

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

CHAMPION VOLUNTEER FIRE COMPANY, INC.,
and JENNIFER WAITE,

PETITIONERS,

-against-

TOWN OF CHAMPION and VILLAGE OF
WEST CARTHAGE,

RESPONDENTS.

Index No.: 2015-1124
RJ No.:

**VERIFIED
PETITION**

VERIFIED PETITION



2015-00001124
05/19/2015 11:54:00 AM
Receipt # 2015032150
117 Pages

Gizelle J Meeks, Jefferson County Clerk

Clerk: AK

Champion Volunteer Fire Company, Inc., and Jennifer Waite, by and through their attorneys,
Pinsky Law Group, PLLC, as and for their Petition, allege as follows:

PARTIES

1. Petitioner, Champion Volunteer Fire Company, Inc., is a Not-for-Profit Corporation with its principal place of business located at 20220 County Route 47, Carthage, New York, 13619.
2. Petitioner is organized to, among other purposes, provide fire protection and rescue services to persons within the Town of Champion, County of Jefferson, State of New York.
3. Petitioner, Jennifer Waite, is a resident taxpayer of the Town of Champion, residing in the Champion fire protection district at 33764 Whittaker Road, Carthage, New York 13619.
4. Respondent, Town of Champion (hereinafter, "Respondent"), is a municipal corporation situated in the County of Jefferson, with offices located at 10 North Broad Street, Carthage, New York, 13619.
5. Respondent, Village of West Carthage, is a municipal corporation situated in the County of Jefferson, with offices located at 61 High Street, West Carthage, NY 13619. Petitioner has named the Village of West Carthage for the limited purpose that Petitioner seeks rescission of Respondent's resolution to amend the fire protection contract with the Village of West Carthage.

SUMMARY OF PETITIONER'S ARGUMENT

6. Petitioners request, in sum, that this Court issue an Order reversing Respondent's unilateral termination of a Fire Protection Agreement. A summary of Petitioner's argument is as follows:

- Town Law §184 prohibits Respondent from unilaterally terminating its fire protection agreement with Petitioner, Champion Volunteer Fire Company, Inc. (hereinafter "Petitioner"), unless the parties mutually consent to termination;
- Respondent failed to comply with Town Law §184 as it did not hold a public hearing or make a determination that termination of the fire protection agreement is in the public interest prior to termination of the agreement;
- Respondent failed to comply with the fire protection agreement as it did not provide Petitioner with written notice to cure any alleged material breaches or provide Petitioner with thirty days to cure any non-alleged breaches;
- Petitioner did not materially breach the Agreement.
- Respondent materially breached the Agreement by failing to pay the consideration due under the Agreement on or before March 15, 2015;
- Respondent failed to comply with Town Law §184 by amending the fire protection contract with the Village of West Carthage without first holding a public hearing on notice.

RELEVANT FACTS

7. Petitioner and Respondent entered into an agreement for fire protection and rescue services for the calendar year 2015. A true and accurate copy of that 2015 Fire Protection Agreement (hereinafter, the "Agreement") is attached hereto as **Exhibit A**.
8. Between January 1, 2015 and April 27, 2015, Petitioner fully complied with its obligations under the Agreement and responded to all of the dispatches for fire protection and rescue services to which it was dispatched.
9. The Agreement required Respondent to remit full payment to Petitioner as of March 15, 2015. No payment or partial payment has ever been made.

10. During a regular public meeting held on March 23, 2015, Petitioner's Secretary and Respondent's Town Board discussed the requirement that firefighters obtain physical examinations. Respondent requested and Petitioner attempted to provide information verifying that the firefighters were current with the required physicals exams. Affidavit of Secretary Jennifer Waite.
11. At that same meeting, some of Respondent's Board members rejected Petitioner's contentions that all members were current regarding physical exams and asserted that the names of certain firefighters had to be removed from the list of qualified fire personnel. Affidavit of Waite.
12. Respondent's Board resolved, after Petitioner's members left the meeting, "to terminate the contract between the Town of Champion and the Champion Fire Company for a failure to adhere to the material terms of the contract effective in thirty (30) days." To this date, Respondent never provided Petitioner with any written notice to cure any defect as required by paragraph 6(b).
13. Later that night, Petitioner's Secretary prepared documents responsive to the verbal concerns raised by the Town Board. She attempted to fax the documents to the Town on the night of March 23, 2015. The Town's fax machine would not receive the documents. The documents were hand delivered to Respondent the next day. A true and accurate copy of the submitted documents is attached hereto as **Exhibit B**. Affidavit of Waite.
14. By letter dated March 25, 2015, Respondent's attorney advised Petitioner, in pertinent part, that "the Town of Champion hereby gives you notice of termination of the Fire Protection Contract signed between the Town of Champion and the Champion Volunteer Fire Company, Inc., . . .". A true and accurate copy of the March 23, 2015 Board minutes is attached hereto as **Exhibit C** and a true and accurate copy of the March 25, 2015 letter is attached hereto as **Exhibit D**. The minutes were printed from the Town's website (<http://www.racog.org/Champion/Championhomepage.php>).
15. Prior to termination, Respondent did not provide Petitioner with any written notice to cure any alleged material breaches. Respondent did not hold a public hearing upon notice with regard to the proposed termination. Respondent's resolution terminating the Agreement did not find that the termination was in the public's interest.
16. Respondent's termination letter did not provide a thirty day notice of the right to cure or provide any time to cure any alleged defects. The letter simply notified Petitioner that the Agreement had been terminated. The letter provided only two alleged breaches of material terms.

17. Respondent's reasons underlying its unilateral termination were two-fold: a failure to provide certain documentation regarding physicals and the failure to provide the town with a certificate of insurance naming the town as an additional insured.
18. With regard to the physicals, Respondent wrote: "Please be advised that the statement as to the physicals performed must, at a minimum, be on doctor's letterhead and state that the physical complied with the requirements as set forth in the contract." **Exhibit D.**
19. With regard to the insurance certificate, Respondent wrote: "The insurance certificate which was provided does not name the Town of Champion as an insured party as required by the Contract. This must be remedied in order to be in compliance with the Contract." **Exhibit D.**
20. Petitioner's attorney responded by letter, dated April 1, 2015. A true and accurate copy of the letter is attached as **Exhibit E.**
21. As argued below, Petitioner was not in breach of the actual Agreement as the Agreement did not require the documentation cited by Respondent's attorney and because Petitioner did provide the required insurance certificate.
22. On April 6, 2015, at a regular meeting of the Town Board, Respondent's Board and Petitioner's members discussed the terms of the Agreement relating to physicals and the requirement for any physicians' certifications. A true and accurate copy of the minutes of the meeting, printed from the Town's website is attached hereto as **Exhibit F.**
23. Respondent's attorney sent an additional letter regarding the alleged breach on April 13, 2015. A true and accurate copy of the letter is attached hereto as **Exhibit G.**
24. On or before April 24, 2015, members who were not yet due for a physical examination completed an additional physical examination.
25. Petitioner's attorney faxed a letter to Respondent's attorney on April 27, 2015. The letter was faxed at 12:26 pm. The letter contained, as an attachment, proof of the completion of physical examinations. A true and accurate copy of the letter and attachment is attached hereto as **Exhibit H.**
26. For some reason, on April 27, Respondent again resolved to terminate the Agreement. During this meeting, the Supervisor cited additional alleged material breaches: "lack of training qualifications, training records and financial reporting" not specified in

Respondent's March 25, 2015 correspondence. On May 4, 2015, Respondent refused to reinstate the contract with Petitioner. True and accurate copies of minutes of the meetings, printed from the Town's website are attached hereto as **Exhibit I and J** respectively.

27. On April 27, 2015, immediately following Respondent's resolution to terminate the Agreement with Petitioner, Respondent resolved to amend its contract with the Village of West Carthage. **Exhibit I.** On May 4, 2015, Respondent again resolved to amend the fire protection contract with the Village of West Carthage and to pay the Village of West Carthage a sum of \$26,066.66 for that amendment. **Exhibit J.**
28. Respondent failed to provide notice of or to hold a public hearing on the amendment to the West Carthage fire protection agreement.
29. It also should be noted that on December 10, 2014, the residents of the Champion Fire Protection District voted to dissolve the fire protection district. Respondent is thus required to formulate a new plan to provide fire protection which will not involve Respondent as a contracting entity. Petitioner surmises that Respondent is retaliating against Petitioner as a result of the vote of the residents.

**POINT I
AS AGAINST THE TOWN OF CHAMPION
RESPONDENT'S TERMINATION VIOLATED TOWN LAW §184**

30. Petitioner reasserts and re-alleges paragraphs one through twenty-nine as if fully stated herein.
31. Town Law §184 provides Respondent with the authority to enter into an agreement for fire protection and rescue services. The Agreement recites this statement of law. (**Exhibit A**, p. 1). The Agreement provides for a definite period of time ending on December 31, 2015 as required by Town Law §184(3).
32. Town Law §184(8) provides the only mechanism for the parties to terminate the Agreement, and provides:

8. By mutual consent of the contracting parties, and after a public hearing held pursuant to notice in the manner aforesaid, any such contract heretofore or hereafter executed may be (1) amended, (2) terminated, or (3) terminated and a new contract may be entered into in lieu thereof, if the town board, after such hearing, shall determine, by resolution, that it is in the public interest so to do.

Such notice shall state in general terms the reason why any existing contract is to be amended or terminated, and if a new contract is to be entered into the notice shall also describe the new contract in general terms.

(Emphasis added.)

33. Town Law §184(8) does not provide any authority for Respondent to unilaterally terminate the Agreement.
34. The New York State Comptroller has opined that: "If a contract were for a definite period of time under Town Law §184(3), it could be terminated prior to the contractual expiration date only by mutual consent of the contracting parties after a public hearing under subdivision 8." 1964 Ops. St. Compt. 933, Opinion 64-933. (Emphasis added).
35. Town Law §184 is a detailed section of statute which specifically provides a town with the only process for entering into and terminating fire protection contracts. One Court has held that "Section 184 of the Town Law is a comprehensive detailed section authorizing a town board to contract for fire protection services after a public hearing...." *Riley v. Town Board, Halfmoon*, 86 Misc. 2d 114, 382 N.Y.S.2d 230 (N.Y. Sup. Ct. 1976) (Emphasis added). The court in *Riley* held that the Legislature occupied the field regarding fire protection contracts. *Cf., Wholesale Laundry Board of Trade, Inc. v. New York*, 17 A.D.2d 327, 234 N.Y.S.2d 862 (1st Dept. 1962), *affd* 12 N.Y.2d 998, 239 N.Y.S.2d 128 (1963) ("Furthermore, it is entirely clear that the State law indicates a purpose to occupy the entire field. And where that is found, local laws are prohibited").
36. Respondent's unilateral termination of the Agreement was in violation of Town Law §184 and is therefore void and unenforceable, as well as being arbitrary and capricious.
37. The provision in the Agreement which provides either party with the ability to unilaterally terminate the Agreement is contrary to and prohibited by the comprehensive nature of Town Law §184 and is void *ab initio*.
38. Town Law §184(8) required the Town to hold a public hearing on the termination of the Agreement upon notice to the public, and prohibited any termination unless the Town found that such termination was in the public's interest.
39. Respondent failed to provide notice of a public hearing, failed to hold a public hearing and failed to make a determination that termination of the Agreement was in the public interest.

40. For each of the above reasons, individually and collectively, Respondent's decision to terminate the Agreement was arbitrary and capricious and was in violation of Town Law §184.

Petitioner respectfully requests an Order that the Agreement be reinstated back to the date of the termination and that Respondent immediately remit full payment to Petitioner as required by the Agreement.

POINT II
AS AGAINST THE TOWN OF CHAMPION
RESPONDENT FAILED TO PROVIDE PETITIONER
WITH A WRITTEN NOTICE TO CURE

41. Petitioner reasserts and re-alleges paragraphs one through forty as if fully stated herein.
42. Respondent was prohibited from terminating the Agreement as Respondent failed to provide Petitioner with written notice of any alleged material breaches or a right to cure such alleged material breaches. In light of such failures, Respondent was without authority to terminate the Agreement and its decision to do so was arbitrary and capricious.
43. Paragraph 6 of the Agreement provides:
- (b) Town may terminate this Agreement, if the Company has failed to adhere to the material terms of this Agreement, including the reporting, training, and accounting practices. Town shall report any breach of the material terms to Company, in writing, and the Company shall have thirty (30) days to cure such breach before such termination shall be final.
44. Respondent has never provided Petitioner written notice to cure prior to resolving to terminate the Agreement. Respondent's letter of March 25, 2015 provides notice of the termination, but does not provide Petitioner a right to cure or notice of any specific allegations of material breaches.
45. Moreover, the termination letter did not provide Petitioner with any opportunity to cure. Petitioner cannot cure what Petitioner does not know exists. Petitioner also disputes that the physical exams are a material term of the Agreement, as such physical exams are not listed as a material term in paragraph 6(b).
46. Even if Respondent argues that its letter of March 25, 2015 constituted notice to cure, it cannot be disputed that the letter does not specify any "lack of training qualifications,

training records and financial reporting.” Respondent claimed these three items as material breaches justifying the resolution to terminate on April 27, 2015, despite the fact that had never been specified in writing. Petitioner’s March 24, 2015 submission included training records.

47. For these reasons alone, Respondent’s decision should be declared arbitrary and capricious should be declared null and void.
48. Petitioner respectfully requests an Order that the Agreement be reinstated back to the date of termination and that Respondent immediately remit full payment to Petitioner as required by the Agreement.

**POINT III
AS AGAINST THE TOWN OF CHAMPION
PETITIONER WAS NOT IN MATERIAL BREACH OF THE AGREEMENT**

49. Petitioner reasserts and re-alleges paragraphs one through forty-eight as if fully stated herein.
50. Should the Court find that Respondent was permitted to unilaterally terminate the Agreement, that Respondent was not otherwise required to comply with Town Law § 184, and that Respondent was not required to provide Petitioner with notice of any alleged breaches or with thirty days to cure, then Petitioner submits that Respondent’s decision to terminate was arbitrary and capricious as Petitioner was not in breach of the Agreement.
51. On March 23, 2015 Respondent’s Supervisor insisted that every member must have completed a physical examination as of March 23, 2015, even though the Agreement did not impose this requirement. Jennifer Waite reminded the Supervisor that the Agreement did not require all members to complete a physical exam in 2015. The Supervisor insisted that Petitioner remove from the roster any member not having completed a physical examination in 2015 and as of March 23, 2015. Petitioner then complied so that Petitioner could argue this point another day.
52. By letter dated March 25, 2015, Respondent alleged that Petitioner was in breach of the Agreement. Respondent’s attorney alleged only two breaches, stating:

Receipt is acknowledged of the information which you forwarded to the Town on the 24th of March, 2015. Please be advised that the statement as to the physicals

performed must, at a minimum, be on doctor's letterhead and state that the physical complied with the requirements as set forth in the contract.

The insurance certificate which was provided does not name the Town of Champion as an insured party as required by the Contract. This must be remedied in order to be in compliance with the Contract.

(Exhibit D, p. 1) (Emphasis added).

53. With regard to the insurance certificate, Petitioner's Secretary provided Respondent with proof of insurance coverage on or about March 24, 2015. Petitioner's attorney again provided proof of insurance coverage on April 1, 2015. A true and accurate copy of the insurance certificate is attached hereto as **Exhibit K**. Petitioner is not in breach of the Agreement.
54. By letter dated April 13, 2015, Respondent's attorney again wrote to Petitioner's attorney. In that letter Respondent's attorney only made reference to one alleged breach. The letter concluded:

Therefore, without appropriate certifications to the physicals, the members of the department, [*sic*] it appears that the department is in breach of the contract and a payment to them cannot properly be made by the Town.

Respondent never cited any other reasons underlying the alleged breach of the Agreement in any correspondence with Petitioner.

55. On April 27, 2015, Respondent's attorney received a letter from Petitioner's attorney which contained proof of completion with Respondent's newly imposed physical examinations conditions. The documents proved that Petitioner's members had obtained physical examinations on or before April 24, 2015. **Exhibit H**.
56. With regard to the physicals, the Agreement provides:

7. TRAINING AND REPORTING REQUIREMENTS

(h) Physicals. Physical exams shall be provided to every interior firefighter over the age of forty no less than once per year. All other active members shall successfully complete **physical exams** no less than every two (2) years. Prior to the renewal of this

Agreement, Town shall be provided with the list of the individuals completing their exams and their status of "Pass" or "Fail" but with no additional information. Such physical exams shall ensure that individuals are capable of performing those activities listed in **Schedule A**.

(**Exhibit A**, p. 5) (Emphasis added).

57. Petitioner was not in breach of the Agreement involving the physicals.
58. First, proof of the completion of the physicals was not due until "Prior to the renewal of this Agreement". **Exhibit A**. The Agreement was not yet due for renewal until December 31, 2015 and the physical examinations were not yet required to be completed.
59. Second, the physical examinations themselves were not yet due. The Agreement does not contain a date certain for the completion of the physicals. The Agreement only requires that certain interior firefighters receive a physical examination "no less than once per year" and that the other members receive examinations "no less than every two (2) years". The Agreement does not state when during the year such physical examination must be conducted. Petitioner had until the end of the year to complete the physical exams and could not yet be in breach of this provision of the Agreement.
60. Third, Respondent alleges breaches of terms which do not exist in the Agreement. The Agreement does not require that the report of the physical exam is placed on a physician's letterhead or that that the report contains any specific certification. Instead, the Agreement specifically states that "no additional information" will be provided to Respondent other than a list of names of individuals completing physicals and an indication if the individuals passed or failed. **Exhibit A**, p. 5.
61. Respondent admitted that such requirements do not exist and that it was instead a "simple request". On April 13, 2015, Respondent's attorney wrote to David Garwood of the Pinsky Law Group, PLLC, attorneys for Petitioner. The letter admits:

The contract requires that the physicals be for the purpose of satisfying the duty-specific requirement set forth at Schedule A. Without some certification that the physicals were of a nature as would confirm an individual's capacity to act under the duty-specific requirements, the list is useless.

* * *

The simple request which I made for the doctor's letterhead and a statement by the doctor that the requirements of the Contract were fulfilled by the physical were an attempt to make it easier for the Department to comply. Since

you have raised the issue, I think this would be a good time to set once and for all how the Department will certify to the Town that the requirements of the physicals have been completed.

(Exhibit G, p. 2) (Emphasis added).

62. The “simple request” constituted a term or condition which was not included in the Agreement and the failure to adhere to it cannot constitute a material breach of the Agreement.
63. These terms were not required by the Agreement and cannot be added by Respondent’s attorney. Paragraph 17 of the Agreement provides:

Entire Agreement. This agreement is the entire agreement among the parties and shall not be changed, except by a writing signed by the party to be charged. This agreement shall supersede all prior agreements between the parties.

(Exhibit A).

Petitioner is the “the party to be charged” and Petitioner never agreed to such a change

64. Neither Respondent nor the Court may add conditions into the Agreement which the parties had not included. *Michael Slamow v. John Delcol*, 174 A.D.2d 725, 571 N.Y.S.2d 335 (2nd Dept. 1991). The absence of the requirements must be construed most strongly against Respondent. *Mazzola v. County of Suffolk*, 143 A.D.2d 734, 735, 533 N.Y.S.2d 297, 297-298 (2nd Dept. 1988). Respondent drafted the sections which Respondent claims is now breached. Respondent’s failure to include any requirements in the Agreement may not operate to Petitioner’s detriment. *Michael Slamow v. John Delcol*, 174 A.D.2d 725, 571 N.Y.S.2d 335 (2nd Dept. 1991).
65. It is improper for Respondent’s attorney to now add terms, not in the clear document, to make additional certification requirements. *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 443 (1990).

71. Town Law §184(8) does not provide any authority for Respondent to amend a fire protection contract without first providing notice of a public hearing and holding such a public hearing.
72. Town Law §209-d requires the members of the West Carthage Volunteer Fire Company, Inc. to consent to the terms of the fire protection contract with the Town of Champion. There is no proof that the members of the West Carthage Volunteer Fire Company, Inc. ever approved the amended agreement or expressed their consent to the amendment of the contract to increase the territory served by their Company.

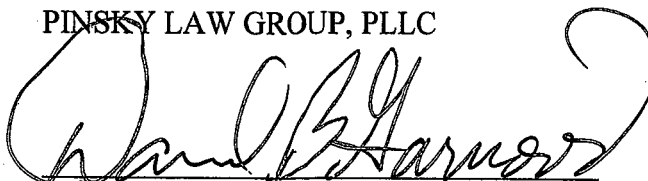
WHEREFORE, Petitioner requests an Order from this Court as follows:

- A. Declaring that Respondent's unilateral termination of the Fire Protection Agreement was in violation of Town Law §184 and that Respondent's termination of the Agreement was arbitrary and capricious;
- B. Declaring that Respondent was in breach of the Agreement by terminating the agreement without providing Petitioner with at least thirty days' written notice of the alleged breaches and an opportunity to cure and that Respondent's termination of the Agreement was arbitrary and capricious;
- C. Declaring that Petitioner was not in breach of any material terms of the Agreement and that Respondent's termination of the Agreement was arbitrary and capricious;
- D. Declaring that Respondent is in material breach of the Agreement by failing to pay the amount due to Petitioner;
- E. Declaring that Respondent failed to comply with Town Law §184 when amending the fire protection contract with the Village of West Carthage; and
- E. Ordering that the Agreement for Fire Protection be reinstated as of the earliest date of termination; and
- F. Ordering that the Respondent remit full payment to Petitioner due under the Agreement; and
- G. Ordering that Requiring Respondent to pay attorney's fees, expenses, and filing fees; and
- H. Ordering that Respondent is required to rescind its amendment of the fire protection contract with the Village of West Carthage.

Dated: May 18, 2015

PINSKY LAW GROUP, PLLC

BY:

A handwritten signature in black ink, appearing to read "David B. Garwood", written over a horizontal line.

David B. Garwood, Esq.
Attorneys for Petitioners
5789 Widewaters Parkway
Syracuse, New York 13214
(314) 428-8345 ext. 15

VERIFICATION

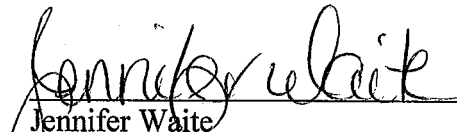
STATE OF NEW YORK)
) ss:
COUNTY OF JEFFERSON)

Jennifer Waite avers that: Deponent is the Secretary of Petitioner in the within action; Deponent has read the foregoing Petition and knows the contents thereof; that the same is true to my own knowledge, except as to the matters therein stated upon the information and belief, and as to those matters I believe them to be true.

The grounds of Deponent's belief as to all matters not stated upon Deponent's own knowledge are as follows: documents in the possession of Petitioner.

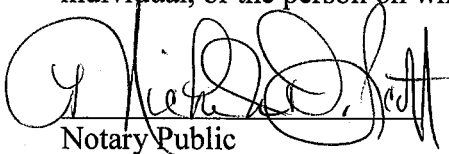
I certify that to the best of my knowledge, information and belief, formed after inquiry reasonable under the circumstances, the presentation of the Petition and the contentions therein are not frivolous.

Dated: May 18th, 2015


Jennifer Waite

STATE OF NEW YORK)
) ss:
COUNTY OF JEFFERSON)

On the 18th day of May, 2015, before me, the undersigned, personally appeared JENNIFER WAITE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity and that his/her signature on the instrument, the individual, or the person on whose behalf which the individual acted, executed the instrument.


Notary Public

MICHELE D. SCOTT
Notary Public, State of New York
Registration No. 01SC6269516
Qualified in Lewis County
Commission Expires September 24, 2016

VERIFICATION

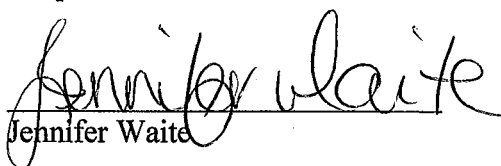
STATE OF NEW YORK)
) ss:
COUNTY OF JEFFERSON)

Jennifer Waite avers that: Deponent is a resident taxpayer of the Town of Champion; Deponent has read the foregoing Petition and knows the contents thereof; that the same is true to my own knowledge, except as to the matters therein stated upon the information and belief, and as to those matters I believe them to be true.

The grounds of Deponent's belief as to all matters not stated upon Deponent's own knowledge are as follows: documents in the possession of Petitioner.

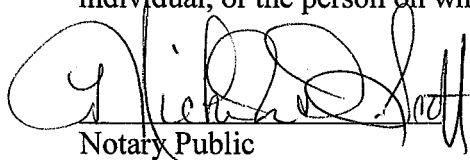
I certify that to the best of my knowledge, information and belief, formed after inquiry reasonable under the circumstances, the presentation of the Petition and the contentions therein are not frivolous.

Dated: May 18th, 2015


Jennifer Waite

STATE OF NEW YORK)
) ss:
COUNTY OF JEFFERSON)

On the 18th day of May, 2015, before me, the undersigned, personally appeared JENNIFER WAITE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity and that his/her signature on the instrument, the individual, or the person on whose behalf which the individual acted, executed the instrument.


Notary Public

MICHELE D. SCOTT
Notary Public, State of New York
Registration No. C1SC6269516
Qualified in Lewis County
Commission Expires September 24, 2016