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BEFORE THE DIVISION OF SECURITIES Utah Department of Commerce
OF THE DEPARTMENT OF COMMERCE Division of Securities
OF THE STATE OF UTAH

In the matter of:

Docket No. SD-07-0084

AARON GRAHAM, CRD# 3167246

**RESPONDENT AARON GRAHAM'S
MOTION TO DISMISS**

Respondent.

Respondent Aaron B. Graham ("Graham" or "Respondent"), by and through undersigned counsel, hereby files this Motion to Dismiss pursuant to, *inter alia*, R151-46b-7(6) of the Utah Administrative Code and Rule 12(b)(6) of the Utah Rules of Civil Procedure. In particular, Graham moves to dismiss the adjudicative proceeding commenced by the Division of Securities' Notice of Agency Action dated December 5, 2007, as untimely on the grounds more specifically set forth in the supporting Memorandum of Points and Authorities filed contemporaneously with this Motion.

RESPECTFULLY SUBMITTED this 3rd day of September, 2009.

ROSHKA DeWULF & PATTEN, PLC

By 

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Jeffrey D. Gardner
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CERTIFICATE OF CERTIFICATE

I hereby certify that I have this day served the foregoing document upon the parties of record in this proceeding as set forth below:

ORIGINAL and one copy of the foregoing Federal Expressed this 3rd ay of September, 2009 to:

Administrative Court Clerk
c/o Pam Radzinski
Utah Divisies of Securities
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, Utah 84114-6760

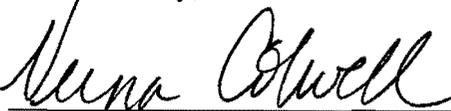
Copy of the foregoing sent Federal Express this 3rd ay of September, 2009 to:

J. Steven Eklund
Administrative Law Judge
Utah Division of Securities
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, Utah 84114-6760

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Verna Colwell

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

In the matter of:

Docket No. SD-07-0084

AARON GRAHAM, CRD# 3167246

**RESPONDENT AARON GRAHAM'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS**

Respondent.

10 Respondent Aaron B. Graham ("Graham" or "Respondent"), by and through undersigned
11 counsel, hereby files this Memorandum of Points and Authorities in support of his Motion to
12 Dismiss this adjudicative proceeding as untimely pursuant to, *inter alia* and without limitation,
13 R151-46b-7(6) of the Utah Administrative Code, Rule 12(b)(6) of the Utah Rules of Civil
14 Procedure and Utah Code §61-1-6. In support thereof, Respondent states as follows:

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I. INTRODUCTION

Utah Code Section 61-1-6 *et seq.*, is the Utah Uniform Securities Act (the "Act"). Code §
61-1-13 is the "Definitions" section of the Act, and defines "Division" as the Utah "Division of
Securities." *See* § 61-1-13(i). The Division filed its Notice of Agency Action ("Notice"), and the
accompanying Petition to Revoke Licenses, Bar Licensee and Impose a Fine ("Petition") on
December 5, 2007. The Division brought the Petition "[p]ursuant to the authority of the Utah Code
Ann. §61-1-6." *See*, without limitation, Petition at pp. 1, 10. Importantly, Utah Code § 61-1-6(4)
provides:

The division may not institute a suspension or revocation
proceeding on the basis of a fact or transaction known to it when the
license became effective unless the proceeding is instituted within the next
120 days after the day on which the license takes effect.

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Here, the Division seeks the entry of an order revoking Respondent's broker-dealer agent
and investment adviser representative licenses, barring Respondent entirely from the securities
industry and the imposition of a \$300,000 fine. *See* Petition at pp. 1, 10-11. Division records

1 further corroborate this fact. Indeed, in an email from Securities Examiner Leigh Davis-Schmidt of
2 the Division to Julie Ann Chytraus of Utah’s Department of Insurance, the Division notifies the
3 Department of Insurance that an action has been filed against Graham. Specifically, the Division
4 states, “[i]n its petition, the Division is seeking to revoke Graham’s securities licenses, to bar
5 Graham from associating with any investment adviser or broker-dealer licensed in the state of
6 Utah, and to assess a significant fine against Graham.” See email dated January 7, 2008,
7 produced by the Division and Bates-stamped Utah2003409, which is attached hereto as Exhibit
8 “1.” It is irrefutable, therefore, that the Division initiated this action as a “suspension or revocation
9 proceeding” within the meaning of Utah Code § 61-1-6(4) and, as such, the 120 day bar applies.

10 Because § 61-1-6(4) applies to this action, the Division was required to commence its
11 revocation action “on the basis of a fact or transaction known to it” no later than 120 days after the
12 effective date of Graham’s broker-dealer agent and investment adviser representative license
13 renewals. It did not do so. Indeed, the subject action was commenced much later than 120 days
14 after the Division learned of the alleged facts or transactions giving rise to this action and after
15 Graham’s license was renewed. The Division’s Petition was untimely, Respondent’s Motion to
16 Dismiss should be granted, this case should be promptly dismissed with prejudice and Graham’s
17 fees and costs should be awarded.

18 **II. UNDISPUTED STATEMENT OF FACTS**

19 The following facts are undisputed:¹

- 20 1. Graham has been licensed in Utah as a broker-dealer agent with United Planners’
21 Financial Services of America, LP, since August 2, 2005. Prior to that time,
22 Graham was licensed with Raymond James Financial Services from January 9, 2004
23 through May 6, 2005. Graham was licensed with UBS Financial Services, Inc. from
24 August 31, 2001 through January 9, 2004, and before that, with Prudential
25 Securities Inc., from November 30, 1998 through August 31, 2001. Petition at ¶ 1;
26

27 _____
¹ References to the Undisputed Statement of Facts shall be referred to here in as “USOF, ¶ ____.”

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- see also* Request for Hearing and Answer of Respondent Aaron Graham to Petition to Revoke Licenses, Bar Licensee and Impose a Fine (“Answer”) at ¶ 1.
2. Graham is currently licensed as an investment adviser representative of AG Financial, LLC (“AG Financial”). Graham is the sole owner of AG Financial, which is a registered investment advisory firm (CRD # 140226). Petition at ¶ 2; Answer at ¶ 2.
 3. The Central Registration Depository (“CRD”) is a computerized database maintained by the Financial Industry Regulatory Authority (“FINRA”), which contains employment, licensing and disciplinary information on broker-dealers, agents, investment advisers and investment adviser representatives. Petition at ¶ 3, footnote 1; Answer at ¶ 3.
 4. Graham has taken and passed the Series 7, General Securities Representative Licensing Examination; the Series 24, General Securities Principal Licensing Examination; the Series 9, General Securities Sales Supervisor Licensing Examination; the Series 63, Uniform Securities Agent State Law Examination; and the Series 65, Uniform Investment Adviser Law Examination. Petition at ¶ 4; Answer at ¶ 4.
 5. The Division is bringing this action pursuant to the authority of the Utah Code Ann. §61-1-6. *See*, generally, the Petition.
 6. The Division seeks the entry of an order revoking Respondent’s broker-dealer agent and investment adviser representative licenses, barring Respondent entirely from the securities industry and the imposition of a \$300,000 fine. *See* Petition at pp. 1, 10-11; *see also*, Division email dated January 7, 2008, produced by the Division and Bates-stamped Utah2003409, which is attached hereto as Exhibit 1.
 7. In a letter dated October 27, 2006 a disgruntled former partner of Graham’s from G2 [G2 Financial Group, LLC] alleged that Graham had placed clients in variable annuities without their knowledge. This letter was accompanied by letters

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ostensibly from six of Graham’s clients that all bear remarkably similar characteristics and that allege Graham made unauthorized purchases of variable annuities against each client’s clear instructions to Graham. Petition at ¶ 6.²

8. The Division was fully investigating Graham no later than November 2006 when, pursuant to Act §61-1-5, it sent detailed requests for documents and information to UBS Financial Services, Inc., Prudential Equity Group, LLC, and Raymond James Financial Services, Inc. See, without limitation: (1) correspondence from Ms. Davis-Schmidt of the Division to UBS Financial Services, Inc., dated November 30, 2006 and Bates-stamped UTAH20033262-63, which was produced by the Division and is attached hereto as Exhibit “2”; (2) correspondence from Ms. Davis-Schmidt of the Division to Prudential Equity Group, LLC, dated November 30, 2006 and Bates-stamped UTAH2013809-10, which was produced by the Division and is attached hereto as Exhibit “3”; (3) correspondence from Ms. Davis-Schmidt of the Division to Raymond James Financial Services, Inc., dated November 30, 2006 and Bates-stamped UTAH2003332-33, which was produced by the Division and is attached hereto as Exhibit “4”. See also Petition at ¶ 6.

9. Leigh Davis-Schmidt interviewed Jonathan Slager—the brother of one of the complainants and brother-in-law of the disgruntled former partner. The Division produced its Memorandum of Interview of Mr. Slager as part of the production in this matter. The Memorandum of Interview reflects the interview was completed on *November 20, 2007*. In the Memorandum of Interview, Ms. Davis-Schmidt admitted that, as of the date of the interview with Mr. Slager, the Division’s investigation of Graham had been ongoing for approximately a year. See p. 3, l. 15-

² Interestingly, all of the complaint letters are dated October 27, 2006; they appear to come from the same printer, and contain Jeff Bland’s—Graham’s former partner at G2—office fax number; all disclose Graham’s social security number, which no customer would have in his or her possession; all begin, “Dear SEC and any regulatory body that it may concern;” and the allegations in the complaint letters are analogous and, importantly, false.

1 16 of the Memorandum of Interview of Jonathan Slager, dated November 20, 2007,
2 which is attached hereto as Exhibit “5.”

3 10. The Division filed the Notice and Petition on December 5, 2007. The Petition’s
4 allegations of wrongdoing are based primarily upon allegations of inappropriate
5 variable annuity sales by Graham to “A.M.” (Athena Metos—the disgruntled former
6 partner’s wife) in 2003 and to “W.B.” (Wiley Bland—the disgruntled former
7 partner’s father) in 2004. Specifically, but without limitation, the Petition alleges
8 falsifying/forgery of client documentation related to the Athena Metos and Wiley
9 Bland annuities, and unauthorized and unsuitable purchases of said annuities for
10 Athena Metos and Wiley Bland by Graham. Petition at ¶¶ 6-27. The allegations in
11 the Petition are based on an investigation conducted by the Division, which
12 commenced no later than October, 2006. *See* USOF, ¶ 8, above.

13 In addition to the above Undisputed Facts, Respondent hereby requests that the presiding
14 officer take judicial notice of the following law and facts, which are capable of public record and
15 judicial notice. *See Tal v. Hogan*, 453 F.3d 1244, 1265 (10th Cir. 2006)(holding that when ruling on
16 a 12(b)(6) motion a court may “take judicial notice of its own files and records, as well as facts
17 which are a matter of public record.” (Internal quotation marks and citation omitted)).

18 11. The Division has by rule designated the CRD as a repository for disclosures made to
19 the State of Utah in connection with the licensing of broker-dealers and agents, as
20 well as investment advisers and representatives. Utah Admin. Cod R164-4-
21 3(D)(1)(2008); *see also*, Petition ¶ 3.

22 12. Licenses awarded to broker-dealers and their agents expire on December 31 of
23 every year. Utah Code § 61-1-4(1)(d). In order to maintain licensure, a broker-
24 dealer or agent is required to file a new application annually. *Id.* at § 61-1-4(1)(a).
25 If no denial order is in effect and no proceeding is pending under Section 61-1-6, a
26 license becomes effective at noon of the 30th day after an application is filed. *Id.* at §
27 61-1-4(1)(e)(i).

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13. On January 1, 2007, Graham's license was renewed.

14. The Division did not file the Petition until December 5, 2007. *See* Petition, p. 11.

III. ARGUMENT

As noted above, the Division initiated this action pursuant to Utah Code § 61-1-6. USOF, ¶ 5. That section of the Utah Act authorizes the Director of the Division, by means of adjudicative proceedings, to issue an order imposing various sanctions. *Id.* The sanctions include, without limitation, the denial, suspension, bar and/or revocation of a broker-dealer's or broker-dealer's agent's license, as well is the imposition of a fine. *Id.* The Division seeks the entry of an order revoking Respondent's broker-dealer agent and investment adviser representative licenses, barring Respondent entirely from the securities industry and the imposition of a \$300,000 fine. USOF, ¶ 6. *See* Petition at pp. 1, 10-11; *see also*, Exhibit 1 hereto.

Importantly, however, the Utah Act prohibits the Division from instituting a suspension or revocation proceeding, such as the subject action against Graham, on the basis of a fact or transaction known to it when the license became effective unless such a proceeding is instituted within 120 days. Utah Code § 61-1-6(4). The Division failed to timely commence license revocation proceedings against Graham within 120 days of facts and transactions known to it prior to the Division's acceptance of Graham's license renewal in January of 2007, which is required under Utah Code § 61-1-6(4). The administrative action against Graham should be promptly dismissed with prejudice, and fees and costs awarded to Graham.

1. The Division Commenced Its Investigation No Later than October 2006.

The Division alleges that in a letter dated October 27, 2006, "a former partner of Graham's from G2 complained that Graham had placed clients in variable annuities without their knowledge." Petition at ¶ 6. "The letter was accompanied by complaint letters from six of Graham's clients, all of whom alleged that Graham had made unauthorized purchases of variable annuities, against each client's clear instructions to Graham." *Id.* USOF, ¶ 7. Graham adamantly denies any and all allegations of wrongdoing in this matter. *See* Request for Hearing and Answer of

1 Respondent Aaron Graham to Petition to Revoke Licenses, Bar Licensee, and Impose a Fine.
2 However, the Division’s foregoing allegation is critical and revealing; Paragraph 6 of the Petition
3 is an admission the Division’s investigation of Graham commenced as of October 2006. *Id.*

4 Further, on November 30, 2006, Division Securities Examiner Leigh Davis-Schmidt sent
5 detailed requests for information regarding Graham to UBS Financial Services, Inc., Prudential
6 Equity Group, LLC, and Raymond James Financial Services, Inc. USOF, ¶ 8; Exs. 2, 3, 4. The
7 Division’s correspondence to these FINRA member firms sought Graham’s client lists and
8 demanded, *inter alia*, the identification of all Graham’s clients who purchased or exchanged
9 variable annuities. *Id.* The correspondence also required the FINRA member firms to produce
10 responsive records no later than December 15, 2006. *Id.* Thus, by November 30, 2006, the
11 Division had not only been put on direct notice of the allegations against Graham, the Division
12 **acted** on the allegations.

13 Additionally, the Division admitted to a potential witness in this case that its investigation
14 of Graham commenced in approximately November of 2006. Specifically, on or about
15 **November 20, 2007**, Ms. Davis-Schmidt interviewed Jonathan Slager. USOF, ¶ 9; Ex. 5. The
16 Division recorded the interview and transcribed same into a document entitled Memorandum of
17 Interview, and subsequently produced the Memorandum of Interview to the Respondent in this
18 matter. In the text of the Memorandum of Interview, Ms. Davis-Schmidt admits that as of the
19 November 20, 2007, interview date, the Division’s investigation of Graham had been ongoing for
20 “approximately a year.” Ex. 5. In light of the foregoing admissions and actions, it is irrefutable the
21 Division was aware of the allegations of wrongdoing against Graham that form the basis of the
22 Petition and commenced its investigation of such purportedly wrongful conduct no later than
23 October 2006.

24 **2. The Action Against Graham is Untimely and Barred Under § 61-1-6(4).**

25 The Division has, by rule, designated the CRD as a repository for disclosures made to the
26 State of Utah in connection with the licensing of broker-dealers and agents, as well as investment
27 advisers and representatives. USOF, ¶ 11. Utah Admin. Cod R164-4-3(D)(1)(2008); *see also*,

1 Petition ¶ 3. Licenses awarded to broker-dealers and their agents expire on December 31 of every
2 year. Utah Code § 61-1-4(1)(d). In order to maintain licensure, a broker-dealer or agent is required
3 to file a new application annually. *Id.* at § 61-1-4(1)(a), (d) and (e). If no denial order is in effect
4 and no proceeding is pending under § 61-1-6, a license becomes effective at noon on the 30th day
5 after an application is filed. *Id.*; USOF ¶ 12. Utah Code § 61-1-6(4) applies whenever a broker-
6 dealer's or broker-dealer's agent's license becomes effective regardless of whether the license
7 becomes effective *via* an initial license grant or a yearly annual license renewal. *Id.*

8 In light of the foregoing, and by operation of law, Graham's license expired December 31,
9 2006. USOF, ¶ 12. Importantly, at the time Graham's license expired on December 31, 2006, the
10 Division had already received from Graham's former partner Jeff Bland complaint letters
11 ostensibly from six of Graham's former clients. USOF, ¶ 7. At the time Graham's license expired
12 on December 31, 2006, the Division had already commenced its investigation of Graham and sent
13 out three detailed requests for information dated November 30, 2006 to FINRA member firms.
14 USOF, ¶ 8. On January 1, 2007, *after Mr. Bland submitted the six complaint letters to the Division*
15 *and after the Division commenced its investigation of Graham*, Respondent's license was renewed.
16 USOF, ¶ 13.

17 The Division did not file the Petition until **December 5, 2007**—*more than one year after*
18 *the Division commenced its investigation of Graham upon receipt of allegations of wrongdoing*
19 *by Graham from Jeff Bland*. USOF, ¶ 14. As a matter of law, the Division is prohibited from
20 instituting the subject revocation proceeding against Graham because the Division failed to
21 institute this proceeding on the basis of facts and transactions known to it within 120 days of
22 Graham's license renewal becoming effective. Utah Code § 61-1-6(4); USOF, ¶ 5. Thus, this
23 action is prohibited and should be dismissed with prejudice.

24 Importantly, the issues presented by Graham's Motion to Dismiss are not novel to the
25 Division. On January 8, 2008, former Division Director Wayne Klein accepted Administrative
26 Law Judge J. Steven Eklund's Recommended Order on Motion to Dismiss by Respondent First
27

1 Western Advisors, Inc., pursuant to Utah Code § 61-1-6(5).³ A copy of the Recommended Order
2 on Motion to Dismiss and former Director Wayne Klein's Order adopting same in *First Western*
3 *Advisors, Inc., et al.* (Case No. SD-07-0015) are attached hereto as Exhibit "6."

4 In *First Western*, the Division received investigative files from the SEC's investigation of
5 the Respondents in late spring or early summer of 2005. Notwithstanding the receipt of the SEC's
6 investigative file on the Respondents, the Division renewed the Respondent First Western's license
7 at the close of 2005.

8 Notably, in the *First Western* case the Division attempted to argue that it did not "know" of
9 the "fact or transaction" on which that proceeding was based until the Division had completed its
10 investigation of the Respondent and filed the Petition in that matter. The Court in *First Western*
11 shot the Division's argument down. Indeed, the Court stated, "Despite whatever independent
12 and/or supplemental investigation which the Division elected to pursue beyond its review of the
13 SEC investigative files, the fact remains that the Division renewed Respondent's license at the
14 close of 2005 on an unconditional and pro forma basis." Exhibit 6, p. 15. The Division was
15 "properly charged with knowledge of the facts and transactions set forth in the SEC's investigative
16 file." *Id.* at p. 16. The Court concluded "the Division's decision to renew Respondent's license
17 with the knowledge of the matters set forth in the SEC's investigative files and its decision not to
18 initiate this disciplinary proceeding until February 16, 2007 reflects a lack of reasonable diligence."
19 *Id.* The Court stated the Division failed to timely initiate the *First Western* proceeding and Utah
20 Code § 61-1-6(5) applied to bar the proceeding as to Respondent. *Id.*

21 Also, the *First Western* decision relied heavily on the Iowa Supreme Court case *Blinder v.*
22 *Goettsch*, 431 N.W.2d 336 (Iowa 1988). In that case, a securities broker-dealer filed a petition for
23 judicial review of a hearing officer's decision revoking its license and censuring various individual
24

25 ³ Utah Code § 61-1-6(5) was renumbered § 61-1-6(4) in May of 2009. (See U.C.A. 1953 § 61-1-6
26 (2009)). The renumbering does not impact this Motion; § 61-1-6(5), like § 61-1-6(4) provided:
27 "The division may not institute a suspension or revocation proceeding on the basis of a fact or
transaction known to it when the license became effective unless the proceeding is instituted within
the next 120 days."

1 agents. Blinder argued that the Iowa Securities Department failed to timely bring the license
2 revocation action under Iowa Code Section 502.304(2). Specifically, Blinder argued that
3 allegations forming the basis of a January 1985 revocation action against him were provided to the
4 administrator of the Iowa Securities Department in 1982. Blinder's broker-dealer license
5 applications were renewed twice, in 1983 and 1984, by Iowa before the revocation action was
6 commenced in 1985.

7 The Iowa Supreme Court noted that under the subject code section the administrator could
8 not institute a suspension or revocation proceeding on the basis of a *fact known* to the
9 administrator when registration became effective unless such a proceeding was instituted within
10 thirty days after the effective date. *Id.* at 431 N.W.2d at 338-39. The Iowa Securities Department
11 argued that a "fact known" is limited to judicially determined facts and does not include
12 information discovered by the state during investigations.

13 The *Blinder* Court held that it was not reasonable to apply the statute of limitations only to
14 those investigations based on judicially determined facts and not to proceedings based on other
15 information. *Id.* at 340. The Court held that a "fact known" is information the Securities
16 Department has actual knowledge of, or upon the exercise of reasonable diligence should have
17 known of. *Id.* The *Blinder* Court held the 1985 revocation action was barred by the statute of
18 limitations because the action was based on facts known to the Securities Department when the
19 license renewal became effective, and the Securities Department failed to bring the action within
20 the permissible thirty day window. *Id.*

21 Graham's case is analogous to the *First Western* and *Blinder* decisions. Like the Division
22 of Securities in *First Western* and the Iowa Securities Department in *Blinder*, here the Division
23 obtained direct and specific information regarding alleged wrongdoing by Graham sufficiently in
24 advance of Graham's license being renewed. Once again, the Division received actual notice of six
25 customer letters alleging complaints against Graham by Jeff Bland in October 2006. The Division
26 commenced its investigation and sent detailed information requests to FINRA members regarding
27 Graham's purported wrongful conduct in November of 2006. Graham's license expired by

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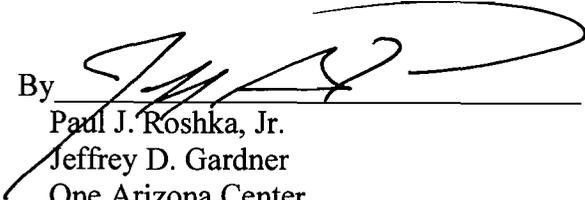
1 operation of law on December 31, 2006, and was renewed on January 1, 2007. USOF, ¶ 13. The
2 Division failed to file its Petition until December 5, 2007—well outside of the 120 day window
3 afforded the Division under § 61-1-6(5). The subject action is untimely and should be barred.

4 **CONCLUSION**

5 For all of the foregoing reasons, Respondent respectfully requests that his Motion to
6 Dismiss this action be granted, the case dismissed with prejudice and Respondent's attorneys' fees
7 and costs be awarded.

8 RESPECTFULLY SUBMITTED this 3rd day of September, 2009.

9 ROSHKA DeWULF & PATTEN, PLC

10
11 By 

12 Paul J. Roshka, Jr.
13 Jeffrey D. Gardner
14 One Arizona Center
15 400 East Van Buren Street, Suite 800
16 Phoenix, Arizona 85004
17 602-256-6100 (telephone)
18 602-256-6800 (facsimile)
19 Attorneys for Respondent

20 **CERTIFICATE OF CERTIFICATE**

21 I hereby certify that I have this day served the foregoing document upon the parties of
22 record in this proceeding as set forth below:

23 ORIGINAL and one copy of the Federal Expressed
24 this 3rd day of September, 2009 to:

25 Administrative Court Clerk
26 c/o Pam Radzinski
27 Utah Division of Securities
160 East 300 South, 2nd Floor
Box 146760
Salt Lake City, Utah 84114-6760

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COPY of the foregoing Federal Expressed this 3rd day of September, 2009 to:

J. Steven Eklund
Administrative Law Judge
Utah Division of Securities
160 East 300 South, 2nd Floor
Box 146760
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