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THOMAS F. MCFARLAND

March 22, 2007

*By e-filing*

Vernon A. Williams, Secretary  
Surface Transportation Board  
395 E Street, S.W., Suite 1149  
Washington, DC 20024

Re: Finance Docket No. 35002, *Savage Bingham & Garfield Railroad Company –  
Acquisition and Operation Exemption – Union Pacific Railroad Company*

Dear Mr. Williams:

Enclosed please find a Petition For Stay, for filing with the Board in the above referenced matter.

Very truly yours,

*/s/ Thomas F. McFarland*

Thomas F. McFarland  
*Attorney for Petitioners*

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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SAVAGE, BINGHAM & GARFIELD )  
RAILROAD COMPANY – ) FINANCE DOCKET  
ACQUISITION AND OPERATION ) NO. 35002  
EXEMPTION – UNION PACIFIC )  
RAILROAD COMPANY )

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**PETITION FOR STAY**

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AMERICAN WELDING & TANK  
5601 Axel Park Road  
West Jordan, UT 84084

BMC LUMBER  
7902 South 1410 West  
West Jordan UT 84084

FRITO-LAY, INC.  
6301 West 4700 South  
Kearns, UT 84118

INTERSTATE BRICK  
9780 South 5200 West  
West Jordan, UT 840804

MASTERCRAFT CABINETS  
126 Prosperity Way  
West Jordan, UT 84084

US NAVY-ALLIANT TECHSYSTEMS  
5000 South 8400 West  
Magna, UT 84044

SME  
5955 Wells Park Road  
West Jordan, UT 84084

Petitioners

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Attorney for Petitioners

DUE DATE: March 22, 2007

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**PETITION FOR STAY**

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Pursuant to 49 C.F.R. § 1150.32(c), as amended, the Shippers listed on the Cover Page (referred to collectively as “the Utah Shipper Coalition”) hereby petition for a stay of (1) consummation of Union Pacific Railroad Company’s (UP) sale of the track assets of the Bingham Industrial Lead to Utah Transit Authority (UTA) until UTA files a Notice of Exemption for such acquisition and/or a Motion to Dismiss that Notice; and (2) acquisition by Savage, Bingham & Garfield Railroad Company (SBGR) from UP of railroad easements to operate over three rail lines located generally west of Midvale, UT, one of which is the Bingham Industrial Lead, pending an investigation into whether the freight operating window agreed to between UP and UTA will result in adequate rail freight service on those rail lines for members of the Utah Shipper Coalition.

**SCHEDULED EFFECTIVE DATES**

UP’s sale of the track assets of the Bingham Industrial Lead to UTA is scheduled to be consummated no later than March 28, 2007.

The scheduled effective date for SBGR’s acquisition of railroad easements from UP is March 29, 2007.

**IDENTITY OF PETITIONERS**

The maps in SBGR’s Notice of Exemption are virtually illegible. In order to have a better understanding of the involved rail lines and the locations of members of the Utah Shipper Coalition, there are attached to this Petition as Appendices 1-A and 1-B, respectively, two maps of the involved area. The map marked Appendix 1-A is an enhanced Google map that shows the Bingham Industrial Lead between Midvale and Welby, via West Jordan, UT, and the Garfield Branch between Welby and Magna, UT. The map marked Appendix 1-B shows UTA’s planned Mid-Jordan Transit Corridor. It, too, shows the Bingham Industrial Lead (referred to on the map as the UPRR Bingham Branch), as well as part of the Garfield Branch. It is readily apparent from Appendix 1-B that freight shippers on the Bingham Industrial Lead and on the Garfield Branch may be adversely affected from a reduction of rail freight service resulting from the introduction of passenger transit service on the Bingham Industrial Lead.

Set forth below for each member of the Utah Shipper Coalition are (1) the location of its rail freight shipping facility; (2) the annual volume of its likely rail freight traffic; and (3) the required number of switches per week:

<b>SHIPPER</b>	<b>LOCATION</b>	<b>ANNUAL VOLUME</b>	<b>SWITCHES PER WEEK</b>
American Welding & Tank	West Jordan	100	4-5
BMC Lumber	West Jordan	500-550	5
Frito-Lay	Kearns (Garfield Branch)	200-250	1-2
Interstate Brick	West Jordan	600-800	3
Mastercraft Cabinets	West Jordan	*	*
US Navy-Alliant Techsystems	Magna (Garfield Branch)	60-70	1-2
SME	West Jordan	1200-1300	5

\* will begin to ship by rail line 2007

As can be seen, members of the Utah Shipper Coalition account for a minimum to 2,660 carloads per year, and many of them require service every weekday. Moreover, Utah Railway Company (URC) controls the yard at Midvale, and itself provides substantial rail service on the rail lines under consideration. The traffic density and congestion on the rail lines require substantial operating time to provide service.

### **STANDARDS GOVERNING ISSUANCE OF STAYS**

The four standards governing issuance of stays are now well-settled. To justify a stay, a petitioner must demonstrate:

- (1) that they have a strong likelihood of prevailing on the merits;
- (2) that they will be irreparably harmed in the absence of a stay;
- (3) that other parties will not be substantially harmed by the stay; and
- (4) that the public interest supports granting the stay.

*See, e.g., Wilmington Terminal R.R., Inc. - Pur. & Lease - CSX Transp., Inc.*, 6 I.C.C.2d 960 (1990); *Union Pacific RR Co. - Aban. - Fremont and Teton Counties, ID*, 6 I.C.C.2d 641, 647 (1990).

### **APPLICATION OF STAY STANDARDS**

#### **1. Likelihood of Prevailing on the Merits**

The Utah Shipper Coalition is likely to prevail on the merits of its opposition to the UP-UTA and UP-SBGR transactions because UTA failed to file a Notice of Exemption and Motion to Dismiss as to sale of the track assets of the Bingham Industrial Lead, as required by consistent ICC-Board precedent. As a result, the record is not sufficient to permit a determination that the passenger transit service to be provided by UTA over the Bingham

Industrial Lead would adversely affect rail freight service on that Lead, and on the Garfield Branch that is reached by traversing the Bingham Industrial Lead. Neither of the proposed transactions should be consummated until a Notice of Exemption and Motion to Dismiss are filed for sale of the Bingham Industrial Lead track assets, and the Administration and Coordination Agreement between UP and UTA is made available for thorough review of its effect on rail freight shippers.

A Transit Authority that proposes to acquire rail line assets from a rail carrier is required to submit the matter to the Board in advance, together with a copy of the agreement between the railroad and the entity acquiring the right-of-way. *See Southern Pacific Transp. Co. – Abandonment*, 8 I.C.C.2d 495, 496, n.6 (1992), citing *Maine DOT – Acq. Exemption – ME Central Co.*, 8 I.C.C.2d 835 (1991), in which that requirement was first adopted. If the Transit Authority does not do so, the Board lacks essential information to determine whether the Transit Authority’s acquisition of the right-of-way is subject to Board jurisdiction. Cf. *Southern Pacific Transp. Co. - Abandonment, supra*, 8 I.C.C.2d at 496.

It is essential for the pertinent agreement to be filed with the Board so that the Board can determine the effect of commuter hour restrictions. As the ICC said in *Orange County Transp. - Exempt - Atchison, T. & S.F. Ry. Co.*, 10 I.C.C.2d 78 (1994), at 83:

In determining whether a transaction will significantly affect the ability of Santa Fe to carry out its common carrier obligations, the effect of commuter hour restrictions on freight service is a major consideration. A part of that issue is who is to exercise dispatching control after the sale. Other relevant considerations are who controls maintenance and whether the vendee can force the freight carrier vendor to discontinue or abandon freight service.

The Board is unable to make an intelligent ruling on its jurisdiction over UTA’s acquisition of track assets from UP without there being any filing by UTA regarding the matter,

and without the underlying Administration and Coordination Agreement having been submitted for the record. On March 5, 2007, counsel for the Utah Shipper Coalition requested counsel for SBGR to provide a copy of that Administration and Coalition Agreement for review. That request was directed to counsel for SBGR because only SBGR filed an exemption request at the Board. Counsel for SBGR advised that the Administration and Coordination Agreement had not yet been prepared.

The legal defects that will permit the Utah Shipper Coalition to prevail on the merits are (1) the absence of any Board filing by UTA for acquisition authority or for dismissal on jurisdictional grounds; and (2) the failure of UTA to file in advance the basic Administration and Coordination Agreement.

**2. Irreparable Injury to Shippers**

Shippers faced with a decline in the quality and quantity of their rail service often suffer a loss of rail-dependent business. That would be the case here. Shippers having a narrow window of freight service due to passenger transit operations and the requirement to accommodate two rail carriers surely would lose substantial volumes of rail-dependent business. Lost business of that nature rarely returns to the former supplier or customer. It is not possible to compensate shippers in damages for the loss of that business. That permanent loss of business not compensable by damages is the very essence of irreparable injury.

**3. No Substantial Injury to Opposing Parties**

UTA and UP are likely to argue that they would be substantially injured if the sale of rail line assets is not consummated because they would lose funding for the transaction. But UTA and UP placed themselves in that position by (1) not complying with the requirements of *State of*

*Maine*; and (2) not seeking Board approval or dismissal at an earlier time. Surely, UTA and UP did not just recently become aware of the deadline for funding. UTA and UP could have and should have come to the Board with enough time before expiration of funding to provide required information and documentation. Therefore, if the expiration of project funding is a substantial injury for UTA and UP, it is an injury that they brought on themselves by failing to act in accordance with the law. That is not the kind of injury that is entitled to weight in the balancing process for ruling on stay requests. SBGR would not be substantially injured by a delay in the start-up of its operations.

**4. The Public Interest Warrants a Stay**

The broad public interest also warrants a stay. There is a broad public interest in providing parties access to information and documents needed to protect their interests in a pending transaction. The Administration and Coordination Agreement is in that category of documents. There is a broad public interest in providing an opportunity for the Utah Shipper Coalition to review that document before the asset sale is consummated so that the shippers can take timely action to protect their position, if necessary. A stay would enable that to be done.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, (1) consummation of UP's sale of track assets of the Bingham Industrial Track to UTA should be stayed until UTA files a Notice of Exemption for its acquisition of those assets and/or a Motion to Dismiss the Notice on jurisdictional grounds; and (2) acquisition by SBGR of railroad easements to operate the Bingham Industrial Lead and two other rail lines that are adjacent to that Lead should be stayed pending an

investigation into whether the freight operating window for SBGR would result in adequate rail freight service over those lines for members of the Utah Shipper Coalition.

Respectfully submitted,

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*/s/ Thomas F. McFarland*

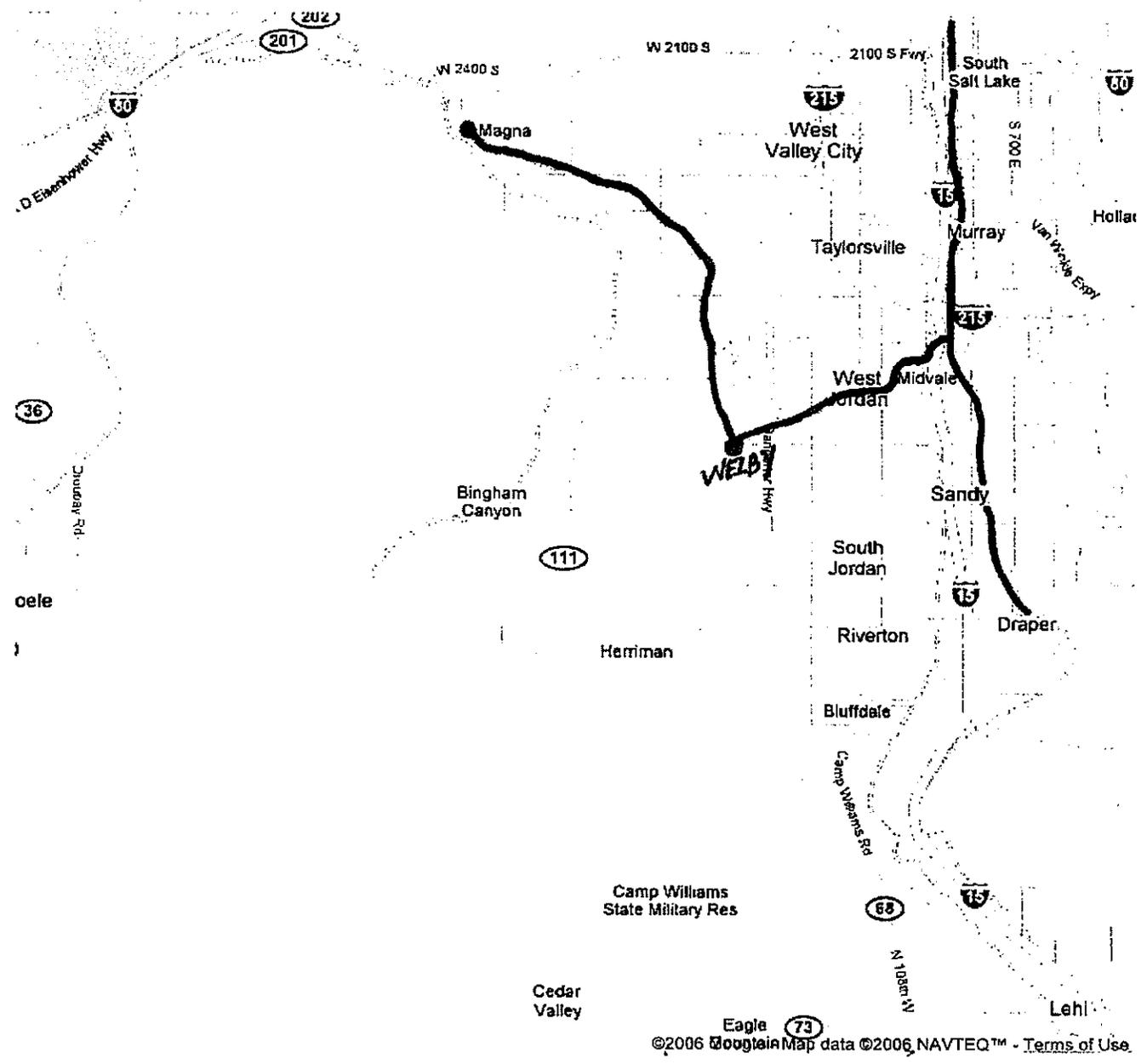
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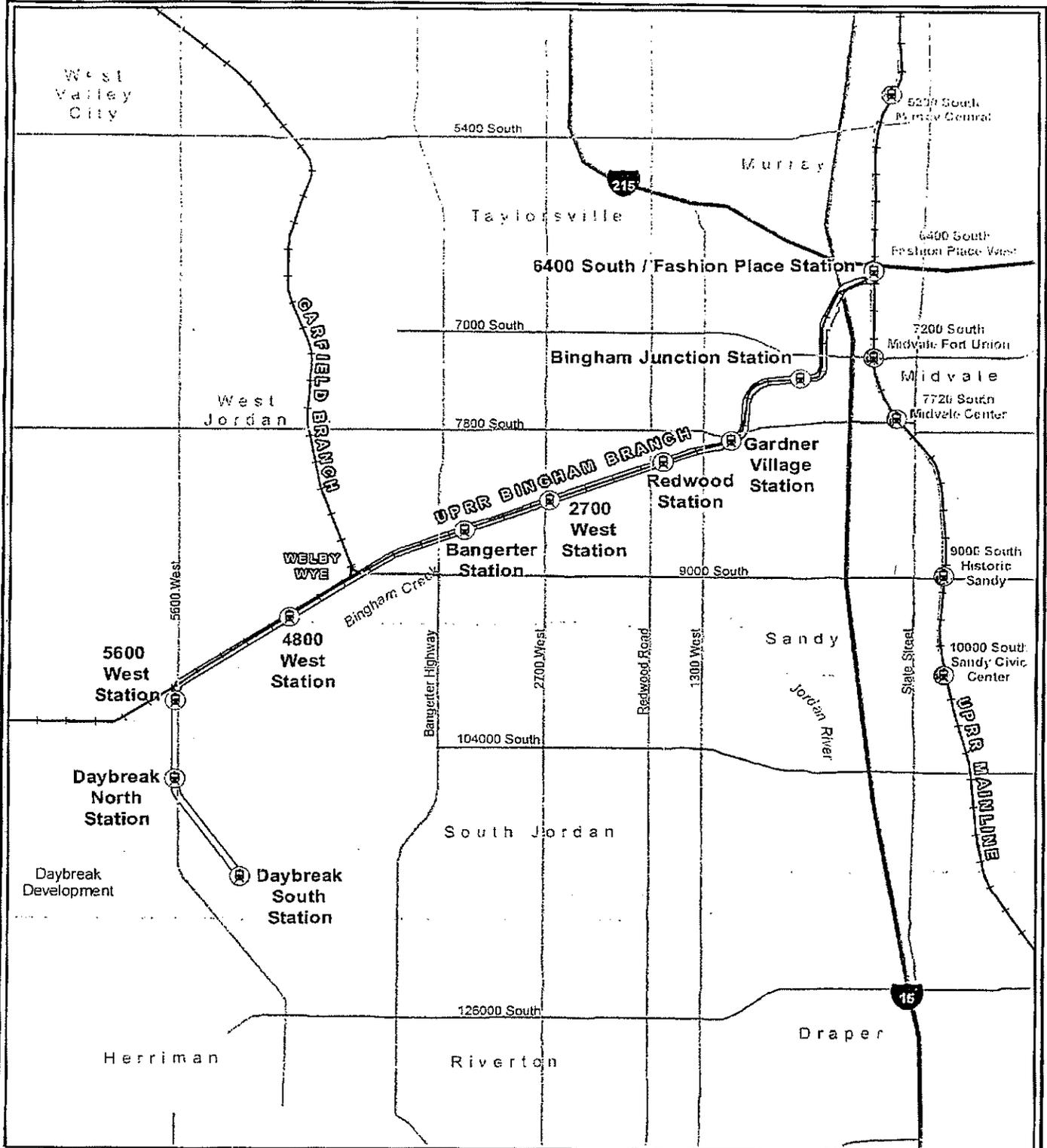
Attorney for Petitioners

DUE DATE: March 22, 2007

Google Maps

Google





**Mid-Jordan  
 Transit Corridor  
 Final Environmental  
 Impact Statement**

**Legend**

- Mid-Jordan LRT Track Alignment and Stations
- UTA Sandy/Salt Lake TRAX Line

The Mid-Jordan LRT Track Alignment will follow the existing UPRR Bingham Branch rail corridor until 5600 West where it turns into Daybreak.

The Mid-Jordan LRT Track Alignment is 10.1 miles long.

0 0.75 1.5 Miles

**MID-JORDAN  
 TRANSIT  
 CORRIDOR**

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 22, 2007, I served the foregoing document, Petition For Stay, on Robert P. vom Eigen, Esq., Foley & Lardner, LLP, 3000 K Street, N.W., Suite 500, Washington, DC 20007, by e-mail to *rvomeigen@foley.com*, and on Mack H. Shumate, Jr., Union Pacific Railroad Company, 101 North Wacker Drive, Suite 1920, Chicago, IL 60606, by e-mail to *mackshumate@up.com*, and by facsimile transmission to (312) 777-2065.

*/s/ Thomas F. McFarland*

Thomas F. McFarland