statute requires every person² or partnership transacting business in a fictitious name, or a designation not showing the names of the persons interested in the business, to file a certificate with the clerk of the county in which the principal place of business is located and subsequently to publish the certificate in a newspaper in that county once a week for four successive weeks. The certificate must show the names and residences of the persons transacting business in the fictitious name. A new certificate must be filed and published on each change of membership in the firm. If a person fails to file and publish the certificate required by the statute, neither he nor his assignees may "maintain" an action on any contract made or any transaction had in the fictitious name until the certificate has been filed and published.³ The "plea in abatement"⁴ thus afforded to the defendant

² The term "person" includes a corporation doing business under a name other than the one set forth in its articles of incorporation. *Berg Metals Corp. v. Wilson*, 170 Cal. App.2d 559, 339 P.2d 869 (1959). The statute does not apply to foreign commercial or banking partnerships established and transacting business outside the United States. Civil Code § 2467. Nor does it apply to persons not maintaining a place of business in this state. *Moon v. Martin*, 185 Cal. 361, 197 P. 77 (1921).

³ Lack of compliance merely abates the action; filing and publication pending trial is sufficient. *Rudneck v. Southern Calif. Metal & Rubber Co.*, 184 Cal. 274, 193 P. 775 (1920); *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d. 518 (1946). If the defense is upheld and the action abated, the judgment for the defendant is not res judicata in a subsequent action on the same cause of action. *Folden v. Lobrovich*, 153 Cal. App.2d 32, 314 P.2d 56 (1957). See also Civil Code Section 2468, which permits filing and publication by a trustee in bankruptcy, guardian, conservator, executor, or administrator for the purpose of maintaining an action to recover any sums due the bankrupt, incompetent, or deceased person or partnership that should have filed and published the certificate but failed to do so.

⁴ The defense of noncompliance is waived if the defendant fails to raise it. *Bryant v. Wellbanks*, 88 Cal. App. 144, 263 P. 332 (1927). Moreover, the trial judge has discretion to refuse to permit amendment of the defendant's pleading to raise the defense. *Stewart v. San Fernando Ref. Co.*, 22 Cal. App.2d 661, 71 P.2d 1118 (1937).

in such an action is the only statutory sanction to enforce compliance with the statute.⁵

The fictitious name statute does not inhibit adoption of business or trade names, nor does it prevent use of duplicate or deceptively similar trade names. Rather, the courts uniformly have said that the single purpose of the statute is to prevent fraud or deception in commerce by providing sources of information--the certificate on file in the county clerk's office and, to a limited and transient extent, the newspaper publication--from which persons can learn with whom they are dealing.⁶

After assessing the views of interested persons and organizations, the Commission has concluded that, admitting its obvious shortcomings, the fictitious name statute continues to serve a useful purpose. Suggestions that the statute be repealed, on analysis, are based on the ineffectiveness

⁵. Nothing precludes entering into contracts and transactions in the fictitious name; the sanction is limited to maintaining actions on such contracts or transactions. See note 3, *supra*. The sanction does not apply to tort actions. *Ralph v. Lockwood*, 61 Cal. 155 (1882); *Grant v. Weatherholt*, 123 Cal. App.2d 34, 266 P.2d 185 (1954); *Thompson v. Byers*, 116 Cal. App. 214, 2 P.2d 496 (1931).

Compliance with the statute is not a prerequisite to obtaining local business or other licenses in the fictitious name, nor in general is such compliance required to conduct in a fictitious name one of the businesses or professions licensed by the state. However, compliance is necessary to obtain a license as a real estate broker or salesman (Business and Professions Code Section 10159.5), mineral, oil, and gas broker or salesman (Business and Professions Code Section 10522.5), or check seller and cashier (Financial Code Section 12300.2). See also Business and Professions Code Section 7540 (private investigators, private patrol operators, insurance adjusters, and repossessioners must comply with the statute before conducting business under a fictitious name).

⁶ See *Andrews v. Glick*, 205 Cal. 699, 272 P. 587 (1928); *J. C. Wattenbarger & Sons v. Sanders*, 216 Cal. App.2d 495, 30 Cal. Rptr. 910 (1963); *Hixon v. Boren*, 144 Cal. App.2d 547, 301 P.2d 615 (1956); *Bank of America v. National Funding Corp.*, 45 Cal. App.2d 320, 114 P.2d 49 (1941). See also 3 Witkin, *Summary of California Law Partnership* § 2 at 2264 (1960) ("The purpose of the requirement is to make a public record of the individual members of firms, for the benefit of those who deal with them.").

and awkwardness of the existing provisions rather than on any question as to the desirability of a ready source of information concerning the realities obscured by business or trade names.

RECOMMENDATIONS

Persons subject to the statute

The existing statute does not apply to all persons doing business in California under a fictitious name. Civil Code Section 2467 specifically exempts commercial and banking partnerships established and transacting business in a place without the United States and the courts have construed the act generally as exempting any person who does not maintain a place of business within this state.⁷

Coverage of the statute should basically be coextensive with those persons who "regularly transact business" in California⁸ under a fictitious business name even though they may have no established places of business within the state. The need for information concerning the identity of a person who does business in California but does not have an established place of business in California seems at least as great as the need for information concerning the identity of a person doing business from a fixed location within the state.

⁷ See Moon v. Martin, 185 Cal. 361, 197 P. 77 (1921).

⁸ The Commission has considered whether the phrase "regularly transacts business" should be defined by statute and has concluded that it should not. Any uncertainty is not likely to cause injustice under the sanctions imposed by the statute. Moreover, the determination as to what constitutes regularly transacting business can best be made judicially as the issue arises. It should be noted, however, that the decision whether compliance with the fictitious business name statute is required should be made in light of the particular purpose served by this statute. Accordingly, application of the statutory and case law from other fields of law is not necessarily appropriate here.

The exemption for "foreign" commercial and banking partnerships should be eliminated. The exemption was provided in 1872 and has remained in the code with only a minor modification in 1873. The reference to banking partnerships is now obsolete as only a corporation may carry on the business of banking in California.⁹ Foreign commercial partnerships should be required to comply with the statute. Persons in California normally would have greater difficulty in obtaining information concerning foreign partnerships than in obtaining information concerning local business enterprises. Since both foreign and domestic enterprises would be treated equally, there would be no discrimination against foreign commerce. The exemption originally was based on a similar provision of New York law which has since been repealed.¹⁰

It is apparently assumed by California practitioners,¹¹ perhaps incorrectly, that a Massachusetts business trust need not comply with the existing fictitious business name statute. However, the need for information concerning a business trust is as great as that for any other type of unincorporated business association. Accordingly, the Fictitious Business Name Statute should make clear that a Massachusetts business trust is generally required to comply with the statute. However, all real estate

⁹ Fin. Code § 102.

¹⁰ See Section 2467 in 2 Haymond & Burch, Cal. Civ. Code Annot. 109 (1872); compare 3 Rev. State of N.Y. (Banks and Brothers 5 ed.) 978 with N.Y. Penal Code Section 440.

¹¹ See Letter From Harold Marsh, Jr., Los Angeles attorney, dated May 27, 1969, on file in office of Law Revision Commission. Compare Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946) (Massachusetts trust required to comply with statute because creators retained control over trustees and business was treated as a copartnership).

investment trusts must be organized as Massachusetts business trusts, primarily because of the requirements of the federal tax law.¹² In recognition of their unique nature, a real estate investment trust should not be required to meet the burdensome requirements of the Fictitious Business Name Statute if the trust complies with Sections 856, 857, and 858 of the Federal Internal Revenue Code, has obtained a permit from the California Commissioner of Corporations under Section 23002 of the Corporations Code,¹³ and has filed a statement with the Secretary of State (pursuant to Section 24003 of the Corporations Code) designating an agent for service of process.

Although the law is not entirely clear,¹⁴ it is generally assumed that the existing statute does not apply to nonprofit associations, such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations. This matter should be made clear by adding to the statute an express provision exempting nonprofit associations.

Fictitious business name statements

Every person covered by the statute should be required to file a fictitious business name statement within 40 days after he begins regularly to transact business in this state under a fictitious business name. The

¹² See Sections 856-858 of the Federal Internal Revenue Code of 1954, as amended. See also Corp. Code §§ 23001, 23002 (limiting liability of shareholders or beneficiaries of a real estate investment trust).

¹³ If such a permit is obtained, it is conclusive evidence that the shareholders or beneficiaries are not personally liable for any of the obligations of the real estate investment trust. See Corp. Code §§ 23001, 23002.

¹⁴ Athens Lodge No. 70 v. Wilson, 117 Cal. App.2d 322, 255 P.2d 482 (1953) (unincorporated fraternal benefit society not required to comply with statute). Compare Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946).

statement should include all the information required by existing law and, in addition, the address of the principal place of business of the person filing the statement. Although not presently required by the statute, the address of the principal place of business is customarily included in a fictitious name certificate.

A provision should be added to the statute making it a misdemeanor to execute, file, or publish any fictitious business name statement knowing that such statement is false, in whole or in part, and the present inconvenient and unnecessary requirement that the statement be made under oath before a notary should be eliminated.

Place of filing of statements

A person required to comply with the statute should continue to file his statement in the office of the county clerk of the county in which he has his principal place of business in this state or, in the absence of such a principal place of business, in the office of the county clerk of Sacramento County.¹⁵

¹⁵ The Commission has given serious consideration to the suggestion that a central filing system be established in some state office in Sacramento. See, e.g., McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 Hastings L.J. 1349, 1372-1375 (1968). The benefits to be achieved by central filing of all types of business and corporate information are significant and, no doubt, such a system will ultimately be adopted. However, the availability of fictitious business name information in the offices of the county clerks is of great convenience to many persons. Accordingly, it appears that at the present time it would be necessary to retain filing at the county level even if a central filing system were established, and the Commission has concluded that the benefits to be achieved by a dual filing at the state and county level would not outweigh the additional costs such a requirement would impose on the persons covered by the statute.

Publication requirement

Since 1872, each person filing a fictitious name certificate has been required to publish the certificate in a newspaper once a week for four successive weeks. A new publication is required each time the membership of a partnership changes.

The Commission has considered suggestions that publication be eliminated¹⁶ or that drastic changes be made in the publication system. However, in view of the controversial nature of the publication requirement, the Commission has decided not to recommend any substantial changes in existing law. Accordingly, no change in the number of publications is recommended. The material published should be simply that filed with the county clerk. The substance of the provision of existing law¹⁷ that prescribes the county where the statement must be published should be retained; but, subject to this requirement, the statute should direct that the statement be published in a newspaper that circulates in the area where the business is conducted.

Furnishing summaries of filings

In view of the inherent shortcomings of publication, it is desirable to authorize another, supplemental notice-giving procedure. Accordingly, the county clerk should be authorized to furnish to any person who so requests daily or less frequent summaries or compilations of filings under the statute. Thus, where this procedure is adopted, any interested person can secure from one source complete and current information concerning all filings within the county. A somewhat similar provision for the furnishing of compilations

16. For a discussion of the considerations involved, see McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 Hastings L.J. 1349, 1384-1389 (1968).

17. Civil Code § 2466.

of financing statements is found in Section 9407 of the Commercial Code. The person making the request should, of course, be required to reimburse the county clerk for the cost of furnishing this information.

Abandonment of use of name; withdrawal from partnership

Under existing law, a person who has filed a fictitious name certificate may, upon ceasing to use the name, file and publish a "certificate of abandonment." This provision should be continued without substantive change in the new statute.

Many states either require or permit a withdrawing partner to file a certificate of withdrawal so that his interests will not be prejudiced if the remaining partners fail to file a new certificate. The California statute does not presently provide for filing a certificate of withdrawal, but the partnership is required to file a new fictitious name certificate when there has been a change in its membership. A provision should be included in the new statute to permit a withdrawing partner to file and publish a statement of withdrawal so that his interests may be effectively protected.¹⁸

Expiration of statement

To ensure that the information on file with the county clerk is kept current and to provide a means whereby the county clerk can dispose of obsolete statements in his files:

(1) The fictitious business name statement should be renewed at least once every five years. This retains the substance of existing law. The county clerk should be required, however, to give notice of the impending expiration of the statement.

¹⁸ For further discussion, see McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 Hastings L.J. 1349, 1381-1382 (1968).

(2) The statement should expire and a refiling be required whenever any change occurs that renders the facts set forth in the statement inaccurate. The only exception to the latter rule should be that a mere change in the residence address of an individual or general partner should not cause the statement to expire. Under existing law, a new certificate must be filed only when there is a change in the members of a partnership.

Maintenance of fictitious business name records

The statute should continue to require that the county clerk maintain indices of fictitious business name statements that will permit determination of whether: (1) any business using a fictitious business name has on file a fictitious business name statement; (2) any individual, general partner, or corporation is listed in any fictitious business name statement; (3) a statement of abandonment of the use of a fictitious business name or withdrawal from partnership is on file.¹⁹

The statute should set forth only the function of these indices. This will permit each county clerk to use the system best suited to the resources and needs of his county. Generally, in the smaller counties, relatively simple alphabetical indices will satisfy the requirement; however, the statute should also permit the use of automatic data processing equipment where available.

¹⁹ Civil Code Section 2470 presently requires each county clerk to keep a "register" of certain of the information contained in the fictitious name certificates. This requirement would be superseded by the requirements recommended in the text.

In 1966, Civil Code Section 2469.2 was enacted to permit the removal of obsolete fictitious name certificates from the files after a stated period of time. A similar procedure should be adopted permitting the destruction of (1) fictitious business name statements, (2) statements of abandonment of use of a fictitious business name and statements of withdrawal from partnership, and (3) the entries in the indices relating to these statements.

Operative date

The operative date of the proposed statute should be July 1, 1971. The date should be deferred: (1) to allow those persons who must comply with the statute a reasonable time in which to familiarize themselves with its new requirements and (2) to give the county clerk sufficient time in which to establish the necessary procedures. All persons, including those who are in compliance with Civil Code Sections 2466-2471, would become subject to the act on its operative date--July 1, 1971.²⁰ However, a person should be permitted to file a statement in compliance with the new act at any time after January 1, 1971, and the statement so filed should be deemed to have been filed on July 1, 1971.

²⁰ Civil Code Section 2469.2, as amended at the 1969 Regular Session, provides that all fictitious name certificates that were filed prior to January 1, 1967, expire on January 1, 1972, and a renewal certificate must be filed on or before December 31, 1971, to continue compliance with the statute. This requirement will be superseded by the requirement that a fictitious business name statement be filed not later than July 1, 1971. Thus, although it is recommended that a new filing be required by all persons doing business under a fictitious name, many, if not most, of such persons would otherwise be required to make a new filing under Civil Code Section 2469.2.

Relocation of statute

The provisions dealing with fictitious business names should be moved to Part 3 of Division 7 of the Business and Professions Code which imposes "General Business Regulations" relating to "Representations to the Public." Fictitious business name legislation is a type of business regulation. The present location in the Civil Code in the title on "Partnerships" is inappropriate as the statute deals with corporations and individuals as well as with partnerships. Furthermore, the other sections dealing with partnerships and limited partnerships have been moved to other codes.

Miscellaneous revisions

In addition to the major changes discussed above, the Commission recommends other technical and relatively minor changes in existing legislation in the interest of clarity and precision. These changes are indicated in the Comments to the proposed statutory provisions that follow:

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to repeal Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code, to add Chapter 5 (commencing with Section 17900) to Part 3 of Division 7 of, and to amend Sections 7540, 10159.5, and 10522.5 of, the Business and Professions Code, to amend Section 12300.2 of the Financial Code, and to repeal Section 26848 of the Government Code, relating to fictitious business names.

The people of the State of California do enact as follows:

SECTION 1. Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code is repealed.

Comment. Chapter 2, consisting of Sections 2466-2471, is superseded by Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code.

Note. The sections repealed read as follows:

2466. Except as otherwise provided in the next section every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate subscribed and acknowledged in the manner provided in Section 2468 of the Civil Code, stating that name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence.

Such subscribed and acknowledged certificate must be published subsequent to the filing thereof with the county clerk pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing

the publication of such certificate as in this section provided shall be filed with the county clerk within 30 days after the completion of such publication, but in no event shall such publication be made prior to the filing of such certificate with the county clerk.

2467. A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate or making the publication prescribed in the last section, use in this state the partnership name used by it there, although it be fictitious, or do not show the names of the persons interested as partners in such business.

2468. The certificate filed with the clerk as provided in Section 2466 must be signed by the person therein referred to, or by the partners, as the case may be, and acknowledged before some officer, authorized to take the acknowledgment of conveyances of real property, by personally appearing before such officer, notwithstanding the provisions of Section 1195 of the Civil Code. Such certificates may be executed on behalf of any such person or partner by an agent, or at any time after the bankruptcy, incompetency, or death of such a person or partner, by the trustee in bankruptcy or the guardian, conservator, executor or administrator of such person or partner for the purpose of maintaining an action to recover any sums due the bankrupt, incompetent, or deceased person or facilitating the maintenance of an action by the partnership, of which the bankrupt, incompetent, or deceased partner was a member, to recover sums due such partnership. Where a business is hereafter commenced by a person under a fictitious name or a partnership is hereafter formed, the certificate must be filed and the publication designated in that section must be made within one month after the commencement of such business, or after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership. Where the business has been heretofore conducted under a fictitious name or where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this act. No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required.

2469. On every change in the members of a partnership transacting business in this state under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the cases mentioned in section twenty-four hundred and sixty-seven, a new certificate must be filed with the County Clerk, and a new publication made as required by this Article on the formation of such partnership.

2469.1. Every person and every partnership transacting business in this State under a fictitious name, or designation not showing the names of the persons interested as partners in such business, who has filed a certificate and caused the publication and filing of the affidavit of publication thereof according to the provisions of this chapter, may, upon ceasing to use that name, file a certificate of abandonment of name, stating the name in full and the place of residence of such person, and stating the names in full of all the members of such partnership and their places of residence. Such certificate shall be signed by the person therein referred to, or by one or more of the partners, as the case may be.

Such certificate must be published pursuant to Government Code Section 6064, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper in an adjoining county. An affidavit showing the publication of such certificate shall be filed subsequent to the certificate with the county clerk within 30 days after the completion of such publication.

2469.2. Every certificate of fictitious name filed under the authority of this chapter shall expire and be of no further force and effect at the end of five years following the first day of January next after the filing of a certificate of fictitious name with the county clerk in accordance with Section 2466, unless at any time within 12 months immediately preceding said date of expiration a renewal certificate containing all information required in the original certificate and subscribed and acknowledged as required by that section is filed with the county clerk with whom said original is on file. No such renewal certificate need be published unless there has been a change in the information required in the original certificate, in which event publication shall be made as provided for the original certificate.

Every certificate of fictitious name filed before January 1, 1967, with the county clerk pursuant to Section 2466 shall expire and be of no further force and effect on and after January 1, 1972, unless at any time on or after January 1, 1971, but not later than December 31, 1971, a renewal certificate in accordance with this section is filed with said county clerk.

2469.3. Upon the filing of a certificate of abandonment pursuant to Section 2469.1 or upon the expiration of a certificate of fictitious name pursuant to Section 2469.2 and following the making of the entry required by Section 2470 the county clerk may destroy the certificate of fictitious name the use of which was so abandoned or which has expired, provided that microfilm copies are taken of the certificates and subsequently filed before they are destroyed.

2470. Every county clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him pursuant to this article, entering in alphabetical order the name of every such person who does business under a fictitious name, and the fictitious name, and the name of every such partnership, and of each partner therein.

Upon the abandonment of the use of a fictitious name, or upon the expiration of the certificate of fictitious name, the clerk shall enter the fact of abandonment or expiration in the register.

2471. Copies of the entries of a County Clerk, as herein directed, when certified by him, and affidavits of publication, as herein directed, made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

§ 17900

Sec. 2. Chapter 5 (commencing with Section 17900) is added to Part 3 of Division 7 of the Business and Professions Code, to read:

CHAPTER 5. FICTITIOUS BUSINESS NAMES

17900. Fictitious business name defined

17900. (a) As used in this chapter, "fictitious business name" means:

(1) In the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners.

(2) In the case of a partnership or other association of persons, a name that does not include the surname of each general partner or a name that suggests the existence of additional owners.

(3) In the case of a corporation, any name other than the corporate name stated in its articles of incorporation.

(b) A name that suggests the existence of additional owners within the meaning of subdivision (a) is one which includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted.

Comment. Subdivision (a) of Section 17900 codifies the definition of "fictitious name" developed by the courts in interpreting former Civil Code Section 2466. See Vagin v. Brown, 63 Cal. App.2d 504, 146 P.2d 923 (1944)(individual); Andrews v. Glick, 205 Cal. 699, 272 P. 587

(1928)(partnership); Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946)(unincorporated cooperative association); Berg Metals Corp. v. Wilson, 170 Cal. App.2d 559, 339 P.2d 869 (1959)(corporation).

The subdivision refers to "general partners" as defined in Section 17901 in order to omit limited partners of partnerships formed under the Uniform Limited Partnership Act (Corporations Code Sections 15501-15531). As a general rule, a limited partner's name may not appear in the firm name without subjecting the limited partner to liability as a general partner. Corp. Code § 15505. See also the Comment to Section 17913.

Subdivision (b) removes an inconsistency in the prior law in defining "a name that suggests the existence of additional owners." Under prior interpretations, the use of such terms as "& Co.," "& Sons," and "Bros." subjected a business to the requirements of the statute. See Schwarz & Gottlieb, Inc. v. Marcuse, 175 Cal. 401, 165 P. 1015 (1917); North v. Moore, 135 Cal. 621, 67 P. 1037 (1902); Byers v. Bourret, 64 Cal. 73, 28 P. 61 (1883). But a distinction was drawn between "Jones Company" and "Jones & Company," and the former was not required to comply with the statute. Contrast Wetenhall v. Chas. J. Mabrey Constr. Co., 209 Cal. 293, 286 P. 1015 (1930) with Byers v. Bourret, *supra*. As a practical matter, few businessmen were aware of the distinction and both terms suggest the existence of additional owners. This distinction is therefore eliminated and both names now require a filing under this chapter. An individual proprietor can still conduct business under a name such as "Kohler Steam Laundry," however, without being required to register under this chapter. See Kohler v. Stephenson, 39 Cal. App. 374, 178 P. 970 (1919).

17901. General partner defined

17901. As used in this chapter, "general partner" means:

- (a) In the case of a partnership, a general partner.
- (b) In the case of an unincorporated association other than a partnership, a person interested in such business whose liability with respect to the business is substantially the same as that of a general partner.

17902. Person defined

17902. As used in this chapter, "person" includes individuals, partnerships and other associations, and corporations.

Connect. The term "other associations" as used in Section 17902 includes such unincorporated associations as a joint venture or a Massachusetts business trust.

17903. Registrant defined

17903. As used in this chapter, "registrant" means a person who is filing or has filed a fictitious business name statement.

§ 17910

17910. Person transacting business in fictitious business name to file statement

17910. Every person who regularly transacts business in this state for profit under a fictitious business name shall:

(a) File a fictitious business name statement in accordance with this chapter not later than 40 days from the time he commences to transact such business; and

(b) File a new statement in accordance with this chapter on or before the date of expiration of the statement on file.

Comment. Section 17910 requires every person--individual, partnership or other association of persons, or corporation--that regularly transacts business for profit in this state under a fictitious name to file a fictitious business name statement. The language of the section ("person who regularly transacts business in this state for profit") excludes from the coverage of the statute any person who only occasionally transacts business in California. In addition, nonprofit associations are exempted by Section 17911 and real estate investment trusts are exempted by Section 17912 if they have met certain requirements.

Two exemptions from the filing requirement that were recognized under prior law are not continued under this chapter. See former Civil Code Section 2467 (commercial or banking partnership established and transacting business in a foreign country) and Moon v. Martin, 185 Cal. 361, 197 P. 77 (1921)(person not maintaining a place of business in this state).

The 40-day period provided for filing the initial fictitious business name statement parallels the 40-day period provided in Corporations Code

§ 17910

Section 15700 for designating an agent to receive process on behalf of a foreign partnership.

See Section 17920 and the Comment to that section for a description of the circumstances under which a fictitious business name statement expires. Filing a new statement also extends the effective period of registration from the date of the new filing. See Section 17920.

§ 17911

17911. Nonprofit associations

17911. This chapter does not apply to a nonprofit association.

"Nonprofit association" includes, but is not limited to, such organizations as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations.

Comment. Section 17911 probably codifies former case law. See Athens Lodge No. 70 v. Wilson, 117 Cal. App.2d 322, 255 P.2d 482 (1953)(unincorporated fraternal benefit society). Compare Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946)(unincorporated agricultural cooperative organized as Massachusetts business trust but treated as a co-partnership).

§ 17912

17912. Real estate investment trusts

17912. This chapter does not apply to a real estate investment trust that has obtained a permit under Section 23002 of the Corporations Code and has a statement on file, pursuant to Section 24003 of the Corporations Code, designating an agent for service of process.

Comment. Section 17912 exempts certain real estate investment trusts. Such trusts are defined in Section 23000 of the Corporations Code. The permit referred to is conclusive evidence that the shareholders or beneficiaries of the trust are not personally liable for any of its obligations. Corp. Code §§ 23001, 23002.

17913. Contents of statement

17913. The fictitious business name statement shall contain the following information and be substantially in the following form:

FICTITIOUS BUSINESS NAME STATEMENT

The following person (persons) is (are) doing business as (here insert fictitious business name) at (If registrant has a place of business in this state, here insert the street address of his principal place of business in this state. If the registrant has no place of business in this state, here insert the street address of his principal place of business outside this state.):

(If the registrant is an individual, here insert his full name and residence address. If the registrant is a partnership or other association of persons, here insert the full name and residence address of each general partner. If the registrant is a Massachusetts business trust, here insert the full name and residence address of each trustee. If the registrant is a corporation, here insert the name of the corporation as set out in its articles of incorporation and the state of incorporation.)

This business is conducted by (here insert whichever of the following best describes the nature of the business: (1) "an individual," (2) "a general partnership," (3) "a limited partnership," (4) "an unincorporated association other than a partnership," (5) "a foreign partnership," (6) "a domestic corporation," (7) "a foreign corporation," (8) "a Massachusetts business trust").

Signed _____

Statement filed with the County Clerk of (name) County on (date).

Comment. Section 17913 continues the requirements of prior law under former Civil Code Sections 2466-2471 insofar as it requires that the statement include the fictitious business name and the name and address of individuals doing business under that name. The address of the principal place of business was not explicitly required by the Civil Code sections superseded by this chapter, but the prevailing practice under prior law was to provide this information. It should be noted that a post office box number does not satisfy the requirement of this section that the "street address" of the principal place of business and the "residence address" of each person doing business be given in the statement.

Prior law did not require that the statement indicate the "type of person" registering. This new requirement will enable interested persons to secure further information from the Secretary of State or other sources concerning the registrant.

Section 17913 does not require the listing of limited partners. The names and addresses of all limited partners are required to be stated in the certificate of limited partnership recorded with the recorder of any county in which the limited partnership has a place of business. See Corp. Code § 15502. Since the fictitious business name statement must indicate whether the business is a limited partnership, the remaining information can easily be secured from the recorder.

See also Section 17924 (forms provided by county clerk to include space for information necessary to enable the county clerk to mail a notice of the impending expiration of the statement).

§ 17914

17914. Execution of statement

17914. If the registrant is an individual, the statement shall be signed by the individual; if a partnership or other association of persons, by a general partner; if a Massachusetts business trust, by a trustee; if a corporation, by an officer.

Comment. Section 17914 eliminates the requirement of former Civil Code Section 2468 that the fictitious business name statement be acknowledged. However, a penalty for executing a false statement is provided in Section 17930. Moreover, the statement must be signed by the individual or, in the case of a partnership or other association, by one of the general partners; and execution by an agent--permitted under former Civil Code Section 2468--is no longer permitted. Section 17914 also specifies who may execute the statement on behalf of a Massachusetts business trust or a corporation--matters not covered by prior law. See also Section 17919 (compliance with chapter after bankruptcy, incompetency, or death of person doing business in fictitious name).

17915. Filing with county clerk

17915. The fictitious business name statement shall be filed with the clerk of the county in which the registrant has his principal place of business in this state or, if he has no place of business in this state, with the clerk of Sacramento County.

Comment. Section 17915 continues the requirement of Civil Code Section 2466 that the fictitious business name information be filed with the county clerk of the county in which the person's principal place of business is located, and further provides for filing in Sacramento County if the registrant has no place of business in California.

17916. What constitutes filing

17916. Presentation for filing of a fictitious business name statement and one copy, tender of the filing fee, and acceptance of the statement by the county clerk constitute filing under this chapter. The county clerk shall note on the copy the file number and the date of filing the original and shall certify and deliver or send the copy to the registrant.

Comment. Section 17916 is based on subdivision (c) of Corporations Code Section 24003 which relates to the filing of statements by unincorporated associations designating a principal office in this state or an agent for service of process or both.

17917. Publication of fictitious business name statements

17917. (a) Within 30 days after a fictitious business name statement has been filed pursuant to this chapter, the registrant shall cause the statement to be published pursuant to Government Code Section 6064 in a newspaper of general circulation in the county in which the principal place of business of the registrant is located or, if there is no such newspaper in that county, then in a newspaper of general circulation in an adjoining county. If the registrant does not have a place of business in this state, the notice shall be published in a newspaper of general circulation in Sacramento County.

(b) Subject to the requirements of subdivision (a), the newspaper selected for the publication of the statement should be one that circulates in the area where the business is to be conducted.

(c) Where a new statement is required because the prior statement has expired under subdivision (a) of Section 17920, the new statement need not be published unless there has been a change in the information required in the expired statement.

(d) An affidavit showing the publication of the statement shall be filed with the county clerk within 30 days after the completion of the publication.

Comment. Section 17917 is substantively similar to the provisions of former Civil Code Sections 2466-2471 that required publication of the fictitious business name statement. As under former law, four publications are required to be made in the county where the principal place of business

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of the registrant is located. However, since the statute requires a fictitious business name statement to be filed by some persons who will not have a place of business in this state, Section 17917 requires publication by those persons in Sacramento County. Subdivision (b) is a directory--not mandatory--provision that was not found in prior law. See Section 17918 (second sentence). The published statement is required to be the same as that filed with the county clerk. See Section 17913 (form of statement).

§ 17918

17918. Compliance with chapter required in order to maintain action

17918. No person transacting business under a fictitious business name contrary to the provisions of this chapter, or his assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by this chapter. For the purposes of this section, the failure to comply with subdivision (b) of Section 17917 does not constitute transacting business contrary to the provisions of this chapter.

Comment. Section 17918 retains the sanction provided under former Civil Code Section 2468. Lack of compliance merely abates the action; filing and publication pending trial is sufficient. Rudneck v. Southern Calif. Metal & Rubber Co., 184 Cal. 274, 193 P. 775 (1920); Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946). This sanction does not apply to tort actions. Ralph v. Lockwood, 61 Cal. 155 (1882); Grant v. Weatherholt, 123 Cal. App.2d 34, 266 P.2d 185 (1954); Thompson v. Byers, 116 Cal. App. 214, 2 P.2d 496 (1931). Moreover, an individual businessman who also uses a fictitious business name is not precluded from maintaining an action arising out of a business transaction consummated under his own name. Dennis v. Overholtzer, 178 Cal. App.2d 766, 3 Cal. Rptr. 193 (1960); Messick v. Houx Bros., 105 Cal. App. 637, 288 P. 434 (1930). The defense of noncompliance is waived if the defendant fails to raise it. Bryant v. Wellbanks, 88 Cal. App. 144, 263 P. 332 (1927). Moreover, the trial judge has discretion to refuse to permit amendment of the defendant's pleading to

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raise the defense. Stewart v. San Fernando Ref. Co., 22 Cal. App.2d 661, 71 P.2d 1118 (1937). If the defense is upheld and the action abated, the judgment for the defendant is not res judicata in a subsequent action on the same cause of action. Folden v. Lobrovich, 153 Cal. App.2d 32, 314 P.2d 56 (1957). See generally McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 Hastings L.J. 1349, 1390 (1968). See also Section 17919 (permitting trustee in bankruptcy, guardian, conservator, executor, or administrator to comply with chapter for purpose of maintaining action to recover any sums due to bankrupt, incompetent, or deceased person).

§ 17919

17919. Compliance with chapter after bankruptcy, incompetency, or death

17919. (a) A fictitious business name statement may be executed, filed, and published by the trustee in bankruptcy at any time after bankruptcy where a failure to comply with the provisions of this chapter would otherwise preclude the maintenance of an action to recover any sums due to the bankrupt or the partnership of which the bankrupt was a member.

(b) A fictitious business name statement may be executed, filed, and published by the guardian, conservator, executor, or administrator at any time after the incompetency or death of any individual or partner where a failure to comply with the provisions of this chapter would otherwise preclude the maintenance of an action to recover any sums due the incompetent or deceased person or the partnership of which he was a member.

Comment. Section 17919 retains the substance of a portion of former Civil Code Section 2468.

17920. Expiration of statement

17920. (a) Unless the statement expires earlier under subdivision (b), (c), or (d), a fictitious business name statement expires at the end of five years from December 31 of the year in which it was filed in the office of the county clerk.

(b) A fictitious business name statement expires 40 days after any change in the facts set forth in the statement pursuant to Section 17913, except that a change in the residence address of an individual, general partner, or trustee does not cause the statement to expire.

(c) A fictitious business name statement expires when the registrant files a statement of abandonment of the fictitious business name described in the statement.

(d) A fictitious business name statement expires 40 days after a general partner who was a member of a partnership transacting business under a fictitious name files a statement of withdrawal from the partnership.

Comment. Section 17920 is designed to ensure that the information on file with the county clerk (see Section 17925) is kept current and to provide a means whereby the county clerk can dispose of obsolete certificates in his files (see Section 17926).

Subdivision (a). The period provided by this subdivision parallels the period provided in subdivision (d) of Corporations Code Section 24003 for a statement filed by an unincorporated association designating its principal office or agent for service of process or both. Subdivision (a) substantially restates prior law under former Civil Code Section 2469.2.

Subdivision (b). Under former law, a new certificate was required to be filed only when there was a change in the membership of the partnership transacting business. However, in order that the fictitious business names index will contain current information concerning the registrant, subdivision (b) requires that a new statement be filed, with one exception, whenever a change occurs in the facts required to be set forth by Section 17913 that renders the statement on file inaccurate. For example, when either the registrant changes his principal place of business in this state or, in a case where he had none previously, the registrant acquires a place of business in this state, a new statement must be filed. In this regard, subdivision (b) is comparable to Corporations Code Sections 3301 (domestic corporations) and 6409 (foreign corporations) (new statement required when domestic or foreign corporation changes location or address of its principal office).

The requirement of former Civil Code Section 2469 that a new statement be filed upon a change in the membership of a partnership is continued by subdivision (b), but as limited partners need not be named in the statement (see Section 17913), the subdivision requires a new filing only upon a change in general partners.

Subdivision (b) also requires a corporation to file a new statement if it continues to transact business regularly under a fictitious business name after a change in its corporate name. Whether former law required a new certificate in this case was uncertain.

Change in residence address of individual, partner, or trustee. Although Section 17913 requires that a fictitious business name statement include the residence address of the individual registrant, of each partner of a

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partnership registrant, or each trustee of a Massachusetts business trust, Section 17920 does not require that a new statement be filed each time there is a change in the residence address of the individual, partner, or trustee. Of course, when a new statement is filed because the previous statement has expired under Section 17920, it must contain the address of the individual or each partner or trustee as of the date of the new statement and, in such case, must be republished. See Section 17917(c).

Subdivisions (c) and (d). A registrant is no longer in compliance with Section 17910 if he continues to do business under his fictitious business name after filing a statement of abandonment under Section 17922 or continues to do business as a partnership for more than 40 days after a partner has withdrawn from the partnership (Sections 17920(b), 17923).

17921. Notice of impending expiration

17921. (a) This section applies only if the registrant has designated a person to receive the notices under this section.

(b) Not later than the first day of December immediately preceding the expiration date of a fictitious business name statement as determined under subdivision (a) of Section 17920, the county clerk shall send a notice to the person designated by the registrant. The notice shall be sent by first class mail. It shall indicate the date on which the statement will expire and the file number assigned to the statement.

(c) Unless a new fictitious business name statement is filed by the registrant within 10 days after the filing under Section 17923 of a statement of withdrawal from partnership, the county clerk shall send a notice to the person designated by the registrant. The notice shall be sent by first class mail. It shall indicate that a statement has been filed under Section 17923, the name of the person who filed such statement, and advise the registrant that a new fictitious business name statement must be filed and published if the firm is to continue in business under the fictitious business name.

(d) Neither the failure of the county clerk to mail the notice as provided in this section nor the failure of the notice to reach the person to whom it is sent continues the fictitious business name statement in effect after its expiration date. Neither the county nor any officer or employee of the county is liable for damages for failure to mail the notice required by this section.

§ 17921

Comment. Section 17921 is included to minimize the danger that the registrant will be unaware of the impending expiration of the statement. The section is based in part on Corporations Code Section 24006.

17922. Abandonment of use of fictitious business name

17922. (a) A person who has filed a fictitious business name statement may, upon ceasing to transact business in this state under that fictitious business name, file a statement of abandonment of use of fictitious business name. The statement shall be executed in the same manner as a fictitious business name statement and shall be filed with the county clerk of the county in which the person has filed his fictitious business name statement. The statement shall be published in the same manner as a fictitious business name statement and an affidavit showing its publication may be filed with the county clerk after the completion of publication.

(b) The statement shall include:

(1) The name being abandoned and the street address of the principal place of business.

(2) The date on which the fictitious business name statement relating to the fictitious business name being abandoned was filed and the county where filed.

(3) In the case of an individual, the full name and address of the individual.

(4) In the case of a partnership or other association of persons, the full names and residence addresses of all the general partners.

(5) In the case of a corporation, the name of the corporation as set forth in its articles of incorporation.

(6) In the case of a Massachusetts business trust, the full name and residence address of each of the trustees.

§ 17922

Comment. Section 17922, which supersedes Civil Code Section 2469.1, continues the substance of the prior law. The manner of publication is prescribed in Section 17917.

§ 17923

17923. Withdrawal from partnership operating under fictitious business name

17923. (a) Any person who is a general partner in a partnership that is or has been regularly transacting business in a fictitious business name may, upon withdrawing as a general partner, file a statement of withdrawal from partnership operating under fictitious business name. The statement shall be executed by the person filing the statement in the same manner as a fictitious business name statement and shall be filed with the county clerk of the county where the partnership filed its fictitious business name statement.

(b) The statement shall include:

(1) The fictitious business name of the partnership.

(2) The date on which the fictitious business name statement for the partnership was filed and the county where filed.

(3) The street address of its principal place of business in this state or, if it has no place of business in this state, the street address of its principal place of business outside this state, if any.

(4) The full name and residence of the person withdrawing as a partner.

(c) Unless a notice of the dissolution of the partnership has been published pursuant to Section 15035.5 of the Corporations Code, the statement of withdrawal from partnership operating under a fictitious business name shall be published in the same manner as the fictitious business name statement and an affidavit showing the publication of the statement may be filed with the county clerk after the completion of the publication.

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Comment. Section 17923 permits a withdrawing partner to file a statement of withdrawal so that his interests will not be prejudiced by failure of the remaining partners to file a new fictitious business name statement. This type of statement is new to California but similar provisions are found in a number of other states. See McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 Hastings L.J. 1381, n. 229 (1968). Under some circumstances, the fictitious business name statement may be evidence that would support a partner's responsibility for the obligations of the partnership. See Section 17926(c)(3). Cf. People v. Pinkus, 256 Cal. App.2d Supp. 941, 63 Cal. Rptr. 680 (1967)(fictitious name certificate evidence against defendant in criminal case to show ownership of store selling obscene films); Kalschenski v. Keller, 49 Cal. App. 406, 193 P. 587 (1920)(fictitious name certificate filed by defendant introduced by plaintiff in unfair competition case as evidence of use of name by defendant). The execution and filing of the statement (and publication if a notice of dissolution has not been published under Section 15035.5 of the Corporations Code) should rebut the presumption under Section 17926(c) that the facts contained in the fictitious business name statement are true and thereby will effectually protect the withdrawing partner. Cf. McClintock, Fictitious Business Name Legislation--Modernizing California's Pioneer Statute, 19 Hastings L.J. 1382 (1968).

17924. Furnishing of forms

17924. (a) The county clerk shall furnish without charge a form satisfying the requirements of Section 17913. In addition to the information required by Section 17913, the form prepared by the county clerk, or the material provided by him with the form, shall include all of the following:

(1) A space where the registrant may indicate the name of the person to whom, and the address to which, the county clerk is to mail the notices required by Section 17921.

(2) A statement substantially as follows: "Your fictitious business name statement must be published in a newspaper once a week for four successive weeks and an affidavit of publication filed with the county clerk when publication has been accomplished. The statement should be published in a newspaper of general circulation in the county where the principal place of business is located and in the area where the business is to be conducted (Business and Professions Code Section 17917)."

(3) A statement substantially as follows: "Any person who executes, files, or publishes any fictitious business name statement, knowing that such statement is false, in whole or in part, is guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed one thousand dollars (\$1,000)(Business and Professions Code Section 17930)."

(b) The county clerk may furnish without charge forms meeting the requirements for a statement of abandonment of use of fictitious business name and a statement of withdrawal from partnership operating under fictitious business name.

Comment. The existing statute does not require that the county clerk furnish forms without charge but this is the practice in some counties.

17925. Index of fictitious business name information

17925. (a) The county clerk shall maintain one or more indices which permit the determination of at least the following information:

(1) Whether any business using a specific fictitious business name has on file a fictitious business name statement setting forth such name and, if so, the file number of the statement.

(2) Whether any individual, general partner, or corporation is listed in any fictitious business name statement on file and, if so, the file number of the statement.

(3) Whether a statement of abandonment of use of a specific business name is on file and, if so, the file number of the statement of abandonment.

(4) Whether a statement of withdrawal from partnership operating under fictitious business name is on file and, if so, the file number of the statement of withdrawal.

(b) Four years after a fictitious business name statement has expired, the county clerk may delete the information concerning that statement from the index. Four years after a statement of abandonment of use of fictitious business name has been filed, the county clerk may delete from the index all reference to the use of that name by the person filing the statement.

Comment. Section 17925 requires the county clerk to maintain and keep current indices of fictitious business name statements. This section supersedes former Civil Code Section 2470. The indices required are merely those that facilitate supplying the information required by Section 17925. Generally, in the counties not using automatic processing

equipment, one index will contain in alphabetical order each fictitious business name in use in the county together with the file number of the statement relating to that name so that the other information contained in the statement can be ascertained. A second index will contain in alphabetical order the name of each person doing business under a fictitious name in the county together with the file number or numbers of each statement on file in which that person is listed. Once the file number of the statement is known, a copy of the statement can be easily secured. Section 17925 is drafted, however, to permit the use of any system that will enable a satisfactory records search. In some counties, this will be aided significantly by use of automatic data processing equipment.

Paragraph (3) of subdivision (a) retains the substance of former Civil Code Section 2470 insofar as it requires the fact of abandonment of use of a fictitious business name and the date of filing a statement of such abandonment to be entered in the indices.

Subdivision (b) authorizes the county clerk to purge the fictitious business name index of obsolete entries after four years. The four-year period parallels that provided by Section 17927. The subdivision permits the county clerk to delete from the index any reference to a statement of withdrawal from partnership operating under fictitious business name four years after the expiration of the fictitious business statement filed by the partnership from which the partner is withdrawing.

17926. Certified copies of statements

17926. (a) As used in this section, "statement" means a fictitious business name statement, a statement of abandonment of use of fictitious business name, or a statement of withdrawal from partnership operating under fictitious business name.

(b) For a fee of two dollars (\$2), the county clerk shall provide any person who so requests a certified copy of any statement on file in his office.

(c) A copy of a statement, when certified as provided in subdivision (b), establishes a rebuttable presumption of all of the following:

(1) The existence of the original statement.

(2) The execution of the statement by the person by whom it purports to have been executed.

(3) The truth of the information required by Sections 17913, 17922, or 17923 that is contained in the statement.

(d) The presumptions established by subdivision (c) are presumptions affecting the burden of producing evidence.

Comment. Section 17926 provides for the furnishing of certified copies of statements on file and gives a presumptive effect to the certified copy. The presumption is classified as one affecting the burden of producing evidence. Evidence Code Section 604 provides:

604. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

17927. Retention and destruction of statements

17927. (a) The county clerk shall mark each fictitious business name statement with a consecutive file number and the date of filing and shall retain the original statement for his file. He may destroy or otherwise dispose of such statement four years after the statement expires.

(b) The county clerk shall mark each statement of abandonment of use of fictitious business name or statement of withdrawal from partnership operating under fictitious business name with a consecutive file number and the date of filing. He may destroy or otherwise dispose of any such statement five years after the statement is filed.

(c) In lieu of retaining the original statement on file, the county clerk may retain a copy of the statement in accordance with Government Code Section 69844.5.

Comment. Insofar as Section 17927 requires the county clerk to retain current fictitious business name statements, and statements of abandonment, it continues the substance of former Civil Code Sections 2469.2 and 2469.3. The provisions of the section are also made applicable to statements of withdrawal from partnership.

Statements are to be filed consecutively according to file numbers to be assigned to them when they are presented for filing. The statements may then be located by the use of indices prepared by the county clerk. See Section 17925.

Subdivision (a) further authorizes the county clerk to destroy fictitious business name statements four years after they expire. To this extent, it is based on subdivision (a) of Corporations Code Section

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24004. However, under the prior law, a statement could be destroyed only if microfilm copies were made and filed; this requirement is not continued.

Subdivision (b) makes similar provision for statements of abandonment and statements of withdrawal and authorizes destruction of such statements five years after they are filed. No equivalent provision existed under prior law. Taken together, subdivisions (a) and (b) provide a procedure for purging the files of obsolete statements. Subdivision (c) also authorizes the county clerk to retain microfilm or other photographically reproduced copies of the current statements.

The county clerk is required to file any statement that meets the requirements of this chapter and is accompanied by the required filing fee. He is not authorized to reject a statement on the ground that the particular fictitious business name is already in use or that the statement was not presented for filing within the time specified in Section 17910. In this respect, Section 17927 continues prior law.

17928. Summaries or compilations of filings

17928. (a) Upon prepayment of the fee established pursuant to subdivision (b), the county clerk may furnish to any person who so requests daily or less frequent summaries or compilations of filings under this chapter.

(b) The fee for furnishing information under this section shall be fixed by the county clerk with the approval of the county board of supervisors and shall be sufficient to pay at least the actual cost of furnishing such information.

Comment. Section 17928 authorizes--but does not require--the county clerk to furnish daily or less frequent summaries or compilations of filings. A comparable provision is included in Section 9407 of the Commercial Code. Nothing in this section, of course, affects the right of any person to personally inspect the public records.

§ 17929

17929. Fees for filing statements

17929. (a) The fee for filing a fictitious business name statement is five dollars (\$5). This fee covers the cost of filing and indexing the statement (and any affidavit of publication), furnishing one certified copy of the statement to the person filing the statement, and mailing the notice of expiration of the statement.

(b) The fee for filing a statement of abandonment of use of a fictitious business name is two dollars (\$2). This fee covers the cost of filing and indexing the statement, and any affidavit of publication.

(c) The fee for filing a statement of withdrawal from partnership operating under fictitious business name is five dollars (\$5). This fee covers the cost of filing and indexing the statement (and any affidavit of publication) and mailing the notice that the statement has been filed.

Comment. Section 17929 supersedes Government Code Section 26848 (repealed by this chapter). The fees are intended to compensate the county clerks for their duties under this chapter.

§ 17930

17930. Penalty for false statements

17930. Any person who executes, files, or publishes any statement under this chapter, knowing that such statement is false, in whole or in part, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars (\$1,000).

§ 7540

Sec. 3. Section 7540 of the Business and Professions Code is amended to read:

7540. No licensee shall conduct a business under a fictitious business name unless and until he has obtained the written authorization of the bureau to do so.

The bureau shall not authorize the use of a fictitious business name which is so similar to that of a public officer or agency or of that used by another licensee that the public may be confused or misled thereby.

The authorization shall require, as a condition precedent to the use of such name, ~~the filing of a certificate of doing business under a fictitious name with the county clerk of the county where the licensee's principal place of business is located, in the manner provided in Chapter 2 of Title 10 of Part 4 of Division 3 of the Civil Code~~ that the licensee comply with Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of this code .

A licensee desiring to conduct his business under more than one fictitious business name shall obtain the authorization of the bureau in the manner prescribed in this section for the use of each such name.

The licensee shall pay a fee of ten dollars (\$10) for each authorization to use an additional fictitious business name and for each change in the use of a fictitious business name. If the original license is issued in a nonfictitious name and authorization is requested to have the license reissued in a fictitious business name the licensee shall pay a fee of ten dollars (\$10) for such authorization.

§ 7540

Comment. Section 7540, which relates to private investigators, private patrol operators, insurance adjusters, and repossessors, is amended to conform to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

Sec. 4. Section 10159.5 of the Business and Professions Code is amended to read:

10159.5. Every person applying for a license under this chapter who desires to have such license issued under a fictitious business name shall file with his application a certified copy of ~~both the entry of the county clerk and the affidavit of publication made pursuant to the provisions of Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code~~ his fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of this code .

Comment. Section 10159.5, which relates to real estate salesmen and brokers, is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

Sec. 5. Section 10522.5 of the Business and Professions Code is amended to read:

10522.5. Every person applying for a license under this chapter who desires to have such license issued under a fictitious business name shall file with his application a certified copy of ~~both the entry of the county clerk and the affidavit of publication made pursuant to the provisions of Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code~~ his fictitious business name statement filed with the county clerk pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of this code .

Comment. Section 10522.5 which relates to mineral, oil, and gas brokers and salesmen, is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

§ 12300.2

Sec. 6. Section 12300.2 of the Financial Code is amended to read:

12300.2. Every person engaging in the business of a check seller or cashier shall conduct such business under his true name unless he has complied with ~~the provisions of Chapter 2, Title 10, Part 4, Division 3 of the Civil Code~~ Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code .

Comment. Section 12300.2 is amended to conform the section to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code which supersedes Chapter 2 (commencing with Section 2466) of Title 10 of Part 4 of Division 3 of the Civil Code. No substantive change is made in this section.

Sec. 7. Section 26848 of the Government Code is repealed.

~~26848.--The-fee-for-filing-and-indexing-a-certificate-of
fictitious-name,-including-affidavit-of-publication,-and-the
fee-for-filing-and-indexing-a-renewal-certificate-of-fictitious
name,-is-two-dollars-(\$2)-.~~

Comment. Section 26848 of the Government Code is superseded by
Business and Professions Code Section 17929.

Sec. 8. (a) This act becomes operative on July 1, 1971, except that at any time after January 1, 1971, a fictitious business name statement may be filed and published as provided in Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code, and the certificate so filed shall be deemed to have been filed on July 1, 1971.

(b) The county clerks shall retain all certificates of fictitious name and certificates of abandonment of fictitious names and the registers relating thereto, as provided in Civil Code Sections 2466 to 2471, inclusive, until July 1, 1975. After July 1, 1975, the county clerks may destroy or otherwise dispose of such certificates and registers. No certificate shall be accepted for filing by the county clerks under Civil Code Sections 2466 to 2471, inclusive, after June 30, 1971.

Comment. The new fictitious business name requirements (Business and Professions Code Sections 17900-17930) are made effective on July 1, 1971, but statements are permitted to be filed and published at any time after January 1, 1971, so that the persons covered by the new requirements will be in compliance on July 1, 1971.

A person who has complied with Civil Code Sections 2466-2471 (the former so-called fictitious name statute) is required to make a new filing under Business and Professions Code Sections 17900-17930 not later than July 1, 1971, if he is regularly transacting business in California. See Business and Professions Code Section 17910.

Subdivision (b) provides for retention of the fictitious name certificates and the registers relating thereto for a limited period following the enactment of the new statute so that the information will be available to persons who have claims arising before July 1, 1971, against firms operating under a fictitious business name.