

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

) No. S178823

Plaintiff/Respondent,

v.

JACOB TOWNLEY HERNANDEZ,

Defendant/Appellant.

SUPREME COURT
FILED

JUN 17 2010

Frederick K. Ohlrich Clerk

VR

Deputy

Sixth Appellate District No. H031992
Santa Cruz County Superior Court No. F12934
The Honorable Jeff Almquist

MOTION FOR JUDICIAL NOTICE

MARC J. ZILVERSMIT, Esq., SBN 132057
523 Octavia Street
San Francisco, CA 94102
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Attorney for Defendant/Appellant
JACOB TOWNLEY HERNANDEZ

RECEIVED

JUN 11 2010

CLERK SUPREME COURT

**TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO
THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA
SUPREME COURT:**

Pursuant to Evidence Code §§ 452 and 459 and California Rules of Court 8.252(a) and 8.520(g), Appellant respectfully requests that this Court take judicial notice of the State Bar Court's "Stipulation Re: Facts, Conclusions Of Law And Disposition And Order Approving Public Reproval" in *In the Matter of Arthur G. Dudley, Bar # 56921* (Feb. 23, 2007) No. 06-O-10112. A copy of the opinion is attached as Exhibit A.

Appellant made a similar motion in the Court of Appeal. The Court resolved the appeal without reference to these records and denied the motion for judicial notice.

The opinion and records in *In the Matter of Arthur G. Dudley* are relevant to demonstrate that Appellant's trial counsel, Arthur G. Dudley, was publicly reprovved by the State Bar one month prior to the trial court's gag order in this case, and was placed on one year State Bar probation which covered the period of the gag order and the entire trial proceedings herein. *See In re Visciotti* (1996) 14 Cal.4th 325, 349-350 (this Court takes judicial notice of trial counsel's state bar record in analyzing sixth amendment claim).

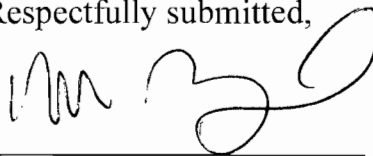
Courts have repeatedly found that even where a court order precluding discussion of some topics with the defendant is more limited than the blanket prohibition in *Geders v. United States* (1976) 425 U.S. 80, such orders are forbidden because they "may have a chilling effect on cautious attorneys, who might avoid giving advice on [any matter related to the prohibition] for fear of violating the court's directive." *Mudd v. United*

States (D.C. Cir. 1986) 798 F.2d 1509, 1512; see *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, 965-966 (cautious attorney would avoid possible contempt finding by interpreting court's order more broadly than intended thus avoiding giving advice on subject matters about which defendant had a right to attorney's advice). Because an attorney on State Bar probation will undoubtedly be "cautious" not to risk a contempt finding by interpreting a court's order more narrowly than intended, evidence that Appellant's counsel was on probation at the time is relevant to proving that the court's order infringed upon "the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters." *Perry v. Leeke* (1989) 488 U.S. 272, 284.

Wherefore Appellant respectfully requests that this Court take judicial notice of the State Bar's record of public reproof in *In re Dudley*.

Dated: June 11, 2010

Respectfully submitted,



MARC J. ZILVERSMIT

Attorney for Appellant

JACOB TOWNLEY-HERNANDEZ

EXHIBIT A

(Do not write above this line.)

State Bar Court of California
Hearing Department
San Francisco

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<p>Counsel For The State Bar</p> <p>Susan I. Kagan Deputy Trial Counsel 180 Howard Street San Francisco, CA 94105 (415) 538-2037</p> <p>Bar # 214209</p>	<p>Case Number (s) 06-O-10112</p>	<p>(for Court's use)</p> <p>PUBLIC MATTER</p> <p>FILED <i>LSH</i></p> <p>FEB 23 2007</p> <p>STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</p>
<p>In Pro Per Respondent</p> <p>Arthur G. Dudley 605 Center Street Santa Cruz, CA 95060 (831) 429-9966</p> <p>Bar # 56921</p>	<p>Submitted to: Settlement Judge</p>	
<p>In the Matter Of: Arthur G. Dudley</p> <p>Bar # 56921</p> <p>A Member of the State Bar of California (Respondent)</p>	<p>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING</p> <p>PUBLIC REPROVAL</p> <p><input type="checkbox"/> PREVIOUS STIPULATION REJECTED</p>	

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

- (1) Respondent is a member of the State Bar of California, admitted **December 19, 1973.**
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **9 pages**, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(Do not write above this line.)

- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- costs added to membership fee for calendar year following effective date of discipline (public reproof)
 - case ineligible for costs (private reproof)
 - costs to be paid in equal amounts for the following membership years:
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
 - costs waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs"
 - costs entirely waived
- (9) The parties understand that:
- (a) A private reproof imposed on a respondent as a result of a stipulation approved by the Court prior to initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page. The record of the proceeding in which such a private reproof was imposed is not available to the public except as part of the record of any subsequent proceeding in which it is introduced as evidence of a prior record of discipline under the Rules of Procedure of the State Bar.
 - (b) A private reproof imposed on a respondent after initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page.
 - (c) A public reproof imposed on a respondent is publicly available as part of the respondent's official State Bar membership records, is disclosed in response to public inquiries and is reported as a record of public discipline on the State Bar's web page.

B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.

- (1) Prior record of discipline [see standard 1.2(f)]
- (a) State Bar Court case # of prior case
 - (b) Date prior discipline effective
 - (c) Rules of Professional Conduct/ State Bar Act violations:
 - (d) Degree of prior discipline
 - (e) If Respondent has two or more incidents of prior discipline, use space provided below or a separate attachment entitled "Prior Discipline."
- (2) Dishonesty: Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

(Do not write above this line.)

- (3) **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4) **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5) **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (6) **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.
- (7) **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.
- (8) **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.

- (1) **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2) **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.
- (3) **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.
- (4) **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5) **Restitution:** Respondent paid \$ _____ on _____ in restitution to _____ without the threat or force of disciplinary, civil or criminal proceedings.
- (6) **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7) **Good Faith:** Respondent acted in good faith.
- (8) **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.
- (9) **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(Do not write above this line.)

- (10) **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11) **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12) **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13) **No mitigating circumstances** are involved.

Additional mitigating circumstances:

D. Discipline:

- (1) **Private reproof (check applicable conditions, if any, below)**
- (a) Approved by the Court prior to initiation of the State Bar Court proceedings (no public disclosure).
- (b) Approved by the Court after initiation of the State Bar Court proceedings (public disclosure).

or

- (2) **Public reproof (Check applicable conditions, if any, below)**

E. Conditions Attached to Reproof:

- (1) Respondent must comply with the conditions attached to the reproof for a period of **one (1) year**.
- (2) During the condition period attached to the reproof, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (3) Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (4) Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
- (5) Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the condition period attached to the reproof. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of the reproof during the preceding calendar quarter. Respondent must also state in each report whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 (thirty) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the condition period and no later than the last day of the condition period.

(Do not write above this line.)

- (6) Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the monitor.
- (7) Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the conditions attached to the reproof.
- (8) Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.
- No Ethics School recommended. Reason: .
- (9) Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10) Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation within one year of the effective date of the reproof.
- No MPRE recommended. Reason:
- (11) The following conditions are attached hereto and incorporated:
- | | |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions | <input type="checkbox"/> Financial Conditions |

F. Other Conditions Negotiated by the Parties:

(Do not write above this line.)

Attachment language (if any):

FACTS AND CONCLUSIONS OF LAW

Facts

1. On June 29, 2000, respondent was appointed by the Sixth District Appellate Program to represent Tai Quoc Dang in an appeal of his criminal conviction in *People v. Dang*, Santa Clara Superior Court Case number C9927769. At the time of his appointment, Dang was in prison for a murder conviction.
2. On May 11, 2001, respondent filed appellant's opening brief in the case *People v. Dang*, Court of Appeal, Sixth Appellate District, Case number H021681.
3. On September 12, 2002, the court heard oral argument and the case was submitted.
4. On September 24, 2002, the appellate court affirmed the conviction.
5. On November 1, 2002, respondent filed a petition for review with the California Supreme Court.
6. On December 11, 2002, the California Supreme Court entered an order denying Dang's petition for review. Respondent received the order denying Dang's petition for review soon after it was entered. However, it was not until February 2, 2003, that respondent sent a letter to Dang in which he provided a copy of the order and informed Dang of the process for seeking a petition of habeas corpus and the deadline for filing the petition. Dang never received respondent's letter.
7. In March 2004, having not received respondent's February 2, 2003 letter, Dang wrote to respondent to determine the status of his petition for review.
8. Respondent received Dang's March 2004 letter soon after it was sent, but did not respond to it.
9. On May 31, 2004, Dang wrote a letter to the clerk of the Sixth District Court of Appeal to determine the status of his petition for review.
10. Prior to June 16, 2004, Dang received a copy of the December 11, 2002 order from the clerk of the Sixth District Court of Appeal.
11. On June 16 and June 17, 2004, Dang wrote letters to respondent requesting that respondent inform him of his legal options.
12. Respondent received Dang's June 16 and June 17, 2004 letters soon after they were sent, but did not respond to them.
13. On August 18, 2004, Dang filed a complaint with the State Bar regarding respondent's failure to communicate and failure to perform.
14. Prior to September 21, 2004, the time in which to file a habeas corpus petition had expired.
15. On September 21, 2004, respondent offered to assist Dang with filing a late habeas corpus petition in response to a letter from a State Bar complaint analyst.
16. On September 28, 2004, based upon respondent's representation that he would prepare the paperwork for the habeas corpus petition, the State Bar closed Dang's complaint.
17. On November 7, 2004, respondent sent Dang a letter offering to prepare the paperwork for a late federal habeas corpus petition within two weeks of the date of his letter.

18. Thereafter, respondent prepared and mailed a copy of the habeas corpus petition to Dang. However, Dang never received the petition.

19. On June 20, 2005, Dang wrote to respondent to inform him that Dang had not received any materials from respondent regarding the federal habeas corpus petition. He requested that respondent provide those materials to him.

20. Respondent did not respond to Dang's June 20, 2005 letter and did not provide Dang with another copy of the federal habeas corpus petition.

21. On September 14, 2005, Dang wrote to respondent to inform respondent once again that he had not received the federal habeas corpus petition and to request that respondent provide him with the documents contained in his client file.

22. Respondent received the September 14, 2005 letter soon after it was sent.

23. On October 13, 2005, respondent sent the client file to Dang. However, at that time, he did not provide another copy of the federal habeas corpus petition.

24. On August 16, 2006, Dang renewed his complaint with the State Bar because respondent had failed to communicate with Dang since the State Bar closed his previous complaint.

25. On January 17, 2006, in response to a letter from a State Bar complaint analyst, respondent wrote in a letter to the State Bar that he would initiate contact with Dang to assist him with his late federal habeas corpus petition. However, respondent took no action. However, it was not until January 17, 2007, one year later, that respondent provided Dang with another copy of the federal habeas corpus petition.

Conclusions of Law

By failing to timely inform Dang that his petition for review was denied, which triggered the time in which Dang had to file a habeas corpus petition, failing to timely advise Dang about the deadlines regarding the federal habeas corpus petition and failing to timely assist Dang with filing a request to file a late federal habeas corpus petition, after agreeing to do so, respondent recklessly and repeatedly failed to perform with competence in violation of rule 3-110(A) of the Rules of Professional Conduct.

By failing to timely inform Dang about the California Supreme Court's denial of his petition for review, respondent failed to inform Dang of a significant matter in which respondent had agreed to provide legal services in violation of Business and Professions Code section 6068(m). By failing to respond to Dang's letters of March 2004, June 16, 2004, June 17, 2004, June 20, 2005 and September 14, 2005, respondent failed to respond to reasonable status update requests in violation of Business and Professions Code section 6068(m).

WAIVER OF VARIANCE BETWEEN NOTICE OF DISCIPLINARY CHARGES AND STIPULATED FACTS AND CULPABILITY

The parties waive any variance between the Notice of Disciplinary Charges filed on October 26, 2006, and the facts and/or conclusions of law contained in this stipulation. Additionally, the parties waive the issuance of an amended Notice of Disciplinary Charges. The parties further waive the right to the filing of a Notice of Disciplinary Charges and to a formal hearing on any charge not included in the pending Notice of Disciplinary Charges.

PENDING PROCEEDINGS

The disclosure date referred to on page two, paragraph A (7) was January 25, 2007.

(Do not write above this line.)

STATE BAR ETHICS SCHOOL

Because respondent has agreed to attend State Bar Ethics School as part of this stipulation, respondent may receive Minimum Continuing Legal Education credit upon the satisfactory completion of State Bar Ethics School.

SUPPORTING AUTHORITY

Standard 2.4(b) suggests reproof or suspension for a respondent who has wilfully failed to perform services in which he was retained. Standard 2.6(a) suggests that a violation of Business and Professions Code section 6068 shall result in disbarment or suspension depending on the gravity of the offense or harm, if any, to the victim, with due regard to the purpose of imposing discipline set forth in standard 1.3.

Based on the mitigation in this matter, particularly respondent's 33 years' of discipline-free practice, which, in totality, outweighs the aggravating circumstance, a public reproof is the appropriate level of discipline.

FACTS SUPPORTING AGGRAVATING AND MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCES

Standard 1.2(b)(iv). Although respondent provided Dang with another copy of the federal habeas corpus petition, his failure to timely perform services on behalf of Dang caused Dang to miss the deadline for timely filing a federal habeas corpus petition, significantly harming Dang.

MITIGATING CIRCUMSTANCES

Standard 1.2(e)(i). Respondent has been in practice since 1973. He has no prior record of discipline.

Standard 1.2(e)(v). Respondent displayed spontaneous candor and cooperation to the State Bar during the disciplinary proceedings.

(Do not write above this line.)

In the Matter of Arthur G. Dudley	Case number(s): 06-O-10112
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SIGNATURE OF THE PARTIES

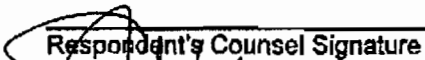
By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Fact, Conclusions of Law and Disposition.

2/5/07
Date


Respondent's Signature

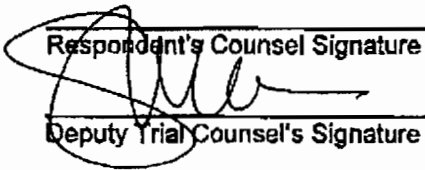
Arthur G. Dudley
Print Name

Date


Respondent's Counsel Signature

N/A
Print Name

2/6/07
Date


Deputy Trial Counsel's Signature

Susan I. Kagan
Print Name

(Do not write above this line.)

In the Matter Of
Arthur G. Dudley

Case Number(s):
06-O-10112

ORDER

Finding that the stipulation protects the public and that the interests of Respondent will be served by any conditions attached to the reproof, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulated facts and disposition are APPROVED AND THE REPROVAL IMPOSED.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the REPROVAL IMPOSED.
- All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 125(b), Rules of Procedure.) **Otherwise the stipulation shall be effective 15 days after service of this order.**

Failure to comply with any conditions attached to this reproof may constitute cause for a separate proceeding for willful breach of rule 1-110, Rules of Professional Conduct.

2/22/07

Date


Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on February 23, 2007, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION
AND ORDER APPROVING**

in a sealed envelope for collection and mailing on that date as follows:

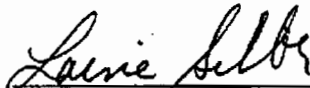
- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**ARTHUR GUILFORD DUDLEY
PAGE SALISBURY & DUDLEY
605 CENTER ST
SANTA CRUZ, CA 95060**

- [X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

SUSAN KAGAN, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **February 23, 2007**.



Laine Silber
Case Administrator
State Bar Court

PROOF OF SERVICE -- 1013(a), 2015.5 C.C.P.

Re: People v. Jacob Townley Hernandez No. S178823

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within

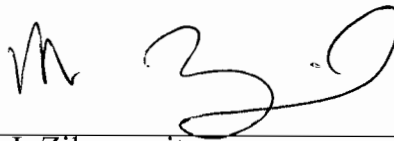
MOTION FOR JUDICIAL NOTICE

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

ATTN AMY HADDIX, ESQ.
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on June 11, 2010 at San Francisco, California.



Marc J. Zilversmit