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Utah Department of Commerce
Division of Securities

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**BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF:

**MOTION TO DISMISS PETITION
TO CENSURE LICENSEES AND
IMPOSE FINES**

WBB SECURITIES, LLC, CRD #118440;
and
GARY R. GYGI, CRD #1577760

Docket No. SD-07-0054

Docket No. SD-07-0055

Respondents.

Gary R. Gygi, by and through his undersigned counsel, respectfully moves the “presiding officer” pursuant to Utah Code Ann. § 63-46b-1(4)(b) and Utah Admin. Code. R151-46b-7(6) for an order dismissing the Petition to Censure Licensees and Impose Fines for failure to state a claim upon which relief can be granted. This motion is supported by the accompanying Memorandum in Support of Motion to Dismiss Petition to Censure Licensees and Impose Fines.

RESPECTFULLY SUBMITTED this 21st day of September, 2007.

SMITH HARTVIGSEN, PLLC



Daniel J. McDonald
Kathryn J. Steffey
Attorneys for Respondent Gary R. Gysi

CERTIFICATE OF SERVICE

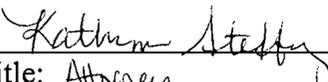
I hereby certify that I have this day served the foregoing document upon the parties of record in this proceeding set forth below by mailing a copy thereof, properly addressed by first class mail with postage prepaid, to the following:

Signed original(s) to:
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WBB Securities, LLC
Attn: M. Larae Bakerink
16835 San Bernardo Drive, Suite 203
San Diego, California 92127

Dated this 21st day of September, 2007.



Title: Attorney

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Respondents.

Gary R. Gygi, by and through his undersigned counsel, respectfully submits this Memorandum in Support of Motion to Dismiss Petition to Censure Licensees and Impose Fines pursuant to Utah Admin. Code R151-46b-7(6)(c).

STANDARD OF REVIEW

Section 63-46b-1(4)(b) of the Utah Administrative Procedures Act provides that the presiding officer should grant "a timely motion to dismiss ... if the requirements of Rule 12(b) ...

of the Utah Rules of Civil Procedure are met by the moving party.” Utah Code Ann. § 63-46b-1(4)(b). Rule 12(b)(6) of the Utah Rules of Civil Procedure provides that a party may challenge the sufficiency of any pleading by timely bringing a motion for “failure to state a claim upon which relief can be granted.” Utah R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Utah R. Civ. P. 12(b)(6) challenges “the legal sufficiency of the complaint.” *Educators Mut. Ins. Ass’n v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029, 1030 (Utah 1995). The movant is entitled to dismissal when “it clearly appears that the plaintiff ... would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim.” *Prows v. State*, 822 P.2d 764, 766 (Utah 1991).

“Rule 12(b)(6) concerns the sufficiency of the pleadings, not the underlying merits of a particular case.” *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997). If the pleading does not allege the facts necessary to establish entitlement to the relief requested, then the motion should be granted and the case dismissed. Although the presiding officer should “assume that the factual allegations in the [Petition] are true and ... draw all reasonable inferences in the light most favorable to the [Petitioner],” *Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 362 (Utah 1997), it is improper to read into the Petition facts that have not been alleged. As the United States Supreme Court has cautioned in the context of the identical Federal Rule of Civil Procedure 12(b)(6),¹ the deferential Rule 12(b)(6) standards do not allow the presiding officer to assume that Petitioner “can prove facts that it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged.” *Associated Gen. Contractors v. Cal. State*

¹ “Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are ‘substantially similar’ to the federal rules.” *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n. 2, 53 P.3d 947 (citation omitted).

Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983) (footnote omitted).

STATEMENT OF MATERIAL ALLEGATIONS

The following material allegations of the Petition are presumed to be true² for purposes of this motion only:

1. Respondent Gary Gygi was a licensed broker-dealer agent and investment adviser representative with Eagle Gate Securities, Inc. (“Eagle Gate”), a dissolved Utah corporation based in Salt Lake City, from April 29, 2003, until December 31, 2005. (Pet. at ¶¶ 4-5.)

2. Eagle Gate was licensed in Utah as a broker-dealer and investment adviser. (Pet. at ¶ 4.)

3. Shortly after joining Eagle Gate, Mr. Gygi entered into a May 1, 2003 Marketing Agreement with SMC Capital Management, Inc. (“SMC”), a Utah corporation and notice-filed federal-covered investment adviser registered with the United States Securities and Exchange Commission (“SEC”). (Pet. at ¶¶ 2, 11-15.)

4. Pursuant to the terms of the Marketing Agreement, Mr. Gygi agreed to (a) develop advertising and marketing pieces to promote SMC’s investment management services; (b) conduct seminars for potential SMC clients; (c) act as the primary voice for Salt Lake City radio station KSL’s daily securities market update segments, which also promoted SMC; and (d) solicit new clients for SMC’s third-party money management services. (Pet. at ¶ 12.)

² Mr. Gygi reserves the right to challenge the factual basis for each and every allegation of the Petition in the event the present motion is denied and Mr. Gygi is required to file a response.

5. In consideration for his services, the Marketing Agreement provided that Mr. Gygi would receive fifty percent of the quarterly investment management fees paid by clients that Mr. Gygi solicited for SMC. (Pet. at ¶ 13.)

6. The Marketing Agreement further required Mr. Gygi to pay SMC \$200 per month to compensate SMC for office space, equipment and secretarial services used by Mr. Gygi. (Pet. at ¶ 14.)

7. While associated with Eagle Gate, Mr. Gygi disclosed his solicitor arrangement with SMC as an outside business activity on the CRD, a computerized licensing database maintained by the National Association of Securities Dealers (“NASD”) (now “FINRA”), which contains employment, licensing and disciplinary information on broker-dealers, investment advisers and investment adviser representatives. (Pet. at ¶¶ 9 n. 1 & 15.)

8. In late November 2005, Eagle Gate was in the process of going out of business. (Pet. at ¶ 16.)

9. WBB Securities, LLC (“WBB”), a California limited liability company and licensed investment adviser in California and New Jersey, was asked by its clearing firm, National Financial Services, LLC (“NFS”), to accept Eagle Gate’s ‘orphaned’ accounts and ‘orphaned’ registered representatives, including Mr. Gygi. WBB agreed to do so. (Pet. at ¶¶ 1-2, & 16.)

10. Mr. Gygi remained a licensed broker-dealer agent and investment adviser representative with Eagle Gate until December 31, 2005, when Eagle Gate withdrew its broker-dealer and investment adviser licenses. (Pet. at ¶¶ 4-5.)

11. On or about January 3, 2006, WBB applied for a Utah investment adviser license. (Pet. at ¶ 1.)

12. On or about January 4, 2006, WBB received its Utah broker-dealer license. (Pet. at ¶ 1.) Mr. Gygi became licensed as a broker-dealer agent for WBB that same day. (Pet. at ¶ 5.)

13. After reviewing WBB's January 3, 2006 investment adviser application, the Division sent WBB a letter in March 2006, expressing concerns that the application was incomplete and requesting additional information from WBB. (Pet. at ¶ 6.)

14. The Division subsequently spoke with WBB's chief executive officer in April 2006, regarding WBB's incomplete application. However, WBB did not respond in a timely manner to the Division's request for additional information. Only after the Division sent WBB a letter in August 2006 stating that the Division intended to deny WBB's application as abandoned did WBB respond to the Division's request. (Pet. at ¶ 7.)

15. Meanwhile, Mr. Gygi and SMC entered into a "Solicitation Agreement" on or about August 1, 2006, the terms of which were the same as the 2003 Marketing Agreement, except Mr. Gygi was no longer required to pay SMC for office space, equipment rental, and secretarial services. (Pet. at ¶ 17.)

16. As the Division further reviewed WBB's investment adviser application and searched the Internet for additional information, it became aware that Mr. Gygi was soliciting investment advisory clients for SMC even though he was not licensed as an investment adviser representative with SMC. (Pet. at ¶¶ 8-9, 17.)

17. This discovery, coupled with WBB's failure to provide additional information in a timely manner, prompted the Division to initiate an examination of Mr. Gygi's Sandy, Utah office in September 2006. (Pet. at ¶ 10.)

18. The Division's examination of Mr. Gygi was completed some time prior to September 14, 2006. (See Pet. at ¶ 20.)

19. WBB did not file an investment adviser representative application for Mr. Gygi until September 14, 2006. (Pet. at ¶ 20.)

20. Despite the fact that it had allowed Mr. Gygi to act as an investment adviser representative since at least May 1, 2003, SMC failed and/or neglected to file an investment adviser representative application for Mr. Gygi until September 15, 2006. (Pet. at ¶¶ 11-15 & 21.)

21. Then, shortly after filing Mr. Gygi's investment adviser representative application, SMC withdrew the application as "made in error" on October 17, 2006. (Pet. at ¶ 21.)

22. Due to SMC's and WBB's failure to timely file the relevant investment adviser representative application(s), the Division now seeks to censure Mr. Gygi pursuant to Utah Code Ann. §§ 61-1-6 and 61-1-3(3) for "transacting business in Utah as an investment adviser representative without being licensed in Utah as an investment adviser representative for WBB or SMC." (Pet. at ¶ 26.)

23. Nowhere does the Petition allege that Mr. Gygi *knew* SMC and WBB had failed to properly license him or that he was not properly licensed. Nowhere does the Petition allege that Mr. Gygi *deliberately* and *purposefully* acted without being licensed or that Mr. Gygi requested that WBB and/or SMC not license him. The Petition fails to allege facts showing that SMC's and WBB's failure to properly license Mr. Gygi was anything more than just accidental or inadvertent. (*See generally* Pet. at ¶¶ 1-32.)

24. Despite failing to allege that Mr. Gygi knew SMC and WBB had failed to properly license him or that Mr. Gygi purposefully and deliberately desired to act without a license, the Petition seeks to censure Mr. Gygi and sanction him with a \$40,000.00 fine because

Mr. Gygi failed “to disclose to investors that Gygi was not licensed as an investment adviser representative” (Pet. at ¶ 27.)

25. The Division also seeks an order censuring and fining Mr. Gygi \$40,000.00 because Mr. Gygi allegedly “failed to disclose to investors that from August 2006 forward, he was receiving free office space, equipment, and secretarial support from SMC,” valued at approximately \$200.00 per month. (Pet. at ¶¶ 14, 17 & 28.)

26. At the time the Division approved WBB’s application to license Mr. Gygi as an investment adviser representative in Utah on February 5, 2007, it was fully aware of these alleged violations. (Pet. at ¶ 5.)

ARGUMENT

I. THE DIVISION’S PETITION IS FATALLY FLAWED AND SHOULD BE DISMISSED BECAUSE THE DIVISION FAILED TO ALLEGE AND CANNOT SHOW WILLFULL CONDUCT ON THE PART OF MR. GYGI.

Section 61-1-6(1) of the Utah Uniform Securities Act provides that “the director, by means of adjudicative proceedings ... may issue an order” censuring and/or imposing a fine upon any licensee or any other person. Utah Code Ann. § 61-1-6(1)(b) & (d). However, the director can only censure or impose a fine “if the director finds that it is in the public interest and finds[] ... that the person” has engaged in one of the acts identified in Utah Code Ann. § 61-1-6(2)(a) – (k). *See id.* § 61-1-6(2).

The Division’s Petition fails to identify which subsection of Section 61-1-6(2) it claims authorizes the imposition of the censure and \$40,000.00 fine sought in this case. For that reason, alone, the Petition is fatally deficient and should be dismissed. However, the only possible subsection that could apply in this case is subsection “(b),” which requires the director to find that Mr. Gygi “has willfully violated or willfully failed to comply with any provision of this

chapter or a predecessor act or any rule or order under this chapter or a predecessor act.” Utah Code Ann. § 61-1-6(2)(b).³ Hence, the only possible way the Division can sustain its action to impose a fine or censure Mr. Gygi under Count I, which alleges a violation of Utah Code Ann. § 61-1-3(3), or Count II, which alleges a violation of Utah Code Ann. § Section 61-1-1(2), is to plead and prove that Mr. Gygi “willfully violated” each of these provisions. As the following subsections demonstrate, both Counts I and II are subject to dismissal because they fail to meet this standard.

A. Count I Should Be Dismissed Because The Division Has Not Alleged And Cannot Prove That Mr. Gygi Willfully Transacted Investment Adviser Representative Business Without Being Licensed.

Count I of the Petition alleges, in its entirety, “Gygi violated Section 61-1-3(3) of the Act by transacting business in Utah as an investment adviser representative without being licensed in Utah as an investment adviser representative for WBB or SMC.” (Pet. at ¶ 26.)⁴ There is no allegation that Mr. Gygi acted willfully, as required by Utah Code Ann. § 61-1-6(2)(b). And

³ Subsection “(a)” is inapplicable because the Division has not alleged that Mr. Gygi filed an incomplete, false or misleading application. *Id.* § 61-1-6(2)(a). Subsections “(c) – (f)” cannot apply because the Division has not alleged that Mr. Gygi was convicted of a misdemeanor or felony, has been enjoined by a court from practicing in the securities business, has been the subject of an order denying, suspending or revoking his license, or has been the subject of any other state, federal or Canadian securities adjudication, determination or order within the past five years. *See id.* §§ 61-1-6(2)(c) – (f). Subsection “(g)” is inapplicable because it only applies to broker-dealers, broker-dealer agents, investment advisers, and federal covered advisers by operation of Utah Admin. Code R164-6-1g(A), which “identifies certain acts and practices which the Division deems violative of Subsection 61-1-6(1)(g).” Utah Admin. Code R164-6-1g(A). Rule R164-6-1g(A) “is intended to act as a guide to *broker-dealers, agents, investment advisers, and federal covered advisers* as to the types of conduct which are prohibited.” *Id.* (emphasis added). Rule R164-6-1g(C) applies only to “broker-dealers.” *Id.* Rule R164-6-1g(D) applies “to agents of broker-dealers or agents of issuers.” *Id.* Rule R164-6-1g(E) applies to investment advisers and federal covered advisers. *Id.* There is no section in Rule R164-6-1g governing activities of investment adviser representatives. Section 61-1-6(2)(h) of the Act is inapplicable because the Division has not alleged that Mr. Gygi is insolvent. Utah Code Ann. § 61-1-6(2)(h). Subsection 61-1-6(2)(i) does not apply because the Division has not alleged that Mr. Gygi is unqualified. *Id.* Subsection 61-1-6(2)(j) only applies to broker-dealers and investment advisers. *Id.* And Subsection 61-1-6(2)(k) does not apply because the Division has not alleged that Mr. Gygi failed to pay the proper filing fee. *Id.*

⁴ Section 61-1-3(3) provides, in pertinent part, “It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless: (a) the person is licensed under this chapter[.]” Utah Code Ann. § 61-1-3(3).

when a statute requires proof of a specific standard of care or specific conduct in order to impose liability, as Utah Code Ann. § 61-1-6(2)(b) does in this case, failure to plead that standard renders the claim defective and requires dismissal.

For example, in *Reedeker v. Salisbury*, 952 P.2d 577 (Utah Ct. App. 1998), the Utah Court of Appeals affirmed a Rule 12(b)(6) dismissal of a cause of action against trustees of a condominium owner's association where Utah Code Ann. § 16-6-107(1) provided that "[a] trustee or officer of a nonprofit corporation is not personally liable to the corporation or its members for civil claims ... unless the acts or omissions are the result of his *intentional misconduct*," 952 P.2d at 584 (emphasis in original), and the plaintiff failed to allege intentional misconduct. The court held that "[b]ecause section 16-6-107(1) of the Nonprofit Corporation Act immunizes trustees from personal liability absent intentional misconduct, and because [Plaintiff] failed to allege such misconduct, the trial court properly dismissed [Plaintiff's] ... claims." *Id.* at 586. The court's rationale was simple and compelling: where a statute clearly requires a certain level of misconduct before imposition of liability, "a plaintiff must allege [that] misconduct ... in order to survive a Rule 12(b)(6) motion." *Id.* at 589.

The Petition in this case cannot survive the force of *Reedeker* "[b]ecause section [61-1-6(2)(b)] of the [Uniform Securities] Act immunizes [licensees] from personal liability absent [willful] misconduct, and because [Petitioner] failed to allege such misconduct," the presiding officer should dismiss the Petitioner's claims. *Id.* at 586.

The Utah Supreme Court has held that "a person acts willfully when it is his or her 'desire to engage in the conduct that cause[s] the result[,]'" *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993), and that "[t]o act willfully in this context means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently." *Id.* at n.3. But one

will search the Petition in vain for any allegation that Mr. Gygi “deliberately and purposefully” desired to transact business without a license. At best, the Petition demonstrates that WBB’s and SMC’s failure to properly license Mr. Gygi was an accidental oversight or inadvertence on their part that was discovered and promptly corrected once the problem was brought to their attention as a result of the Division’s September 2006 examination of Mr. Gygi’s Sandy office. (*See* Pet. at ¶¶ 10-15 & 20-21.)⁵

Additionally, it is impossible to impute willful culpability to Mr. Gygi when, under Utah’s statutory and regulatory scheme, the responsibility for changes in licensing status is placed upon the investment adviser, *not* the investment adviser representative.⁶ For example, Utah Code Ann. § 61-1-3(4)(b) provides, “When an investment adviser representative required to be licensed under this chapter begins or terminates employment with an investment adviser, the *investment adviser* shall promptly notify the division.” *Id.* (emphasis added). Similarly, Utah Admin. Code R164-4-2(C)(2) provides, “[t]o license as an investment adviser representative, the *investment adviser* ... with which the applicant will associate must submit” the required materials. *Id.* (emphasis added). And Utah Admin. Code R164-4-2(D)(2) & (E)(2) provide that is the responsibility of the investment adviser and federal covered adviser, respectively, to renew the licenses of associated investment adviser representatives. *Id.*⁷ Thus, when Mr. Gygi entered into the Marketing Agreement with SMC on May 1, 2003, and prior to December 31 of each

⁵ The Petition fails to identify what possibly could have motivated Mr. Gygi—a qualified, experienced, well-respected and well-known member of the securities and investment community who had previously been licensed with Eagle Gate and Morgan Stanley—to “deliberately and purposefully” choose not to be licensed.

⁶ This is also the practice in the industry in Utah.

⁷ Even in the case of a “dual license” Division regulations require affirmative action on the part of the investment advisers. “Both investment advisers ... with which applicant intends to associate [must] represent in writing to the Division that each assumes full responsibility for applicant at all times....” Utah Admin. Code. R164-4-2(C)(3)(b)(ii).

year thereafter, *SMC* should have ensured that Mr. Gygi's license was properly affiliated and renewed with *SMC*. When *WBB* applied for its investor adviser license, it was *WBB's* responsibility to make sure the Division knew Mr. Gygi would be serving as an investment adviser representative. When *SMC* and Mr. Gygi entered into the August 1, 2006 Solicitation Agreement, *SMC* should have, once again, ensured that Mr. Gygi was properly affiliated with *SMC* in the eyes of the Division. But they did not.

Certainly Mr. Gygi was legally entitled to presume that those who would be employing him as an investment adviser representative would comply with their statutory and regulatory obligations. Indeed, it turns the entire statutory and regulatory scheme on its head to punish Mr. Gygi—let alone punish him *more* severely than *WBB*, which only faces imposition of a \$5,000 fine, and *SMC*, which is not even a party to this proceeding—for failing to take action that was primarily the legal responsibility of his investment advisers.

All of this reveals the *coup de grace* for the Petition, which is that in order to sustain its theory of culpability against Mr. Gygi, the Division would have to allege that Mr. Gygi willfully (*i.e.*, “deliberately and purposefully”) instructed or persuaded *SMC* and *WBB* *not* to comply with their statutory and regulatory duties to register his license and that *SMC* and *WBB* obliged. However, the Petition fails to allege any such facts. Indeed, it fails to even join *SMC* as a party.

The reality is that Mr. Gygi's non-licensure was the result of oversight and inadvertence. But, as courts in other jurisdictions have concluded when faced with an identical problem, the inadvertent failure to properly file a license “ought ordinarily not to warrant a conclusion of willfulness.” *Mayflower Securities Co., Inc. v. Bureau of Securities*, 312 A.2d 497, 500 (N.J. 1973). For example, in the *Mayflower* case, the New Jersey Supreme Court held that an oversight which resulted in a broker-dealer unlawfully employing an agent for three years and

three months without being properly licensed was, “[a]t worst” the result of “careless processing and handling of the renewal application” which “violation must be called technical and not willful.” *Id.* at 502.⁸

In sum, Count I of the Petition cannot withstand the force of Utah Code Ann. § 61-1-6(2)(b), *Reedeker, Larsen*, and the other cited authorities. There was no willfulness. Mr. Gygi did not deliberately and purposefully desire non-licensure. There is no allegation to the contrary. Thus, Count I of the Petition is fatally flawed and should be dismissed.

B. Count II Should Be Dismissed Because The Division Has Not Alleged That Mr. Gygi’s Alleged Violations of Utah Code Ann. § 61-1-1(2) Were Willful.

The Utah Supreme Court expressly and unequivocally held in *Larsen* “that a person violates section 61-1-1(2) only if that person willfully misstates or omits material facts.” *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶14, 974 P.2d 288 (citing *Larsen*, 865 P.2d at 1358). Again, to act willfully for purposes of Section 61-1-1(2) “means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently.” *Id.* at ¶15 (quoting *Larsen*, 865 P.2d at 1358 n.3).

Thus, to sustain Count II of the Petition the Division must show that Mr. Gygi “deliberately and purposefully” failed “to disclose to investors that Gygi was not licensed as an investment adviser representative,” (Pet. at ¶ 27), and “deliberately and purposefully” failed “to disclose to investors that from August 2006 forward, he was receiving free office space, equipment, and secretarial support from SMC,” (Pet. at ¶ 28). However, the Division has failed to allege that Mr. Gygi acted willfully. And it *cannot* show that he acted willfully because the

⁸ It is worth noting that the regulatory enforcement action in that case was directed toward the broker-dealer employer *not* the agent-employee.

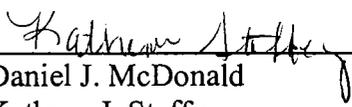
Division has altogether failed to allege that Mr. Gygi knew he was not licensed. Thus, because willfulness has not been alleged, Count II is also deficient and should be dismissed.⁹

CONCLUSION

Based upon the foregoing, the presiding officer should enter an order dismissing the Petition and awarding Mr. Gygi such other and further relief as the presiding officer deems appropriate and just under the circumstances.

RESPECTFULLY SUBMITTED this 21st day of September, 2007.

SMITH HARTVIGSEN, PLLC


Daniel J. McDonald
Kathryn J. Steffey
Attorneys for Respondent Gary R. Gygi

⁹ It must be noted that the Division has failed to point to any statute, rule or regulation that would impose a requirement upon Mr. Gygi to disclose to investment clients whether or not he paid rent to SMC, the terms of his equipment leases, if any, and whether or not he had to pay for secretarial support. Moreover, the fact that the Petition presumes these things had a value of only \$200 per month and were fixed expenses, as opposed to any form of commission-based or transaction-based compensation, shows that these alleged nondisclosures were immaterial.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the parties of record in this proceeding set forth below by mailing a copy thereof, properly addressed by first class mail with postage prepaid, to the following:

Signed original(s) to:

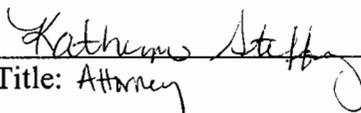
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Dated this 21st day of September, 2007.



Title: Attorney