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<b>State Bar Court of California</b> <b>Hearing Department</b> <b>Los Angeles</b> <b>ACTUAL SUSPENSION</b>		
Counsel For The State Bar  Margaret P. Warren 1149 So. Hill St. Los Angeles, CA 90015-2299 (213) 765-1342  Bar # 108774	Case Number(s): 09-O-13575  <div style="text-align: center; font-size: 1.2em; font-weight: bold;">PUBLIC MATTER</div>	For Court use only  <div style="text-align: center;"> <b>FILED</b>  <b>FEB 15 2012</b>             STATE BAR COURT            CLERK'S OFFICE            LOS ANGELES         </div>
Counsel For Respondent  Daniel S. Agle Klinedinst PC 501 West Broadway, Suite 600 San Diego, CA 92101 (619) 239-8131, Ext. 2220  Bar # 251090	Submitted to: <b>Assigned Judge</b>  STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING  <b>ACTUAL SUSPENSION</b>  <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	
In the Matter of: James Henry Pasto  Bar # 48445  A Member of the State Bar of California (Respondent)		

**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 January 7, 1971.
- (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 23 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."

(Effective January 1, 2011)



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- (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."
- (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):
- Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
  - Costs are to be paid in equal amounts prior to February 1 for the following membership years: (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
  - Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
  - Costs are entirely waived.

**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 80-C-24 SD (S.D. 382); Bar Misc. 4282
  - (b)  Date prior discipline effective January 8, 1982
  - (c)  Rules of Professional Conduct/ State Bar Act violations: Conviction of one (1) count of violation of Penal Code section 132, offering false evidence [no RPC/State Bar Act violations were listed or cited in the Stipulation as to Facts and Discipline filed on June 25, 1981; the Supplemental Stipulation as to Facts, Supplementing Stipulation as to Facts and Discipline, also filed on June 25, 1981; or the Order Approving Stipulation as to Facts and Discipline, filed on July 9, 1981].
  - (d)  Degree of prior discipline Respondent was suspended, by order of the Supreme Court in BM 4282, until the Professional Responsibility Examination is passed, or for a period of one year, whichever is greater, but not less than one year.
  - (e)  If Respondent has two or more incidents of prior discipline, use space provided below.
- (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.
- (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.

(Effective January 1, 2011)

- (4)  **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice. As a result of Respondent's grossly negligent record keeping in his capacity as trustee of Harmony Trust #3, an accurate accounting of all transactions involving Harmony Trust #3 monies can never be made. Respondent's repeated breaches of his fiduciary duties as trustee of Harmony Trust #3 led to litigation in both the Harmony Trust #3 matter and in the probate of the estate of Serena Birch (who was one of two beneficiaries of Harmony Trust #3) and thereby harmed 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.

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- (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.
- (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)  **Stayed Suspension:**
- (a)  Respondent must be suspended from the practice of law for a period of four (4) years.
- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii) Standards for Attorney Sanctions for Professional Misconduct.
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:
- (b)  The above-referenced suspension is stayed.

(2)  **Probation:**

Respondent must be placed on probation for a period of five (5) years, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

(3)  **Actual Suspension:**

- (a)  Respondent must be actually suspended from the practice of law in the State of California for a period of thirty (30) months.
- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:

**E. Additional Conditions of Probation:**

- (1)  If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in the general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.
- (2)  During the probation period, 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 period of probation. 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 probation during the preceding calendar quarter. Respondent must also state 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 days, that report must be submitted on the next 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 period of probation and no later than the last day of probation.

- (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 to the monitor 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 probation 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 probation conditions.
- (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)  The following conditions are attached hereto and incorporated:
  - Substance Abuse Conditions                       Law Office Management Conditions
  - Medical Conditions                                       Financial Conditions

**F. Other Conditions Negotiated by the Parties:**

- (1)  **Multistate Professional Responsibility Examination:** 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 during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**
- No MPRE recommended. Reason:
- (2)  **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (3)  **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (4)  **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension:
- (5)  **Other Conditions:**



6. In March 2003, Byron and Serena hired Respondent to represent their interests in an action against Russell Handy, Gary Russell Handy, and Potter in connection with Harmony Trust #3. On March 26, 2003, Respondent filed, on behalf of Byron and Serena, a "Petition to Trace and Recover Trust Property Wrongfully Disposed of and to Compel Redress, Removal of Trustees and Alternate Trustees and Appoint Successor Trustees, Recovery of Personal Property Wrongfully Taken, Concealed or Disposed of From Estate of Decedent Evelyne Angel Lek Birch," in the matter entitled *In re the Matter of the HARMONY TRUST NO. 3, Robert Byron Birch, and Serena Desiree Birch, Petitioners v. Russell C Handy, Trustee of the Harmony Trust No. 3, and Gary Russell Handy, Successor Trustee of the Harmony Trust No. 3, Respondents*, case no. P 183688, filed in the Superior Court of California, County of San Diego ("Harmony Trust litigation").

7. On April 29, 2003, a settlement agreement was reached in the Harmony Trust litigation. The settlement agreement provided, inter alia, that the parties would reform the sales agreement between Trustor and Potter so that the sales price on Trustor's La Jolla residence was one million one hundred thousand dollars (\$1,100,000.00), of which 1 million dollars would be delivered to the Trustee of Harmony Trust #3, in cash, at the close of the refinance escrow; and that a one hundred thousand dollar (\$100,000.00) note secured by deed of trust be executed by Potter in favor of Harmony Trust #3, with monthly payments of six percent (6%) interest for 24 months, all due and payable 24 months from close of the refinance escrow ("Potter Note"); that Gary Russell Handy and Russell Handy would resign as trustees of both Harmony Trusts #2 and #3; that Potter and the Handys would deliver to Respondent all of Evelyne's assets; and that the new trustee would be responsible for administration of the Harmony trust(s).

8. In accordance with the settlement agreement reached by the parties in the Harmony Trust litigation, Gary Russell Handy and Russell Handy, the trustees of both Harmony Trusts #2 and #3, resigned. In July 2003, pursuant to the terms of the settlement agreement, Respondent, as counsel of record for Byron and Serena, took delivery of \$1,000,000.00 in cash. Respondent was appointed successor trustee of Harmony Trust #3 by order of the Superior Court dated October 16, 2003.

9. The only assets of Harmony Trust #3 distributed to Respondent in July 2003 consisted of \$1,000,000.00 in cash. The only other asset belonging to Harmony Trust #3 was the Potter Note. Respondent, in his capacity as trustee for Harmony Trust #3, received all interest payments on the Potter Promissory Note through in or about March or April 2005, at which time the Note's \$100,000.00 in principal was distributed to Respondent for the benefit of Harmony Trust #3.

10. Pursuant to the terms of Harmony Trust #3, the trust assets were to be divided equally between Byron and Serena: Byron was entitled to outright distribution of his one-half share of the Trust assets upon the death of the Trustor; Serena was entitled to her one-half share to be paid over time.

11. At all times relevant herein, Respondent was aware of the fact that Serena had a history of substance and alcohol abuse, as well as bouts of depression, throughout most of her adult life.

12. At all times relevant herein, Respondent knew that Serena believed she was not able to manage her own financial affairs in a responsible manner.

13. At all times relevant herein, Respondent knew that Serena believed that her brother and/or other family members might take financial advantage of her.

14. At all times relevant herein, Respondent knew that Serena distrusted governments and governmental entities, for reasons she did not disclose to Respondent.

15. At all times relevant herein, Respondent knew that Serena reposed complete trust and confidence in him as her advisor and financial manager.

16. Respondent continued to act in the capacity of trustee of Harmony Trust #3 until September 8, 2008.

**Case No. 09-O-13575 / Facts:**

17. On August 1, 2003, Respondent opened an account at Washington Mutual Bank (hereinafter referred to as "WaMu"), account no. 092-388868-2 (the "Harmony account"). Respondent opened the Harmony account in his own name and with his own Social Security Number as the Harmony account's Tax Identification Number. Respondent alone had signature authority for the Harmony account.

18. The Harmony account remained in existence from August 1, 2003 through and including May 7, 2007, when Respondent closed it out with a zero balance.

19. Throughout its existence, the Harmony account remained a "single account" in Respondent's name only, and with Respondent having sole signature authority. At no time during its existence was the Harmony account ever designated or identified as property of Harmony Trust #3. At no time during its existence was the Harmony account identified by a Tax Identification Number other than Respondent's individual Social Security Number.

20. In August 2003, Respondent made the following deposits of funds into the Harmony account:

<u>DATE</u>	<u>AMOUNT</u>
August 1, 2003	\$37,482.07
August 5, 2003	\$965,150.00
August 27, 2003	<u>\$490.99</u>
<b>TOTAL:</b>	<b>\$1,003,122.90</b>

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21. Between November 2003 and July 2005, Respondent deposited personal funds not subject to Harmony Trust #3 into the Harmony account, as follows:

--11/21/03: Personal check drawn on Respondent's Morgan Stanley Dean Witter account # 100 5803 288, payable to WaMu, in the amount of \$57,000.00;

--11/26/03: Two checks from Benjamin De Rosales, payable to Respondent, in the amounts of \$9,664.00 and \$2,836.00;

--11/26/03: Personal check drawn on Respondent's Morgan Stanley Dean Witter account # 100 5803 288, in the amount of \$7,500.00;

--3/25/04: Two checks from Cheryle L. Kudros, totaling \$32,496.40, payable to Respondent, one in the amount of \$14,748.20, and one in the amount of \$17,748.20;

--3/26/04: Check from Shine Lee, payable to Respondent, in the amount \$95,000.00;

--7/14/04: Check from E.F. Whalen Co. Estate Liquidators, payable to Respondent, in the amount of \$10,000.00;

--7/14/04: Check from Mabel Dahl, payable to Respondent, in the amount of \$3,000.00;

--11/3/04: Check from Lori Clark-Viviano, payable to Respondent, in the amount of \$75,000.00;  
and

--7/12/05: Check from Manuel Pacheco "re Marc Pacheco" payable to Respondent, in the amount of \$5,000.00.

22. In November 2003, Respondent was in the process of purchasing, as a personal investment, certain real property located at 6886 Bluefield Court, San Diego, CA (the "Bluefield Property"), and had put down earnest money of his own on the Bluefield Property. The Bluefield Property was in escrow in November 2003.

23. On November 21, 2003, Respondent purchased a bank check in the amount of \$487,000.00, with funds withdrawn from the Harmony account, payable to "Pickford Real Estate Escrow," for the purpose of consummating the purchase of the Bluefield Property. The Bluefield Property's purchase price was approximately \$495,000.00. The \$487,000.00 Respondent withdrew from the Harmony account and delivered to the Bluefield Property escrow included \$475,000.00 in Harmony Trust #3 funds belonging to Serena; and \$12,000.00 in funds belonging to Respondent.

24. Serena's total one-half share of the Harmony Trust #3 assets exceeded \$475,000.00. Respondent, in his capacity as trustee of Harmony Trust #3, made periodic disbursements from the

Harmony account to or on behalf of Serena (as a beneficiary of Harmony Trust #3) from August 2003 through at least September 2005.

25. On December 1, 2003, Serena signed a document prepared by Respondent entitled "Receipt and Memorandum of Agreement" ("Agreement"), acknowledging receipt of the sum of \$475,000.00 on November 21, 2003 as her "net distribution from Harmony Trust No. 3" and authorizing Respondent to use the \$475,000.00 for the "initial purchase" of the Bluefield Property. Pursuant to the Agreement, "[t]itle to Bluefield and any other real properties acquired jointly by the parties [Serena and Respondent] shall be taken and held in the name of James H. Pasto and [Respondent's wife] Dorothy A. Pasto as joint tenants." The Agreement provided that Serena would "obtain a purchase money or refinance loan on the [Bluefield] property" and that the "loan proceed shall be used to establish and maintain investment accounts with Morgan Stanley, or any other properly licensed investment bank or financial institution [Respondent] may select, in the name of [Respondent] for the benefit of the parties." The Agreement further provided that Respondent was "to manage and use said account(s)" and "make and obtain loans; to buy and sell shares of stock, bonds or other evidence of corporate or municipal debt; to invest in 'margin' accounts or futures; or to make loans or sales to himself and/or to others with proper documentation or recourse." The Agreement further provided that, "[a]t the time Serena directs the sale of Bluefield, [Respondent] shall first receive repayment of all sums expended or invested by him in connection with the purchase, renovation, maintenance and operation of that property (his 'capital account'). Next, Serena shall be paid all sums invested by her for the acquisition, renovation, maintenance and operation of that property (her 'capital account'). All profit remaining following the sale of Bluefield shall be divided equally between the parties." This Agreement was not notarized, nor was it ever recorded.

26. On November 21, 2003, a Grant Deed was recorded in the San Diego County Recorder's Office (Document #2003-1402739), whereby the Bluefield Property was deeded to Respondent and Dorothy Pasto, "husband and wife as Joint Tenants." At no time thereafter was any writing executed and recorded to show that Serena had any right, title or interest (legal or equitable) in the Bluefield Property.

27. At no time did Respondent and Serena ever execute any other writing (besides the December 1, 2003 Agreement) that fully disclosed, *inter alia*, what the total purchase price (including any and all ancillary costs and fees, etc.) of the Bluefield Property came to; the exact amounts contributed by Serena and Respondent, respectively, to the purchase of the Bluefield Property; what if any right, title or interest (legal or equitable) Serena had in the Bluefield Property; how any funds obtained from refinancing the Bluefield Property would be allocated between Respondent and Serena; how much money Respondent and Serena each contributed to the remodeling the Bluefield Property; how any rents

received from tenants of the Bluefield Property would be apportioned between Respondent and Serena; whether any potential loss resulting from a sale of the Bluefield Property would be apportioned between Respondent and Serena, and if so, how.

28. In February 2004, Respondent successfully applied to refinance the Bluefield Property and obtained a loan, in his name and secured by the Bluefield Property, in the amount of \$346,500.00. The loan netted \$335,704.98. On February 6, 2004, Respondent made two deposits to the Harmony account: one in the amount of \$285,560.48; and one in the amount of \$50,144.43, for a total deposit of \$335,704.91.

29. On February 13, 2006, Respondent withdrew \$210,006.00 from the Harmony account and deposited \$210,000.00 of those funds in Morgan Stanley account no. 794-042167.032, which was held in Respondent's name only ("Morgan Stanley account"). The \$210,000.00 deposit represented a portion of the loan proceeds Respondent received upon refinancing the Bluefield Property. On March 9, 2006, Respondent deposited \$10,000.00 of his personal funds into the Morgan Stanley account.

30. In 2004 and 2005, the Bluefield Property was extensively remodeled. Both Respondent's personal funds and Serena's funds were used to pay for the improvements.

31. Respondent never provided an accounting to anyone, at any time, of exactly how much of Serena's money was expended in the improvements to the Bluefield Property, or from what account(s) any expenditures attributable to Serena were made in payment of those improvements.

32. Sometime between 2004 and 2006, the Bluefield Property was rented out to tenants, who regularly paid rent in the amount of \$2200-\$2400 per month, for a period of approximately one year. The rental income was received by Respondent. Respondent never accounted to anyone, at any time, for these rent receipts, or for what if any portion of these receipts Serena was entitled to receive.

33. In August 2007, the Bluefield Property was sold for approximately \$675,000.00, netting \$218,908.81. Respondent never provided an accounting to anyone, at any time, for the sale of the Bluefield Property, or how much if any of the \$218,908.81 realized from the sale was Serena's share.

34. On July 9, 2003, Respondent opened a personal account in his own name at WaMu, account # 067-132258-6, which Respondent designated "Property Account."

35. Between September 2003 and July 2004, Respondent made several transfers of funds from the Harmony Account to the "Property Account," as follows:

<u>Date</u>	<u>Amount</u>
9/22/03	\$3,000.00
12/1/03	\$3,400.00
3/15/04	\$5,000.00

4/12/04	\$6,000.00
4/15/04	\$8,000.00
4/27/04	\$6,000.00
7/13/04	<u>\$10,000.00</u>
<b>Total:</b>	\$41,400.00

36. Between October 2003 and January 2005, Respondent made several transfers of funds from the Harmony Account to a personal account at WaMu, account # 379-1370203, held in Respondent's name only, as follows:

<u>Date</u>	<u>Amount</u>
10/24/03	\$18,674.69
11/29/03	\$ 1,192.56
12/24/03	\$ 469.78
1/10/04	\$ 2,195.00
2/3/04	\$ 72.95
3/12/04	\$ 8,000.00
1/29/05	<u>\$ 6,000.00</u>
<b>Total:</b>	\$36,604.98

37. On February 13, 2004 and March 9, 2004, Respondent made two withdrawals of \$210,000.00 and \$10,000.00, respectively, from the Harmony Account to purchase two official bank checks payable to "Morgan Stanley," and deposited the checks into a Morgan Stanley investment account held in his name only, account no. 794-042167.032 ("Morgan Stanley account"). In January 2006, Respondent closed the Morgan Stanley account and transferred the account's remaining balance of \$17,700.69 to a Bank of America Broker account held in his name only, account # W86-227463 / checking account # 1182346429.

38. On March 18, 2004, Respondent issued a check, drawn on the Harmony Account, in the amount of \$38,706.29, payable to "La Mesa RV Central," for the purchase of a recreational vehicle. Title to this recreational vehicle was never in Serena's name, and the recreational vehicle was not part of Serena's estate upon her death.

39. On July 9, 2004, Respondent transferred \$12,000.00 from the Harmony Account to his personal account at WaMu, account # 092-3890364.

40. On July 13, 2004, Respondent withdrew \$6,000.00 from the Harmony Account, ostensibly for the purchase of a bank check; the payee was not identified by Respondent on the withdrawal slip. At no time did Respondent ever provide an accounting to anyone for this \$6,000.00 withdrawal, or identify the payee(s).

41. Respondent never provided anyone, at any time, with an accounting for the transfers of the foregoing sums from the Harmony Account to his personal accounts at WaMu and his personal account at Morgan Stanley. Respondent never provided anyone, at any time, with an accounting for, and purpose of, the \$38,706.29 payment of trust funds to "La Mesa RV Central" on March 18, 2004.

42. Between October 2003 and May 2007 (when Respondent closed out the Harmony Account with a zero balance), Respondent made the following disbursements to or on behalf of Byron from the Harmony Account:

<u>Date</u>	<u>Amount</u>
10/4/03	\$ 22,679.70
11/6/03	\$ 2,000.00
12/24/03	\$300,000.00
1/17/04	\$ 670.78
2/3/04	\$ 1,000.00
6/11/04	\$ 5,000.00
6/11/04	\$ 500.00
6/30/04	<u>\$ 5,082.00</u>
<b>Total:</b>	\$336,932.48

43. Between April 2005 and December 2007, Respondent made the following additional payments to or on behalf of Byron, from sources other than the Harmony Account, totaling \$150,000.00:

4/5/05	\$100,000.00
12/[illegible]/07	\$ 50,000.00

44. On July 6, 2004, Byron sent a letter to Respondent, requesting full distribution of all remaining funds in the Harmony Trust to which Byron was entitled. Byron also requested Respondent to provide him with an accounting of all Harmony Trust property received by Respondent and to account for all disbursements made by Respondent from the Harmony Trust funds. Respondent did not respond in any manner to Byron's letter.

45. On October 25, 2007, attorney Nikki Miliband ("Miliband"), acting on behalf of Byron, sent a letter to Respondent requesting Respondent's response to Byron's demand for an accounting. Miliband also requested, inter alia, that Respondent provide any final distribution Byron might be entitled to from the Harmony Trust. Respondent did not provide the requested accounting, either to Byron or Miliband or the Superior Court, or remit any monies to Byron or Miliband, as requested by Miliband.

46. On November 14, 2007, Miliband sent another letter to Respondent, requesting his response to her previous letter to him of October 25, 2007. Respondent did not provide an accounting or remit any monies to Byron or Miliband, as requested by Miliband. Instead, Respondent telephoned Miliband's office, sometime after November 14, 2007 and before November 22, 2007, and left a message for Miliband stating that he would be working on an accounting over the Thanksgiving Weekend (Thanksgiving Day fell on Thursday, November 22, 2007).

47. On November 30, 2007, Miliband sent Respondent a third letter, reminding him that he had not yet responded to her previous two letters. Respondent never responded to Miliband's November 30 letter at any time, to anyone; nor did he provide Miliband or Byron with the requested accounting or remit any monies to Miliband or Byron, as requested by Miliband in her letters to Respondent.

48. On February 22, 2008, Byron filed a Petition for Removal of James H. Pasto as Trustee of the Harmony Trust No. 3, for Accounting, for Distribution, and to Compel Trustee to Redress Breach of Trust, in the matter entitled *In re the Matter of the Harmony Trust No. 3*, case no. P183688, filed in the Sand Diego Superior Court ("Petition for Removal").

49. On February 27, 2008, the court set a hearing on the Petition for Removal to take place on April 28, 2008.

50. On April 28, 2008, Respondent appeared at the hearing on the Petition for Removal. At that time, the court ordered Respondent to submit an accounting for Harmony Trust #3 within thirty (30) days, and to file any objections to the Petition for Removal within the same time period. The court continued the hearing on the Petition for Removal to June 30, 2008.

51. On June 9, 2008, Serena executed a document entitled "Waiver of Account by Distributee of Trust" that had been prepared for her signature by Respondent. This document was captioned, "*In the Matter of the Harmony Trust No. 3 Robert Byron Birch, and Serena Desiree Birch, Petitioners v. Russel [sic] C. Handy, et al. Respondents, Case No. P183688,*" and reads in full: "Serena Desiree Birch, being one of the distributes [sic] of he [sic] Harmony Trust No. 3., does hereby waive the duty of James H. Pasto, the Trustee of said Trust, to prepare and render an account for his activities as Trustee of said Trust."

52. On June 20, 2008, Respondent filed his Objection to Byron's Petition for Removal ("Objection"). In his Objection, Respondent represented that he had disbursed \$489,736.70 in Harmony Trust #3 funds to the "beneficiaries" [sic] of the trust, and other disbursements totaling \$28,340.00. Respondent represented that \$41,350.12 remained of Harmony Trust #3 funds. Respondent further represented that he disbursed a total of \$1,032,136.70 to the beneficiaries. In his Objection, Respondent represented to the court: "On or about June 9, 2008 beneficiary Serena Birch executed a waiver of account in connection with my services as Trustee of the Trust." Respondent attached a copy of the June 9, 2008 "waiver of account" to his Objection.

53. On June 26, 2008, Serena executed the "Last Will and Testament of Serena Desiree Birch" ("Serena's Will"), which was drafted by Respondent. Respondent was nominated as Executor in Serena's Will; and Respondent's son, James H. Pasto, Jr., was nominated in Serena's Will as successor Executor. Among other specific bequests in Serena's Will, \$15,000.00 was to go to Respondent, to be held in trust for the benefit of Serena's dog. Serena's Will left the residue of her estate to Respondent in trust, for the benefit of Serena's pets and certain specified animal charities; Respondent's son was nominated to serve as successor trustee. Serena's Will was witnessed by two individuals, one of whom was Respondent's brother and employee, John Pasto, a former California attorney who resigned with charges pending from the State Bar of California effective March 22, 2001.

54. On June 26, 2008, Serena executed a document entitled "Acknowledgement and Receipt," prepared by Respondent, which read in full: "I, Serena Desiree Birch, hereby acknowledge receipt of an account for all transactions of the Trustee taken in connection with Harmony Trust No. 3, including all receipts, expenses and distributions, and all monies due me as a beneficiary of that trust from James H. Pasto, Trustee. I further acknowledge that the Trustee has distributed to me all sums due me pursuant to the terms of that trust and that I have no further interest in Harmony Trust no. 3." At no time did Respondent ever submit to the court or anyone else a copy of the account he purportedly provided to Serena.

55. Two days later, on June 28, 2008, at the age of 46 years, Serena committed suicide by self-inflicted handgun wound to the head. At the time of her death, Serena had no identifiable assets but for minimal personal property and her interest in Harmony Trust #3.

56. On June 30, 2008, Respondent appeared at the hearing on the Petition for Removal, but did not submit a full accounting to the court on that date. Respondent submitted an accounting only as to the distributions from the trust he had made to or on behalf of Byron.

57. At the June 30, 2008 hearing, the court ordered Respondent to submit, within sixty (60) days of the date of the hearing, an accounting for all distributions Respondent had made to Serena from

the Harmony Trust funds. At the time the court ordered him to submit a full accounting for all distributions he made from the trust to Serena, Respondent knew he had failed to keep, and did not have, adequate and accurate records of all his transactions involving Serena's share of the Harmony account and thus was unable to submit an accurate and truthful accounting for all distributions made to Serena. Respondent did not, however, inform the court at this or any other time that he had failed to keep adequate and accurate records of all his transactions involving Serena's share of the Harmony Trust #3 funds. The court continued the hearing on the Petition for Removal to September 8, 2008.

58. On July 29, 2008, Respondent filed a Petition for Probate of Will and for Letters Testamentary, and for Authorization to Administer Under the Independent Administration of Estates Act in the Superior Court of California, County of Orange, in the matter entitled *Estate of Serena Desiree Birch*, case no. 30-2008-00087965-PR-PW-LJC ("Serena probate"). On that same date, Respondent filed Serena's Will.

59. On September 8, 2008, Respondent appeared at the hearing on the Petition for Removal, and filed an unverified, purportedly complete accounting for all funds received by, and disbursed from, Harmony Trust #3. In this accounting, Respondent represented that \$31,125.22, and not \$41,350.12 as he had previously represented to the court, was what remained of Harmony Trust #3 funds.

60. The September 8, 2008 accounting Respondent submitted to the court failed to disclose the following material facts:

--The November 21, 2003 transfer of \$475,000.00 of Serena's share of Harmony Trust #3 funds directly from the Harmony Account to the Bluefield escrow for the purpose of purchasing the Bluefield Property;

--An unsecured loan of \$15,000.00 in funds withdrawn from the Harmony Account to a Daniel Martinez on March 20, 2004; whether or not this purported loan was ever repaid; and if so, the date(s) of repayment and identification of any account(s) into which such repayment(s) were deposited;

--Unsecured loans, totaling \$107,000.00, made to "Amilien Antic," an antique dealer, between in or about September 2003 and in or about April 2004;

-- Respondent's transfers of funds from the Harmony Account to his personal bank and investment accounts between in or about September 2003 and in or about January 2006;

--Respondent's withdrawals from the Harmony Account of \$6,000.00 on or about July 13, 2004, and \$75,000.00 on or about November 9, 2004 for unknown purposes; and

--Respondent's \$38,706.29 payment to "La Mesa RV Central" on or about March 18, 2004 with Harmony Account funds, to purchase a recreational vehicle for someone other than Serena.

61. The September 8, 2008 accounting Respondent submitted to the court failed to account for the following funds Respondent received and deposited into the Harmony Account:

--Twenty-three (23) payments from Shell Trading, payable to "Evelyne Birch/Earth Trust," for mineral rights, deposited between January 2004 and September 2005, totaling \$9,820.97;

--\$135,800.00 received from Amilien Antics in repayment of principal and interest on the unsecured loan of \$107,000.00 in Harmony Account funds to that entity (which exceeded the principal loan amount by \$28,800.00);

--Two money orders, totaling \$800.00, both dated 10/1/02, from a Dennis Tomlinson, and payable to "Evelyne Birch," deposited to the Harmony Account on or about November 21, 2003.

62. On September 8, 2008, the court suspended Respondent's powers as trustee of Harmony Trust #3 and appointed Wendy Hatch ("Hatch") as temporary trustee.

63. On October 6, 2008, Respondent delivered the sum of \$31,125.22 to Hatch, which he contended was the balance of Harmony Trust #3 funds to which Byron was entitled.

64. On September 10, 2008, Respondent filed a Notice of Petition to Administer Estate in the Serena probate.

65. On October 16, 2008, Byron filed a Contest and Grounds of Objections to Probate of Serena's Purported Will, a Petition for Probate of Will and for Letters of Administration with Will Annexed; and Authorization to Administer Under the Independent Administration of Estates Act ("Byron's Contest").

66. On December 8, 2008, Respondent filed his Demurrer to Byron's Contest.

67. On December 12, 2008, the court appointed Violet Boskovich ("Boskovich") as Special Administrator of Serena's estate.

68. On March 20, 2009, Respondent; Respondent's son, James H. Pasto, Jr.; Byron and his attorney; and attorney Boskovich, Special Administrator of Estate of Serena Birch, executed a Release and Settlement Agreement with respect to Serena's estate, and agreed to the following: That Boskovich be appointed Administrator of Serena's Purported Will; that Respondent and his son decline to act as Executor and Successor Executor, respectively, of Serena's Will; that Thomas Birch (Serena's father),

Gary Stowell, and Norma Orr (all named legatees of Serena's Will) receive distributions from Serena's Estate; and that any funds remaining in Serena's Estate be donated to charities named in Serena's Will.

69. On March 23, 2009, Byron filed a Petition for Approval of Release and Settlement Agreement in the Harmony Trust #3 matter ("Byron's Petition for Approval").

70. On June 22, 2009, Serena's Will was admitted to probate with reformation. Both Respondent and his son were precluded from acting as executor or trustee of Serena's estate. On July 8, 2009, the Order Appointing Boskovich as Administrator with Will Annexed of Serena's estate was filed.

71. On August 18, 2009, the Order on Byron's Petition for Approval was filed in the Harmony Trust #3 matter. Among other things, the court ordered Respondent to do the following:

--Deliver \$90,000.00 to Byron, through Byron's counsel;

--Deliver \$260,000.00 to Hatch, the Successor Trustee of Harmony Trust #3;

--Transfer to Hatch all Shell Trading mineral rights, one-half of said rights to be distributed to Byron, and the remaining half to be distributed to Serena's estate; and

--Deliver to Respondent's counsel the liquidated dollar amount of Bank of America account # W86-227463, in the approximate amount of \$40,000.00, which counsel was then to deliver to Hatch.

**Case No. 09-O-13575 / Legal Conclusions:**

72. By not designating the Harmony account, into which Respondent deposited Harmony Trust #3 property, as property of Harmony Trust #3, Respondent failed to see that trust property was designated as property of the trust, in violation of section 16009 (b) of the Probate Code, and thereby failed to support the laws of the State of California in willful violation of section 6068(a) of the Business and Professions Code.

73. By commingling funds belonging to him with funds belonging to Harmony Trust #3, Respondent failed to keep the trust property separate from other property not subject to the trust, in willful violation of Probate Code section 16009(a), and thereby failed to support the laws of the State of California, in willful violation of section 6068(a) of the Business and Professions Code.

74. By using or dealing with trust property, in his capacity as trustee, for his own profit or any other purpose unconnected with the trust; by taking part in a transaction in which he, as trustee, had an interest adverse to the beneficiary; by entering into a transaction with a beneficiary, while in his capacity as trustee, while his influence with the beneficiary remained and by which he obtained an advantage from the beneficiary, Respondent breached his duty to administer the trust solely in the interest of the beneficiaries, in violation of Probate Code section 16002; used or dealt with trust property for his own profit or for another purpose unconnected with the trust, or took part in a transaction in which he had an

interest adverse to the beneficiary, in violation of Probate Code section 16004; and thereby breached duties he owed to the beneficiary, thus committing a breach of trust in violation of Probate Code section 16400, and thereby failed to support the laws of the State of California in willful violation of section 6068(a) of the Business and Professions Code.

75. By failing to respond to Byron's repeated requests (as a beneficiary of Harmony Trust #3) for an accounting of all trust property received by Respondent and to account for all disbursements made by Respondent from the trust funds, Respondent failed to provide the beneficiary, on the beneficiary's reasonable request, with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust, in violation of Probate Code section 16061, and thereby failed to support the laws of the State of California in willful violation of section 6068(a) of the Business and Professions Code.

76. By applying \$475,000.00 in trust assets belonging to Serena to consummate Respondent's purchase of the Bluefield Property in his and his wife's names as joint tenants; by failing to record any instrument showing that Serena had any right, title, or interest in the Bluefield Property; by failing to memorialize the terms and conditions of the Bluefield Property purchase, including but not limited to the respective rights and liabilities of Respondent and Serena with regard to the purchase, maintenance, rental, refinancing, and eventual sale of the Bluefield Property; by failing to keep proper books and records of all disbursements and other transactions involving Harmony Trust #3 funds throughout Respondent's tenure as trustee of Harmony Trust #3; by failing, throughout his 5-year tenure as trustee of Harmony Trust #3, to keep proper books and records of all funds belonging to Serena that Respondent had transferred out of the Harmony account to accounts held solely in his name and in which Respondent maintained his personal funds; by procuring Serena's signature on two documents purporting to waive his duty to account for any and all disbursements he made from Harmony Trust #3 to Serena, in order to avoid submitting a court-ordered accounting for his disbursements of Serena's share of Harmony Trust #3 funds; by submitting an inaccurate and incomplete accounting to the court, knowing that he had failed to keep proper books and records concerning all transactions involving Harmony Trust #3 during his tenure as trustee and thus was in no position to provide an accurate and complete accounting; by drafting a Last Will and Testament for Serena, while he was still acting as trustee of Harmony Trust #3, that nominated Respondent as Executor of Serena's estate and Respondent's son as successor Executor, that nominated Respondent as testamentary trustee of \$15,000.00 for the care of Serena's dog and nominated Respondent's son as successor trustee, and having Serena execute said Will four (4) days before Respondent was ordered to appear in court to

submit a court-ordered accounting for his distributions from Harmony Trust #3 (including distributions to Serena from her share of the trust funds), and knowing that in the event of Serena's death, Respondent as Executor of Serena's estate would have sole standing to object on behalf of Serena's estate to any allegations of wrongdoing on his part as trustee of Harmony Trust #3, Respondent engaged in a series and pattern of acts of misconduct in which he breached his fiduciary duties to Serena and his obligations to the court, thereby committing an act or acts involving moral turpitude, dishonesty or corruption.

### **PENDING PROCEEDINGS.**

The disclosure date referred to, on page 2, paragraph A(7), was January 12, 2012.

### **AUTHORITIES SUPPORTING DISCIPLINE.**

#### **Standard 1.3:**

The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

#### **Standard 2.3** provides:

Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.

**Standard 2.6** provides that culpability of a member of a violation of section 6068 of the Business and Professions Code "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3 [.]"

#### **Standard 1.7 (a)** provides:

If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2 (f), the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding **and** the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust. [Emphasis added.]

**COSTS OF DISCIPLINARY PROCEEDINGS.**

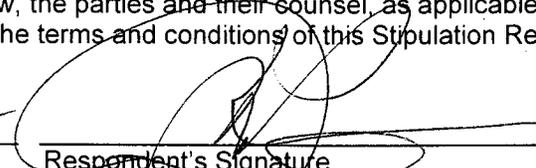
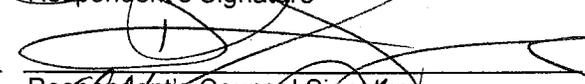
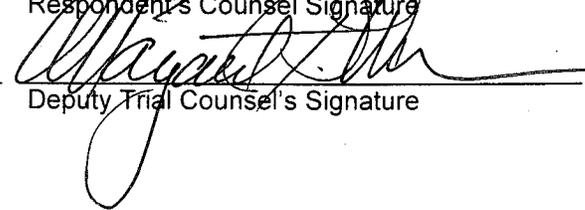
Respondent acknowledges that the Office of the Chief Trial Counsel has informed respondent that as of **January 12, 2012**, the prosecution costs in this matter are approximately \$2,797.00. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

(Do not write above this line.)

In the Matter of: James Henry Pasto, #48445	Case number(s): 09-O-13575
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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 Facts, Conclusions of Law, and Disposition.

<u>1/25/12</u> Date	 Respondent's Signature	<u>James H. Pasto</u> Print Name
<u>1/25/12</u> Date	 Respondent's Counsel Signature	<u>Daniel S. Agle</u> Print Name
<u>27 JAN 12</u> Date	 Deputy Trial Counsel's Signature	<u>Margaret P. Warren</u> Print Name

(Do not write above this line.)

In the Matter Of <b>JAMES HENRY PASTO</b>	Case Number(s): <b>09-O-13575</b>
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**ORDER**

Finding the stipulation to be fair to the parties and that it adequately protects the public, 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 DISCIPLINE RECOMMENDED to the Supreme Court.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- All Hearing dates are vacated.

At p. 21, line 6, add: "in violation of section 6106 of the Business and Professions Code.

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 135(b), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

2-15-12  
Date

  
Richard A. Honn  
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 Los Angeles, on February 15, 2012, 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:

by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

DANIEL S. AGLE  
KLINEDINST PC  
501 W BROADWAY STE 600  
SAN DIEGO, CA 92101 - 3584

by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

by overnight mail at , California, addressed as follows:

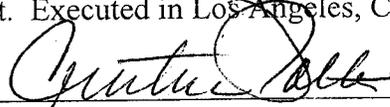
by fax transmission, at fax number . No error was reported by the fax machine that I used.

By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

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

Margaret P. Warren, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 15, 2012.

  
\_\_\_\_\_  
Cristina Potter  
Case Administrator  
State Bar Court