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November 3, 2008

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
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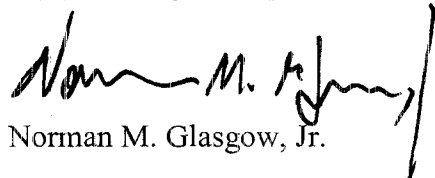
Re: BZA Appeal No. 17830 of L. Napoleon Cooper, et al.
Motion to Dismiss the Appeal

Honorable Members of the Board:

On behalf of Harris Teeter, Inc., attached please find an original and twenty copies of a motion to dismiss the above-referenced appeal. If you have any further questions, please do not hesitate to have the Office of Zoning staff contact me. Thank you for your attention to this matter.

Sincerely,

HOLLAND & KNIGHT LLP


Norman M. Glasgow, Jr.

Enclosure.

cc: L. Napoleon Cooper
Advisory Neighborhood Commission 1C
Melinda Bolling, Assistant Attorney General

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17830
EXHIBIT NO. 14

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**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPEAL OF:

L. Napoleon Cooper, et al.

BZA Appeal No. 17830

**From a decision of the Zoning Administrator to
issue a building permit and certificate of
occupancy for a grocery store, allegedly in
violation of the Reed-Cooke Overlay District,
at premises 1631 Kalorama Road, N.W.
(Square 2672, Lot 36)**

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MOTION TO DISMISS THE APPEAL

**I.
INTRODUCTION**

If an appeal is not timely filed, the Board does not have jurisdiction, and the appeal must be dismissed.¹ Similarly, if an appeal has already been decided by an agency, a subsequent appeal about the same matter should be dismissed.²

This appeal is both untimely and duplicative, and should be dismissed. As explained below, this appeal was filed on May 22, 2008, to challenge a building permit that was issued on November 13, 2006—a permit about which appellants had both actual and constructive knowledge no later than November 2007 (and probably earlier). Under the 60-day rule, the appeal is untimely.³ But the appeal is also an end-run around previous rulings affirming the right of Harris Teeter to sell beer and wine at this location. Appellants have already had a full and fair opportunity to litigate that question, and they should be bound by the answer that this grocery

¹ See, e.g., *Basken v. D.C. Board of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008).

² See, e.g., *Appeal No. 16679A of Spring Valley Wesley Heights Citizens' Ass'n* (June 10, 2005); *Oubre v. D.C. Department of Employment Services*, 630 A.2d 699, 703 (D.C. 1993).

³ See 11 DCMR § 3112.2, discussed below.

store is lawful and permissible. Finally, even if the Board reached the merits of the present appeal, it is plain that the appeal is without basis and should be denied.

II. FACTS

The property that is the subject of this appeal is located in the Adams-Morgan neighborhood on Lot 36 in Square 2672 at premises 1631 Kalorama Road, N.W., Washington, D.C. (the "Property"). The Property is improved with a large one-story building with a barrel-vaulted roof that is commonly known as the "Citadel." The building has been operated as a grocery store since April 2008. The Property is zoned C-2-B, and is located within the Reed-Cooke Overlay District.

The chronology of the permits, licenses, and appeals to date is as follows:

February 2005: Jemal's Citadel, LLC, the owner of the Property (the "Owner"), files an application for a building permit for exterior renovations to the Citadel to allow its use as a Harris Teeter grocery store.

August 18, 2005: Harris Teeter files an application with the Alcoholic Beverage Control ("ABC") Board for a Class B liquor license for this location.⁴

October 11, 2005: Current appellant Yaheyis Getachew—also the principal in appellant Dorchester Grocery & Deli—files a protest against the liquor license application.

December 16, 2005: Current appellant L. Napoleon Cooper files a protest against the liquor license application.

March 27, 2006: DCRA issues exterior demolition permit. The construction authorized under the exterior building permit was completed by early 2008.

⁴ A Class B Retailer's License allows the holder to sell wine or beer in a barrel, keg, sealed bottle, or other closed container for off-premises consumption. D.C. Code § 25-112 (2001).

September 11, 2006: Harris Teeter applies for a building permit to construct the interior of its proposed grocery store. The permit application correctly states that the property is located within the Reed-Cooke Overlay District. The plans attached to the application correctly identify the proposed use of the building as a grocery store. The plans show aisle locations for beer and wine sales.

September 26, 2006: The Zoning Administrator approves Harris Teeter's interior building permit application, thereby confirming that the application and drawings fully comply with the Zoning Regulations.

November 13, 2006: DCRA issues Building Permit No. 98040 (the "Building Permit"), which authorizes the interior construction of the proposed grocery store in accordance with the submitted plans.

November 2006: Opponents of Harris Teeter's liquor license application file a motion asking the ABC Board to dismiss the application on the grounds that the sale of beer and wine for off-premises consumption is prohibited within the Reed-Cooke Overlay District.

March 21, 2007: The Zoning Administrator issues a letter stating that the sale of beer and wine as an accessory to a grocery store use is permitted as a matter-of-right within the RC/C-2-B District.

May 25, 2007: Cooper, Getachew, and other neighborhood residents file BZA Appeal No. 17677, claiming that the Zoning Administrator's letter of March 21, 2007 had been issued in error because Section 1401.1(b) of the Zoning Regulations prohibits the sale of alcoholic beverages for off-premises consumption within the Reed-Cooke Overlay District.

September 12, 2007: The ABC Board dismisses Cooper from the liquor license appeal proceedings upon finding that he had improperly demanded money from Harris Teeter in

exchange for his agreement to withdraw his protest—all in violation of D.C. Official Code Section 25-434.

November 1, 2007: The Owner files a motion to dismiss BZA Appeal No. 17677. The motion served on appellants [Cooper and Getachew], attaches a copy of Building Permit 98040, which had been issued on November 13, 2006, and under which construction on the store was being done. The Appellants therefore had actual knowledge of the Building Permit no later than November 1, 2007.

March 4, 2008: Board denies BZA Appeal No. 17677, holding that Section 1401.1(b) prohibits only the sale of alcoholic beverages as a principal use, not sales that are customarily incidental and subordinate to the Property's principal use as a full-service grocery store. Harris Teeter's sales are permitted as an accessory use within the Reed-Cooke Overlay District.

March 2008: Harris Teeter files an application with DCRA for a certificate of occupancy.

March 17, 2008: Cooper sends email request to the Office of the Zoning Administrator inquiring as to whether a certificate of occupancy had been issued for the proposed grocery store and seeking to participate in the review process for any such application.

March 21, 2008: DCRA issues Certificate of Occupancy No. CO163333 (the "Certificate of Occupancy") to Harris Teeter.

March 27, 2008: Cooper sends second email request to Office of Zoning Administrator requesting information as to the Certificate of Occupancy.

May 22, 2008: Appellants file the current appeal, challenging the issuance of the Building Permit and the Certificate of Occupancy. The appeal was filed at least six months after

the Appellants had actual knowledge of the Building Permit and more than sixty days after the issuance of the Certificate of Occupancy.

II. ARGUMENT

A. The Present Appeal Is Untimely

Timeliness is a threshold requirement of the Board's jurisdiction. *Goto v. D.C. Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In order to appeal a decision of the Zoning Administrator to the Board of Zoning Adjustment, an aggrieved party must file its appeal within the time limits prescribed under Section 3112.2 of the Zoning Regulations.⁵ In the absence of "exceptional circumstances," that provision essentially imposes three requirements with respect to the timing of BZA appeals: (1) all appeals must be filed within sixty days of *actual or constructive notice* of the decision being appealed; (2) an individual must be given at least sixty days *from the date of the decision appealed* in which to file an appeal; and (3) an appeal of a building permit will be barred if it is filed more than ten days after the new structure is under roof.

⁵Section 3112.2 provides that any person aggrieved by a decision of an administrative officer in the administration of the Zoning Regulations may file a timely appeal as follows:

- (a) An appeal shall be filed within sixty (60) days *from the date the person appealing the administrative decision had notice or knowledge of the decision complained of*, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.
- * * *
- (c) Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.
- (d) The Board may extend the sixty- (60) day deadline for the filing of an appeal *only if the appellant demonstrates that*:
 - (1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that *substantially impaired* the appellant's ability to file an appeal to the Board; and
 - (2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.

11 DCMR § 3112.2, Zoning Commission Order No. 02-01, February 7, 2003 (emphasis added).

Section 3112.2(d) further provides that the Board may extend the sixty-day deadline only if two separate requirements are satisfied. First, the appellant must demonstrate that "[t]here are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board." 11 DCMR § 3112.2(d)(1). Second, the Board must ensure that any extension of time "will not prejudice the parties to the appeal, as identified in § 3199.1 [of the Zoning Regulations]." 11 DCMR § 3112.2(d)(2). If either one of these requirements has not been met, then the Board may not grant an extension. As discussed below, the subject appeal is untimely with respect to both the Building Permit and the Certificate of Occupancy.

An appellant must be given at least sixty days in which to file an appeal of a building permit. In BZA Appeal No. 17677, the Appellants claimed that the official decision from which they were appealing was the confirmatory letter issued by Zoning Administrator on March 21, 2007. The Appellants now seek to appeal the Building Permit itself, which was issued on November 13, 2006. There is no question that the present appeal was filed more than sixty days after the date on which the Building Permit was issued.

The Zoning Regulations further provide that an appeal challenging the administration or enforcement of the Zoning Regulations must be filed "within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2(a). In this case, there is no question that the Appellants possessed actual knowledge of the Building Permit more than sixty days prior to filing the present appeal. During the Board's public hearing on BZA Appeal No. 17677, Appellant Cooper testified that he had actual knowledge of the Zoning Administrator's March 21, 2007 letter in late

April 2007 and should have been aware of the letter when it was provided to members of the public at the ABC Board's public hearing on March 28, 2007. *See* Public Hearing Transcript, BZA Appeal No. 17677 (January 29, 2008), at 265. Because the letter merely confirmed the validity of the previously issued Building Permit, it necessarily follows that the Appellants became aware of the underlying Building Permit no later than late April 2007. The present appeal was filed more than a year after the Appellants received the Zoning Administrator's letter.

In addition, the Appellants clearly received actual notice of the Building Permit when they were hand-delivered a copy of the Owner's motion to dismiss BZA Appeal No. 17677 on November 1, 2007. As noted above, a copy of the Building Permit was attached as an exhibit to that motion. The Appellants waited more than six months after physically receiving a copy of the Building Permit before filing the present appeal.

The Appellants have cited no exceptional circumstances outside of their control that would warrant tolling the sixty-day deadline. Indeed, the Appellants filed an appeal of the March 21, 2007 letter on May 25, 2007. In addition, it is clear that extending the sixty-day deadline in this case would prejudice Harris Teeter. The construction work authorized by the Building Permit was completed in March 2008, and the grocery store has been in operation since April 2008. Because neither of the requisite elements for an extension of the sixty-day deadline is present in this case, the Board must dismiss the subject appeal as untimely.

The subject appeal is also untimely with respect to the Certificate of Occupancy. As the Board and the Court of Appeals have held, a certificate of occupancy may be appealed to the Board only if it represents a separate and independent zoning decision that was not contained within an underlying building permit or if it provides the first notice of an earlier zoning decision. Because the alleged zoning violation in this case (i.e., the use of the Property as a

grocery store) was contained in the Building Permit, the Certificate of Occupancy does not provide an independent basis for the present appeal. The Court of Appeals has explained why a certificate of occupancy that merely confirms a zoning decision contained in a previously issued building permit does not trigger a new sixty-day appeal period:

A certificate of occupancy does not ... start another sixty-day appeal period as to any and all DCRA zoning decisions affecting a project that preceded issuance of the certificate. If that were so, every zoning determination that preceded issuance of a building permit would effectively be subject to review again at the certificate-of-occupancy stage, and no property owner could ever have assurance that a building project would not be stopped in its tracks at the last minute.

Basken v. D.C. Board of Zoning Adjustment, No. 06-AA-379, slip op. at 21-22 (D.C. April 18, 2008). Because the use of the Property as a grocery store was approved by the Zoning Administrator at the building-permit stage, *Basken* is dispositive with respect to the present appeal as it relates to the Certificate of Occupancy.

B. The Subject Appeal Is Barred under Principles of Administrative Res Judicata and Collateral Estoppel

Because the Appellants' claims have been previously litigated and determined in this forum, they are barred under well-settled principles of administrative res judicata and collateral estoppel. The D.C. Court of Appeals has described those doctrines as follows:

After a valid final adjudication on the merits, the doctrine of res judicata bars relitigation of the same claim between the same parties. ... Collateral estoppel, a related doctrine, precludes relitigation of issues of fact or law determined in a prior proceeding which were essential to that judgment.

Oubre v. D.C. Department of Employment Services, 630 A.2d 699, 703 (D.C. 1993). Importantly, the Court of Appeals has held that res judicata and collateral estoppel "apply to the results of administrative proceedings when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate." *Borger Management v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (punctuation and

internal citation omitted). *See also Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999) (holding that collateral estoppel "applies not only to judicial adjudications, but also to determinations made by agencies other than courts, when such agencies are acting in a judicial capacity").

With respect to the claim that the Building Permit was issued in error, the present appeal is res judicata. The Appellants' claim that the Zoning Administrator had erred in approving the Building Permit was previously adjudicated in this forum by the same parties as are involved in this recently filed appeal (i.e., the Appellants and the District), and the issue was conclusively determined by the Board in BZA Appeal No. 17677. It is also clear that the Board was acting in a quasi-judicial capacity in that proceeding. The Court of Appeals has described some of the indicia of an adjudicative proceeding:

In the present case, the record reflects that the initial proceeding was indeed the equivalent of a judicial proceeding. An evidentiary hearing was held on petitioner's claim, the parties were given an opportunity to make opening and closing statements, to call witnesses, to cross-examine witnesses, and to introduce exhibits. The hearing examiner made findings of fact and conclusions of law on the issues and entered a compensation award. All of these factors mark the administrative hearing on petitioner's initial claim as an adjudicative function.

Oubre, 630 A.2d at 703. Similarly, the Board held multiple public hearings on BZA Appeal No. 17677. The Appellants made opening and closing statements, cross-examined witnesses, and introduced evidence into the administrative record. In addition, Section 3125.3 of the Zoning Regulations provides that any Board "decision or order on an appeal or application shall be in writing and accompanied by findings of fact and conclusions of law, which shall be filed in the record." 11 DCMR § 3125.3. *See also* D.C. Administrative Procedure Act, D.C. Code § 2-509(e) (2001) (providing that "[e]very decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law"). Because the proceeding in BZA Appeal No. 17677

possessed all of the indicia of a judicial proceeding, the present appeal is barred under principles of res judicata with respect to the Appellants' claim that the Building Permit was issued in error. The Appellants should not be allowed to relitigate the same claim against the same party in the same forum for no other reason than their disagreement with the outcome of the previous proceeding.

Because BZA Appeal No. 17677 addressed only the validity of the underlying Building Permit, the Appellants apparently argue that their appeal is not barred by res judicata with respect to their new claim that the Certificate of Occupancy was erroneously issued. The first appeal, the Appellants may argue, challenged a separate and distinct administrative decision. Even if the Board agrees that the present appeal is not barred under the doctrine of res judicata as it relates to the Certificate of Occupancy, the appeal is nonetheless barred under the related doctrine of collateral estoppel and under the *Basken* decision.

The Court of Appeals has held that the doctrine of collateral estoppel can preclude the relitigation of a specific issue even when the claim is not barred by the doctrine of res judicata:

Even where res judicata is inapplicable, collateral estoppel or issue preclusion may bar relitigation of issues determined in a prior action. That doctrine can be invoked against a party where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment.

Wilson v. Hart, 829 A.2d 511, 514 (D.C. 2003). The Board has applied the doctrine of collateral estoppel to preclude the relitigation of issues determined in an earlier BZA proceeding. See *Appeal No. 16679A of Spring Valley Wesley Heights Citizen's Association* (June 10, 2005). The Board has already determined that the Zoning Administrator did not err in approving the Building Permit, and that decision must be given preclusive effect in the present appeal under principles of collateral estoppel. And as discussed below, the Board's rules provide that when an

applicant builds in accordance with a building permit, a certificate of occupancy will be issued. *See* 11 DCMR § 3203.11.

First, the Building Permit's validity was the central issue litigated by the parties and determined by the Board in BZA Appeal No. 17677. The issue was therefore "actually litigated." Second, the issue was determined by the Board in the form of a valid, final judgment on the merits. As an intervenor in BZA Appeal No. 17677, the Owner raised a number of jurisdictional arguments and equitable defenses in response to the Appellants' claims. The Board rejected those arguments and proceeded to address the merits of the appeal. The Board ultimately held that the Zoning Administrator did not commit error in approving the Building Permit. Third, the Appellants were afforded a full and fair opportunity to litigate the validity of the Building Permit. As noted above, the Appellants made opening and closing statements, submitted evidence, and cross-examined witnesses. Finally, the Board's determination that the Building Permit was valid was essential to its decision in BZA Appeal No. 17677 because that issue was the very basis of the Appellants' appeal. Because all four of the elements of collateral estoppel are satisfied in this case, the Board must give preclusive effect in the present appeal to its prior ruling upholding the Zoning Administrator's decision.

The validity of the Building Permit is dispositive with respect to the Appellants' claim that the Zoning Administrator erred in approving the Certificate of Occupancy. Section 3203.11(c) of the Zoning Regulations provides that any use of a structure that is dependent upon the construction, conversion, or alteration of that structure must be designated on the building permit application. 11 DCMR § 3203.11(c). When the building permit is issued, the District designates the proposed use in a provisional certificate of occupancy. 11 DCMR § 3203.11(d). In issuing a provisional certificate of occupancy, the Zoning Administrator must determine that

the proposed use is consistent with the Zoning Regulations as of the date on which the building permit is issued. 11 DCMR § 3203.11(d). The 2003 D.C. Construction Codes Supplement similarly provides that "[a]t the time of approval of the building permit application by the Zoning Division of the Department [of Consumer and Regulatory Affairs], the proposed use shall become the provisional occupancy approved by the code official." 12 DCMR § 110.3.2. The approved provisional certificate of occupancy becomes final upon the issuance of an official certificate of occupancy by DCRA. 12 DCMR § 110.3.4. In other words, a certificate of occupancy is deemed valid so long as it is consistent with the underlying building permit. The Board held in BZA Appeal No. 17677 that the Zoning Administrator did not err in approving the Building Permit, and the determination of whether the proposed grocery store use is consistent with the Zoning Regulations was a necessary element of that approval. The Certificate of Occupancy is therefore valid.

C. **Grocery Stores Are Permitted as a Matter of Right within the Reed-Cooke Overlay District**

In BZA Appeal No. 17677, the Appellants argued that the sale of wine and beer for off-premises consumption within a full-service grocery store was prohibited within the Reed-Cooke Overlay District. The Appellants now argue that the entire grocery store violates the purposes of the Reed-Cooke Overlay District. According to the Appellants, the Zoning Administrator erred in failing to consider the impacts of the proposed grocery store on the surrounding neighborhood when reviewing Harris Teeter's applications for the Building Permit and the Certificate of Occupancy.

The Appellants' argument is without merit. Neither the Board nor the Zoning Administrator may properly prohibit a matter-of-right grocery store use solely on the basis of an alleged inconsistency with the *purposes* of the Zoning Regulations. The denial or revocation of a

building permit or certificate of occupancy by the Board or the Zoning Administrator for no other reason than an alleged violation of one of those purposes would represent an impermissible and *ultra vires* exercise of authority that is properly vested in the Zoning Commission. See D.C. Code § 6-641.07 (2001) (providing that the "Board of Zoning Adjustment shall not have the power to amend any regulation or map"). A grocery store is expressly allowed as a matter-of-right use within the Reed-Cooke Overlay District. See 11 DCMR § 701.4(l). Because a grocery store is a permitted use within the Reed-Cooke Overlay District, the Zoning Administrator could not have properly declined to issue the Building Permit or Certificate of Occupancy simply because the Appellants believed that the proposed project was inconsistent with certain of the purposes set forth in Section 1400.2 of the Zoning Regulations.

D. The Board Has No General Jurisdiction over Alleged Violations of D.C. Code § 25-434 and the U.S. Constitution

The Appellants claim that Harris Teeter violated Section 25-434 of the D.C. Code in connection with the Class B liquor license proceedings before the ABC Board, and that this Board should therefore revoke the Building Permit and Certificate of Occupancy on that basis.⁶ The Appellants further argue that the issuance of the Building Permit and Certificate of Occupancy violates a number of provisions of the U.S. Constitution. The Board cannot properly address those statutory and constitutional claims. The Board is not a law enforcement agency or a court of general jurisdiction. It does not have plenary authority to review any alleged violation of state or federal law. On the contrary, the Zoning Act provides that the Board has appellate jurisdiction over administrative decisions "granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision *based in whole or in*

⁶ Harris Teeter notes that as a matter of public record Appellant Cooper was dismissed from the proceedings before the ABC Board for violating this very provision. The Appellants also claim in this appeal that "compensation" is due to them. See Addendum to Appeal at 7.

part upon any zoning regulation or map adopted under this subchapter or subchapter V of this chapter." D.C. Code § 6-641.07(f) (2001) (emphasis added). The alleged violations of Section 25-434 of the D.C. Code and the U.S. Constitution do not represent an "administrative decision based in whole or in part upon any zoning regulation or map" and are thus beyond the scope of the Board's jurisdiction.

E. The Burden of Proof in this Appeal Rests with the Appellants

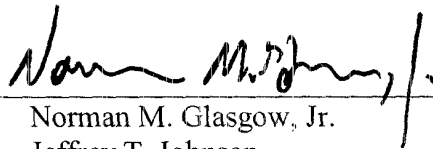
The Appellants request that the Board order Harris Teeter "to show cause why its C of O authorized by the ZA should not be ordered by the BZA held in abeyance, and suspended, pending the outcome of this appeal, and pending any related issues unresolved by this appeal being adjudicated in the appropriate courts." Appeal Addendum, at 8. The Zoning Regulations are clear, however, that "[i]n all appeals and applications, the burden of proof shall rest with the appellant or applicant." 11 DCMR § 3119.2. If the Board declines to dismiss the subject appeal and proceeds to the merits of this case, the Appellants must carry the burden of introducing evidence sufficient to support their claim that the Zoning Administrator erred in approving the Building Permit and Certificate of Occupancy. Harris Teeter is under no affirmative obligation to defend the validity of its Building Permit or Certificate of Occupancy.

**III.
CONCLUSION**

Based on all of the reasons set forth herein, the Board should dismiss or deny the present appeal.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Norman M. Glasgow, Jr.
Jeffrey T. Johnson
2099 Pennsylvania Ave., N.W.
Suite 100
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November 3, 2008

CERTIFICATE OF SERVICE

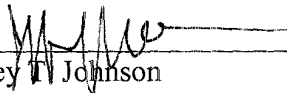
I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss was served this

3rd day of November 2008, via hand-delivery upon the following:

L. Napoleon Cooper
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Jeffrey T. Johnson

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