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TITLE GUARANTY DIVISION

ABTRACTOR APPLICATION FOR WAIVER – UNION COUNTY

STATE OF IOWA)

COUNTY OF POLK)

TELEPHONE (515) 222-9900

NAME OF APPLICANT: Charles W. Hendricks

BUSINESS ADDRESS: 1701 – 48th Street, Suite 290, West Des Moines, IA 50266

I, the above-named Applicant, do hereby submit for consideration the following information concerning my request for waiver of abstractor participation requirements of the use and ownership of a current 40-year tract index for the Title Guaranty Program:

1. Number of years at present location: I have been at the present location since December of 2006. Before starting my own practice, I was with Wasker Dorr Wimmer & Marcouiller, P.C., from April 2003 through December of 2006. I have been a member of the Iowa State Bar Association since 1999.
2. Number of years abstracting experience: My practice has concentrated on real estate law since April of 2003. During that time I have conducted numerous searches of judicial, bankruptcy and land records indices and examined hundreds of abstracts. Also, my current employees have several years of abstracting experience. Affidavits will supplement this response showing their experience in the field.
3. Annual volume of business (gross receipts): Unknown. I have not been in business on my own for an entire year. An estimate of total receipts is in excess of \$200,000.
4. Number of abstracts updated last year: 0. However, my staff prepared approximately 3,000 title searches throughout the State of Iowa last year.
5. Percent of abstracting business in your trade area: Abstracting will account for approximately one-fourth ($\frac{1}{4}$) of my law practice. The remaining three-fourths ($\frac{3}{4}$) will be from closings, title opinions/examinations, probate and litigation files.
6. Turn-around time for completing abstracts: I anticipate 24-48 hour turn-around time for refinance title searches and 24-72 hour turn-around on abstracting updates. Not having a title plant will require me to sub-contract all root of title abstract requests.
7. Number of employees under your supervision: I currently have 9 employees.
8. Amount of Errors and Omissions coverage: My current Errors and Omissions coverage is 1 million/2 million, well in excess of the Title Guaranty required minimum.

9. Is there another abstractor serving the same geographic area who has a current 40-year tract: Yes.

Using the space provided, describe the following and attach any appropriate supporting information:

- A. Your intentions to develop a 40-year tract index: None.
- B. Hardship that will be created by not participating in the Title Guaranty Program: Title Guaranty and participating attorneys face 3 very significant challenges with the existing system. First, title insurance companies offer customers a wash agreement. Under the terms of the wash agreement, any transaction that does not close is not billed to the requester of the title search. The current Union County abstractor does not offer wash agreement. As such, a participating attorney has to either eat that abstracting cost or pass it on to the client. If he chooses the former, he is faced with paying out a few thousand dollars a month in additional expenses. If he chooses the later, the client will simply select title insurance and not pay this cost.

Second, without the ability to conduct my own abstracting, I am at the mercy of the abstractor and the time it takes me to prepare a title commitment. Deed forward lien searches on refinance transactions take between 72 hours and as long as 10 days in some counties. Title insurance companies offer their title with 24-hour turn-around time. Again, a participating attorney who supports Title Guaranty has difficulty convincing clients the additional delay is a good thing. Without an ability to control the time needed for abstracting, a real estate attorney's practice is literally at the mercy of an abstracting company.

A participating real estate attorney must have the ability to conduct his own abstracting. Otherwise, because of the competitive disadvantage, his or her client will choose title insurance. This creates a personal hardship on myself, individually, as I will continue to lose clients and income as a result of my competitive disadvantage. However, the hardship created by this extends beyond personal hardship, and ultimately translates to Title Guaranty/The State of Iowa missing out on thousands to millions of dollars.

- C. Public interest that will be served by granting a waiver: If I am granted an abstracting waiver, I will offer wash agreements, a lower pricing for abstracting services and faster turn-around times. Additionally, lenders who currently refuse to use Title Guaranty because of existing problems with the Union County Abstractors, such as Wells Fargo, will have an alternative and may begin utilizing Title Guaranty.

I affirm that the above information is true and correct.

Charles W. Hendricks

Subscribed and sworn to before me, a Notary Public, in and for said County and State,
This _____ day of _____, 20____.

(Notary Public)

**APPLICATION FOR A TITLE PLANT
AND TRACT INDEX WAIVER
UNDER IOWA CODE SECTION 16.91**

Charles W. Hendricks, Attorney at Law

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | Introduction and Statement of Issues | 1 |
| II. | Personal Profiles | |
| | A. Charles W. Hendricks | 2 |
| | 1. General Background | 2 |
| | 2. Real Estate Legal Experience | 2 |
| | B. Abstracting Support Staff | 3 |
| III. | Legal Analysis | 5 |
| | A. First Prong - The Requirement of a Tract Index and Title Plant Pose a Hardship | 7 |
| | 1. Financial Hardship | 7 |
| | 2. Hardship with Increasing Inability To Compete | 9 |
| | B. Second Prong - Clear Public Interest | 12 |
| | 1. Competition - Monopolies | 12 |
| | 2. Infusion of New Attorney-Abstractors | 14 |
| | 3. Direct Search | 16 |
| | 4. Turnaround Time | 18 |
| | 5. Wash Agreement | 18 |
| | 6. Cost | 18 |
| IV. | Conclusion | 19 |
| | A. Hardship | 19 |
| | B. Clear Public Interest | 19 |
| | ADDENDUM (Including Letters of Recommendation) | 21 |

ARGUMENT IN FAVOR OF GRANTING ABSTRACTING WAIVER PURSUANT
TO IOWA CODE § 16.91(5)

I. INTRODUCTION AND STATEMENT OF ISSUES

Charles W. Hendricks has applied to become a participating abstractor of the Iowa Title Guaranty Program. This Argument sets forth the legal argument in support of the application.

Pursuant to Iowa Code section 16.91, an applicant seeking a waiver from this Board must establish the following:

- A. Hardship in establishing/creating a Tract Index and Title Plant; and
- B. The Application is either in the public interest or absolutely necessary to ensure the availability of title guaranties throughout the state.

After reviewing the application, this written argument and the oral argument to be submitted to the Board, there can be no conclusion but for the conclusion that this applicant has met the burden and established each of these requirements.¹

¹ It must be noted that others have argued the imposition on an attorney to have to request a waiver is unconstitutional, as only the Supreme Court has the authority to govern the activities of licensed attorneys within the State. See Application for a Title Plant and Tract Index Waiver Under Section 16.91 of the Code of Iowa, by David D. Dunakey and Charles P. Augustine (hereinafter "Dunakey/Augustine Application"). This argument does not address this legal proposition.

II. PERSONAL PROFILES

A. CHARLES W. HENDRICKS

1. General Background. Charles Hendricks was born April 30, 1972. He graduated from the University of Wisconsin at Eau Clair in 1995, and from Drake University Law School, with Honors, in 1999. He has been twice published in legal journals and a member of the Iowa State Bar Association since 1999.

2. Real Estate Legal Experience. Chuck began the general practice of law in 1999, following his graduation from law school. From the beginning, real estate law has been one of his areas of practice. While at Lipman Law Firm, Chuck was the attorney who handled all legal matters related to real estate law. During April of 2003, Chuck transitioned to Wasker Dorr Wimmer & Marcouiller, P.C., where almost 100% of his practice became dedicated to real estate law. In November of this past year, Chuck started his own law firm. The transition was made, in large part, to pursue the potential opportunity of becoming a certified abstractor.

While a Wasker Law Firm, Chuck performed title opinions on thousands of abstracts, conducted thousands of closings on real estate transactions and conducted thousands of searches on various indices, such as the Iowa

Land Records, Iowa Courts On-line and the Bankruptcy records. In all of the transactions and title opinions completed to date, Chuck has never had a claim on his personal E&O or through the Title Guaranty on any title he has issued.

Chuck's main clients at the present time are mortgage brokers who, unlike banks, do not concentrate their loans in any geographic area. Instead, these clients conduct business statewide and in some instances even outside the state.

B. ABSTRACTING SUPPORT STAFF

Each of the following individuals is currently an employee of the Applicant. Each of these persons will be providing integral support to the abstracting searches and preparation.

1. Donna Reed. Donna has been in the title industry for 13 years. She was the overall manager of the title production department and final policy department of a title company, and was also the examiner of commitments and final policies. She has conducted thousands of land records searches and judgment searches throughout the state. Donna is also licensed to sell/issue title

insurance in various states including Wisconsin and Minnesota.²

2. Victoria Donovan. Victoria has been in the title industry for 9 years. During that time, her duties have included conducting title searches, examining final policies and commitments, HUD prep and disbursement on closings. She was the President and overall manager of the closing department of a title company. She is licensed to sell/issue title in various states including Wisconsin and Minnesota.

3. Jodi MacKenzie. Jodi has been in the title industry for 7 years. During that time frame, she has conducted title searches, property mapping, and prepared final policies and commitments. Before her employment in the title industry, she worked at a county courthouse in both the Assessor's Office and the Recorder's Office, where she was certified in Assessment and Mapping. She is licensed to sell/issue title in Wisconsin and Minnesota.

² At present, this Applicant and all staff persons have no affiliation with any title insurance company and conduct 100% of their business in the State of Iowa. Also, all title ever issued by this Applicant since starting his own firm during November of last year has been issued through the Title Guaranty, with a certified abstractor conducting the search.

4. Susan Rosenberger. Sue has been in the title industry for six years. She has performed thousands of searches and prepared thousands of commitments and final policies throughout the state of Iowa. Sue has also performed thousands of gap and post closings searches in addition to initial searches.

5. Lyn Kostenbader. Lyn has been in the title industry for 4 years. She has performed thousands of searches on all indices, and typed commitments for thousands of issued titles.

III. LEGAL ANALYSIS

There are, under the Iowa Code, three ways in which an abstractor may participate in the Title Guaranty program. First, an abstractor may own or lease and maintain a 40-year title plant and tract index. Second, a participating attorney may be grandfathered in if he or she was abstracting on November 12, 1986, up to the date of his or her application. Last, Title Guaranty may waive the requirements of the 40-year title plant and tract index if an applying attorney shows: a) the requirements of a 40 year plant and tract index impose a hardship on the

attorney; and b) the waiver is clearly in the public interest. Iowa Code § 16.91(5) (2005).

It must be noted; the abstracting industry in Iowa has no independent regulation. Likewise, title plants are not subject to audit. As stated in the Dunakey/Augustine Application:

Simply owning or leasing a 40-year plant entitles the applicant to become a Title Guaranty participating abstractor. There is no background check on the person's moral standing, no testing, and no other regulatory conditions to ensure honesty and competency for the public's interest. Likewise, any attorney-abstractor who was abstracting from November, 1986, was grandfathered in, again with no checks or requirements concerning competency or ability.

The implication of the above should not be lost on this Board. Anyone, without any abstracting experience, can be a participating Title Guaranty abstractor by simply owning or leasing the title plant. This is the case even if the title plant and tract index is inherited and the abstractor has zero experience.

Conversely, while attorneys have general continuing legal education requirements, ethical requirements and a bar examination requirement, there was no testing or experience requirement to be grandfathered in as a participating abstractor. Instead, any attorney,

regardless of competence or experience, can include participating Title Guaranty abstractor within their areas of legal practice today, so long as they were licensed and abstracting at least one hour prior to the deadline up until their application.

A. FIRST PRONG - THE REQUIREMENT OF A TRACT INDEX AND TITLE PLANT POSE A HARDSHIP

1. Financial Hardship. This applicant has attempted to determine the total number of documents needing to be copied to create a tract index and 40-year title plant for Union County. However, the exact number and cost is unknown. Estimates are in excess of \$100,000.00, with thousands of documents needing to be copied. Also, factoring in that the standard mortgage for the past decade is at least 15 pages in length, there could be as many as a million pages to be copied.

This investment, even if made, may not ultimately result in any business. This applicant has been made aware of the situation in Union County, where the largest loan originator, Wells Fargo, is choosing to utilize First Nebraska Title Insurance over Title Guaranty. This is in large part due to problems with Union County abstractors.

This negative stigma may very well carry over to the Applicant.

It should also be noted one of the two participating Union County abstractors is a grandfathered attorney, who has not had to create a 40-year title plant and tract index. Requiring this Applicant, also a licensed attorney, to invest money to create a title plant solely because he was not abstracting in 1986 creates a financial hardship and competitive disadvantage in the marketplace that cannot be overcome.

Also, this Applicant conducts title work for lenders throughout the State of Iowa. The only means for the Applicant to not be faced with an economic hurdle of several million dollars³ for each county wherein he issues title and is interested in abstracting is the granting of a waiver. As an attorney, the Supreme Court has already determined an abstracting attorney may abstract throughout the State.

³ Forcing the Applicant to seek an abstracting waiver for each county in which he prepares title creates not just a hardship in time consumption, but factoring in the cost for a 40-year title plant within each of those counties (Black Hawk County was estimated to be a 2 year project exceeding several million dollars, in the Dunakey/Augustine Application), this Applicant faces an insurmountable financial hardship. An estimate from the Madison County recorder exceeded one million dollars, and the Polk County recorder indicated the estimate there was significantly higher.

2. Hardship with Increasing Inability to Compete. Throughout the State, title insurance companies are offering flat fees for full title and closing services. Likewise, participating abstractors, both attorney-abstractor and non-attorney abstractors, have begun to offer settlement services as part of their services. These companies provide lenders and brokers with a "one-stop shop" to both title and close a loan.

As expressed by the Iowa Land Title Association on its web site:

Title companies began to include real estate closings as a part of their services in the past few years. As Iowa companies become more familiar with the title process nationwide, a frequent request has been for closing services, particularly for national lenders.⁴

This applicant likewise offers his clients a one-stop shop; however, if he wishes to utilize Title Guaranty to title the loan, he must rely on subbing out the actual abstracting to a certified, participating abstract. This creates a veritable plethora of problems, including but not limited to:

- a. Inability to issue title until receiving the abstractor's report;

⁴ Iowa Land Title Association web site located at http://www.iowalandtitle.org/about_us_history1.cfm

- b. Inability to provide abstracting free of charge on deals that do not close;
- c. Inability to control a significant cost component of providing title to clients.

Title insurance companies offer title within 24 hours, and provide full wash agreements⁵ with their customers. This Applicant cannot provide title within 24 hours and is 100% at the mercy of the abstractor in the time that it may take them to conduct their abstracting prior to the ability to issue a Title Guaranty policy. If the abstractor takes 48 hours to conduct their search, I cannot issue title for at least 48 hours. If they take 10 days, my client cannot receive their title from me for 10 days.

Also, since title insurance companies currently offer full wash agreements, this Applicant must offer his clients the same to compete. However, this Applicant cannot obtain similar agreements from a majority of abstractors. In counties where there are only one or two abstractors, why would they? There is no alternative from which to get certified abstracting. However, when a client's deal does not close, this Applicant must pay for the abstracting charges. For the past two months, the applicant has paid in

⁵ A wash agreement is where there is no charge for title (including abstracting) if the transaction does not close.

excess of \$3,000 to abstractors for abstract searches where the deal did not close.

Attached to this Application is a copy of the current offer being run by All-American Title & Escrow, a title insurance company doing business in Iowa. They offer a flat \$475⁶ for full title and closing, with full wash agreements, for each and every county in Iowa. On every refinance transaction, the undersigned has the current average costs:

| | |
|----------------------------|----------------------|
| Title Guaranty Net Premium | \$65.00 ⁷ |
| Abstracting Search | \$150 - \$370 |
| Post Closing Search | \$25 - \$100 |
| Incoming Wire Fee | \$10.00 |
| Overnight Fees | \$30.00 |

Without even considering overhead and staff costs, this Applicant's costs already exceed the \$475 offered by one of his competitors, when conducting business in many Iowa counties. Union County, for example, charges over \$200 for pre-closing and post-closing searches, and will

⁶ See Addendum 2, Pricing Sheet from All-American Title & Escrow.

⁷ Title Guaranty offers policies for \$90. However, almost every lender requires the comprehensive endorsement rider, thereby making the total cost \$105. Deducting from that the \$40 paid back to the Applicant, and the net cost on every Title Guaranty premium is \$65.

not agree to a wash agreement. Also, with abstractors being able to issue title and conduct closings all at one location, they clearly have the financial interest to process their own title requests prior to outside orders. Without the ability to conduct his own abstracting, this Applicant will go out of business. *3000 Title Searches last year*

B. SECOND PRONG - CLEAR PUBLIC INTEREST

1. Competition-Monopolies. As has been pointed out in previous applications to this Board, the Code of Iowa fails to define what is "clearly in the public interest." Various cases that have been cited for the proposition that "competition is in the public interest."⁸

Clearly, the existing abstracting system is a monopoly, in almost every Iowa County. This monopoly has come about in large part, by the State's regulation choking the ability of newcomers to enter the field. Michael LaFaive, a staff economist at the Mackinac Center for Public Policy, had the following to say regarding government created monopolies:

In Adam Smith's day, monopoly referred to a firm that enjoyed some government grant of exclusive

⁸ See Bermensol v. Tennyson Transfer & Storage Co., 352 P.2d 240 (1960).

privilege (e.g. the Navigation Acts of 1651 or the Tea Act of 1773)--the use of the power of government on behalf of one or more special, private interests, to hobble or preclude competition. One step further in this direction, of course, is an actual government monopoly itself whereby government says, "We will do this work and will forcibly shut down anyone else who tries to compete with us." First class mail delivery is a good example.

Governments can do this in overt fashion as explained above, or it can indirectly accomplish some degree of the same thing (intentionally or otherwise) by burdensome taxation and regulation. **Taxes and regulations usually hit newcomer or smaller businesses harder than the older, bigger, or politically well-connected firms; the effect is, to some extent, to limit competition and thereby confer a degree of monopoly privilege on the existing or larger firms.** Many people today are candidates to start a business, perhaps in competition with large existing companies, but they do not do so because the tax and regulatory barriers discourage them from the start.

When governments, by one method and to one degree or another, limit competition by the various means described above, the result is a coercive monopoly for those producers who benefit from the limitation of competition. This is the kind of monopoly to be concerned about because it breeds a situation where a company (or the government itself) can get away with abuse that would doom a company in a truly competitive, consumer-responsive market.⁹

This monopoly has, as monopolies often do, driven up the cost of title in the State of Iowa. While it remains below the national average, the only downward pricing

⁹ Michael LaFaive, Regulation and Monopolies (Nov. 1, 1997) (found on-line at <http://www.mackinac.org/article.aspx?ID=683>) (emphasis added).

change on title within this state over the past decade was when Title Guaranty decreased their premium fee. This monopoly and pricing increase is directly contrary to the legislative findings contained in Iowa Code section 16.3(15):

The abstract-attorney's title opinion system promotes land title stability for determining the marketability of land titles and is a public purpose. A public purpose will be served by providing, as an adjunct to the abstract-attorney's title opinion system, a low cost mechanism to provide for additional guaranties of real property titles in Iowa. The title guaranties will facilitate mortgage lenders' participation in the secondary market and add to the integrity of the land-title transfer system in the state.¹⁰

As explained, competition in this field is a clear matter of public policy. The infusion of new abstractors is the only downward pricing force monopolistic enterprises, such as abstractors, will face. Without this downward pricing force, abstractors will continue to increase their pricing and make Iowa more attractive to quicker, lower costing title insurance.

2. Infusion of New Attorney-Abstractors.

Besides the public interest in allowing competition, there is also a public interest in allowing new attorney

¹⁰ Iowa Code § 16.3(15) (2005).

abstractors to be participating Title Guaranty abstractors. Every grandfathered attorney has been practicing law for a minimum of twenty and one-half years. As such, even the youngest of grandfathered attorneys is approaching their 50s. As these attorneys get closer to retirement, there must be an influx of new attorney-abstractors to replace them; otherwise the abstracting community will consist of entirely non-attorney abstractors who may not understand the legal intricacies of real estate law. The art of abstracting has as much to do with realizing which documents should be reported, as it does with locating the documents in the first place. Also, many counties may be left without an abstractor, as the only current abstractors are grandfathered attorneys.

This sentiment was echoed by Marc R. Engelmann, participating attorney-abstractor, in his letter of support to the Dunakey/Augustine Application:

I also think it is time to recognize that the only way to enhance and improve the real estate experience in this state is to continually take advantage of the younger members of the Bar. . . . My understanding of the history of ICA 16.91(5) was that it was inserted for precisely this reason; i.e., that new members of the Bar should be encouraged to continue to practice in the real estate area, with all of the naturally advantageous competitive effects that has. I can only hope that the obvious intent of the statute

shown above will be used to promote these effects by providing for a continuous source of new and innovative members of real estate practitioners. Let us welcome these people into the Title Guaranty system so that we can use their intelligence and capabilities to improve our real estate transactional process well into the 21st Century.¹¹

As indicated, this letter was written on behalf of other applicants before this Board. However, the sentiment contained within that letter cannot be lost, even with the passage of a few years. Since the letter was written and those applicants were granted waivers, the undersigned is unaware of any other new participating abstractors joining Title Guaranty. If this Board chooses to not replace exiting attorney-abstractors with new attorney-abstractors, title within the state will suffer.

3. Direct Search. Iowa Code section 558.55 provides that items indexed outside the grantor/grantee index are not entitled to constructive notice. It is only after the document has been properly filed and indexed that constructive notice is given.¹²

¹¹ Marc R. Engelmann, Letter of May 16, 2001 (Addendum to Dunakey/Augustine Application).

¹² The Dunakey/Augustine Application provides an incredibly thorough analysis/comparison of the direct grantor/grantee search vs. a title plant & tract index search. The Board should review Appendix 1 to that Application if any questions exist regarding the differences. This Applicant will be conducting direct grantor/grantee searches, which is the industry standard for grandfathered attorneys within the state.

In many ways, a title plant is actually inferior, and is certainly unnecessary, to the abstracting of real estate within the state of Iowa. By searching the tract, and not the grantor/grantee, an abstractor will discover stray recordings without any true legal effect on the property. Once these stray filing are noted, the examining attorney must clear them.

With the emergence of computers, direct on-line searches are now not only possible, but are the way many abstractors conduct business. As stated on its web site, the Iowa Land Title Association fully recognizes and endorses computer aided searches:

Title plant maintenance switched from time-consuming handwritten posting of instruments to the computerized indexing of documents in many companies, often accompanied by scanned images of the documents. . . . In the early 1990s the State of Iowa created the Iowa Court Information System linking all judicial districts with the state office in Des Moines. Searches of names can now be done over the Internet from title offices at any time.

As is clearly current abstracting policy, on-line searches are not only a part of abstracting these days, but the way abstracting is done. To require a 40-year title plant and tract index with technology in its current state

is an unnecessary monetary expenditure of thousands, if not millions of dollar.

4. Turnaround Time. The average turnaround time for this Applicant to complete a title search is 24-48 hours. The above-mentioned staff persons were honed in completing title searches within 24 hours. The average turnaround time for Union County is 3-5 days on refinance searches, and 2-3 weeks on abstract updates. These are standard times throughout rural Iowa. Also, it is not unusual to have abstracts take 3 weeks from the date of final continuation to reach an examining attorney.

While a delay of a week or two may not seem like an unreasonable delay, in the mortgage business it is an eternity. Within that time any number of things can happen that may cause a deal to fall apart and a consumer to lose their loan.

5. Wash Agreement. The Applicant will offer all customers wash agreements to help Title Guaranty compete with title insurance companies offering the same.

6. Cost. The Applicant intends on offering abstracting services at a flat cost, lower than is currently offered. While it is a different county,

attached to this application is an abstractor's bill for a refinance transaction that approaches \$400.¹³ This was a standard search for a standard refinance. Clear public interest exists in lower abstracting costs.

IV. CONCLUSION

A. HARDHIP.

As presented, this Applicant has demonstrated the hardship both in lost revenues with the current system and in the financial hardship in creating a title plant. As such, the first prong of the waiver requirement has been met.

B. CLEAR PUBLIC INTEREST.

1. Granting the waiver will create competition, which will drive down prices and increase benefits (such as wash agreements).

¹³ See Addendum 1, Bill from Abstract & Title Services of Marion County. This is just one example of pricing that is causing this Applicant to actually lose money in certain Iowa counties. Since this Applicant's competition offers closing services in all Iowa counties, this Applicant cannot selectively chose which counties he wishes to offer his clients closing and title services. This Addendum also contains numerous other billings exceeding a couple hundred dollars, and many of those bills are for only pre-closing searches. Post closing searches necessary for the issuance of a title policy incur additional charges.

2. Granting the waiver will promote the abstract-attorney opinion system and help hinder title insurance's dissemination within the state.

3. Granting the waiver will strengthen Title Guaranty and increase collected premiums.

4. Granting the waiver will help infuse new attorney-abstractors and help solidify the abstracting system by keeping attorneys involved in the process.

Based on the forgoing reasons as set forth in this Argument, and the letters of support accompanying this argument, Charles W. Hendricks respectfully requests that the Board grants his request for a waiver pursuant to section 16.91(5) of the Code of Iowa.

Respectfully submitted:

Charles W. Hendricks