

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO EX REL. N.G., )  
)  
Relator/Appellee, )  
)  
vs. ) CASE NO. 15-0363  
)  
CUYAHOGA COUNTY COURT OF )  
COMMON PLEAS, JUVENILE ) On Appeal from the Cuyahoga County  
DIVISION, et al. ) Court of Appeals, Eighth Appellate District  
) Case No. CA-14- 101425  
Respondents/Appellees, )  
)  
-and- )  
S.F., )  
Intervening Respondent/ )  
Appellant. )

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**RESPONSE BRIEF OF APPELLANT SENAYT FEKADU TO  
RELATOR/APPELLEE N.G.'S MOTION FOR SANCTIONS**

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*Counsel for Respondents/Appellees*

## MEMORANDUM

### I. INTRODUCTION

Now comes Appellant Senayt Fekadu<sup>1</sup> (“Appellant” or “Ms. Fekadu”), by and through undersigned counsel, and hereby respectfully requests that this Honorable Court **deny** Relator/Appellee N.G.’s *Motion for Sanctions* (“Motion”), filed on August 11, 2015<sup>2</sup>. It is important for the Court to note that this is not the first time that Relator/Appellee N.G. (“Appellee”) has filed for sanctions against Appellant Senayt Fekadu (“Appellant” or “Ms. Fekadu”) and her counsel. In the case below, Appellee filed for sanctions on November 7, 2014 with the Ohio Court of Appeals for the Eighth District (“Eighth District”), alleging two (2) of the same improprieties that he does in his instant Motion. Specifically, he claimed sanctions were warranted because (1) Ms. Fekadu falsely claimed the custody order entered by the Arlington Domestic Relations Court on June 5, 2012 was vacated, and (2) Ms. Fekadu and her counsel stated they were unaware of the Complaint for Writ of Prohibition (“Writ”) until after the Writ was granted. The Eighth District denied outright Appellee’s *Motion for Sanctions* on or about January 14, 2015. Now, Appellee brings the *same* unjustified arguments to this Court, and adds the baseless claim that Ms. Fekadu has no standing to bring her appeal. Appellee’s Motion is

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<sup>1</sup> Appellee’s allegation that Ms. Fekadu did not comply with the Rules of Superintendence for the Courts of Ohio is unfounded. Supp.R. 45(D) advises parties to omit personal identifiers prior to the submission of a filing. However, it is unnecessary for Ms. Fekadu to omit her full name from her filings. Supp.R. 44(H) defines “Personal identifiers” as “social security numbers, except for the last four digits; financial account numbers, including but not limited to debit card, charge card, and credit card numbers; employer and employee identification numbers; and a *juvenile’s name* in an abuse, neglect, or dependency case, except for the juvenile’s initials or generic abbreviations such as ‘CV’ for ‘child victim.’” Accordingly, as Ms. Fekadu is not a minor, she was not required to omit her full name from the filings.

<sup>2</sup> Relator/Appellee N.G. attached an inaccurate Certificate of Service to his Motion for Sanctions, wherein he claimed a “Motion to Strike” was filed on May 29, 2015. This is not true. A Motion for Sanctions was filed on August 11, 2015, according to the Court’s Docket.

nothing more than a ploy to bolster the arguments in his merit brief, and should be disregarded by this Court. Accordingly, for the reasons that follow, Appellee's Motion should be denied.

## **II. ARGUMENT**

Rule 11 of the Ohio Rules of Civil Procedure states, in pertinent part, that an attorney or party must certify "that the attorney or party has read the documents; that to the best of the attorney's or party's knowledge, information and belief that there is good ground to support it; and that it is not interposed for the purpose of delay." Civ. R. 11. Similarly, Supreme Court Rule of Practice 4.03(A) provides that the Supreme Court may impose sanctions when it determines "that an appeal or other actions is frivolous or is prosecuted for delay, harassment, or any other improper purpose." S.Ct.Pract.R. 4.03 further provides, "An appeal or other action shall be considered frivolous if it is not reasonably well-grounded in fact or warranted by existing law or good-faith argument for the extension, modification, or reversal of existing law." S.Ct.Pract.R. 4.03. As detailed below, Ms. Fekadu's appeal was not brought for the purpose of delay, but rather in an effort to have the Uniform Child Custody Jurisdiction and Enforcement Act accurately and consistently applied in Ohio. Ms. Fekadu's arguments were well-founded in fact and warranted by existing law. Appellee's Motion is entirely unwarranted.

As set forth in his Motion, Appellee seeks sanctions based on three (3) grounds, which will be addressed in turn:

### **(1) Statements made by Ms. Fekadu and her Counsel that the June 5, 2012 Order in Virginia has been Vacated.**

Appellee continues to advance the argument that the June 5, 2012 order of the Virginia court remains in full force and effect, and claims that "Virginia has recently enforced the June 5, 2012 order". (Motion at 8). However, Appellee completely distorts the factual and procedural

posture of the events surrounding the June 5, 2012 order in a further attempt to have this Court impose sanctions on Ms. Fekadu and her counsel.

As set forth in Ms. Fekadu's *Motion to Supplement the Combined Motion* ("Motion to Supplement"), filed on November 3, 2014 in the Eighth District (Case No. 101425), Ms. Fekadu filed an Emergency Appeal and Motion to Dismiss and/or Vacate the September 9, 2014 order to enforce the June 5, 2012 custody order in the Virginia litigation (the "Virginia Appeal"). The sole purpose of Ms. Fekadu's Virginia Appeal is for the Virginia Circuit Court to clarify and confirm that its May 23, 2014 Order of Dismissal in the Virginia litigation obviously dismissed the underlying June 5, 2012 order, which was the subject of said litigation, and conceded jurisdiction over the parties pending custody petitions to the Ohio court (because the Ohio court properly determined that Ohio is the "home state" of the children). On October 28, 2014, the Arlington County Circuit Court continued the hearing on the Virginia Appeal to allow the Eighth District to render a decision as to whether the Writ should be vacated. (See Ms. Fekadu's Motion to Supplement at Exhibit A).

In response to Appellee's motion for sanctions in the Eighth District, Ms. Fekadu's Virginia Counsel, Paul Smollar, Esq., provided an affidavit attesting to the procedural posture to date in the Virginia litigation. (See Affidavit of Paul Smollar, attached hereto as **Exhibit A**). In this Affidavit, Mr. Smollar presents additional important facts which not only refute Relator's distortion of the factual and procedural posture regarding the June 5, 2012 order contained in his response to Ms. Fekadu's Combined Motion, but also demonstrate good grounds for Ms. Fekadu's Combined Motion, and her appeal to this Court. (See generally **Exhibit A**). Specifically, the Affidavit presents facts relevant to whether the June 5, 2012 custody order in the Virginia Litigation is still binding, Ms. Fekadu's Virginia Appeal regarding the September 9,

2014 hearing in Virginia, and the effect of a determination that Ohio is the home state of the parties' children. (**Exhibit A** at ¶¶6-8).

As it relates to Appellee's instant Motion, the Virginia court's "enforcement" of the June 5, 2012 order has been, and remains, disputed, and the Virginia Circuit Court's affirmation of its dismissal of said order is pending. Again, not surprisingly, Appellee failed and/or refused to bring any of these developments to this Court's attention. (See, generally, Motion). Instead, Appellee continues to present his distorted view of the facts to this Court, this time in his request for sanctions. (See Motion at 20). Accordingly, Appellee's Motion should be denied.

**(2) Statements made by Ms. Fekadu and her counsel that they did not know of the existence of the Complaint for Writ of Prohibition until October 16, 2014.**

As more fully set forth in the record, including in Ms. Fekadu's Merit Brief, her Reply Brief, as well as her Combined Motion in the Eighth District, neither Ms. Fekadu nor undersigned counsel was aware that the Complaint for Writ of Prohibition ("Complaint") had been filed in May 2014, until on or about October 16, 2014, when Appellee arrived at the children's school in Pepper Pike, Ohio.

Appellee has not provided any evidence on the record, or to this Court in particular, which directly controverts Ms. Fekadu's or her counsel's statement that they were unaware of the Writ until October 16, 2014. Notably, Appellee did not produce, nor allege, any correspondence, cover letter, fax, or email to Ms. Fekadu or her counsel, or any certified mail return receipt demonstrating that a service copy of the Complaint had been sent, let alone a courtesy copy of the Complaint, to undersigned counsel at any point in time. Nor did Appellee provide any affidavit averring that any such service of the Complaint had been made upon either Ms. Fekadu's Ohio or Virginia counsel, or that he had provided undersigned counsel a courtesy copy of the Complaint at any time. Appellee has simply failed to demonstrate that Ms. Fekadu

had any knowledge of the Complaint sufficient to allow her to intervene in the proceedings at any point prior to when she did.

Appellee claims that *both* Ohio and Virginia counsel for Ms. Fekadu had “actual knowledge of the filing of the Complaint for Writ of Prohibition no later than May 23, 2014.” While Appellee asserts this is a “verifiable truth,” he cites no evidence on the record, or otherwise, to support his baseless claim. However, the record clearly demonstrates that Appellee’s contention in this regard is erroneous. Ms. Fekadu’s Virginia and Ohio counsel, Paul Smollar, Esq. and Robert Dubyak, Esq., respectively, prepared affidavits in support of Ms. Fekadu’s *Brief in Opposition to Relator’s [Appellee N.G.] Motion for Sanctions Against Intervenor and Intervenor’s Counsel* in the Eighth District. (Copies of Mr. Smollar’s Affidavit and Mr. Dubyak’s Affidavit are attached hereto as **Exhibits B** and **C**, respectively). In response to Appellee’s claims that Mr. Smollar was handed the Complaint for Writ of Prohibition on or about May 23, 2014, Mr. Smollar stated that he had “no recollection of having been handed the Ohio pleading call [sic.] a Writ of Complaint.” (See **Exhibit B**, ¶3). Similarly, Mr. Dubyak stated that he “was never served, personally or otherwise, with a copy of Relator’s Complaint for Writ of Prohibition at any time after it was filed in May 2014.” (See **Exhibit C**, ¶4).

Further, there is no basis on the record to support Appellee’s claim that Ms. Fekadu or her counsel had actual knowledge of the Complaint on May 23, 2014, and that she acknowledges as much in her Reply Brief. Appellee is misreading Ms. Fekadu’s Reply Brief, wherein she references Appellee’s cite to a transcript from a **September 9, 2014** hearing. (Fekadu Reply Brief, p. 8) In fact, the September 9, 2014 hearing transcript is the only Virginia transcript on the record. Appellee has **never** produced the transcript from the May 23, 2014 hearing, although he has consistently claimed that this transcript shows the misconduct of Ms. Fekadu and her

counsel. Indeed, Appellee states in his Motion that the transcript from the May 23, 2014 hearing in Virginia will verify that Ms. Fekadu had knowledge of the Complaint; yet, he fails to attach the transcript or otherwise provide proof of his assertion. If this transcript is as pivotal to the Appellee's position as he claims, why has he left it out of the record to date?

At no time during the pendency of this case, has Appellee ever produced an affidavit averring under oath or otherwise demonstrating that Appellee, or his counsel, ever informed Mr. Dubyak of the Complaint, or provided him with a copy of the same. Clearly this is because neither Appellee nor his counsel made any such efforts. (**Exhibit C**, Dubyak Affidavit at ¶¶4-5) Moreover, the record reflects that Mr. Dubyak simply had no knowledge of the Complaint being filed in May 2014 until on or about October 16, 2014, when Ms. Fekadu called him to tell him that Appellee arrived at the minor children's school in Pepper Pike, Ohio, to remove them and take them to Virginia. (**Exhibit C** at ¶7). Thereafter, Ms. Fekadu took immediate steps seeking to protect her interests and those of her children by filing her Combined Motion. (**Exhibit C** at ¶8).

Without any legitimate support therefore, Appellee's Motion asks this Court to impose sanctions upon Ms. Fekadu and her counsel for intentionally lying about having no knowledge that the Complaint had been filed. This, despite the fact that Ms. Fekadu and her counsel have been involved in extensive, intrastate litigation for three years so that Ms. Fekadu can protect her interests and those of her minor children. Appellee's argument simply defies logic and common sense that Ms. Fekadu would not attempt to intervene in the Eighth District action regarding the Writ, had she had notice of Appellee's filing of his Complaint for the same. Accordingly, Appellee's Motion should be denied.

**(3) Ms. Fekadu and her Counsel Raised an Issue on Appeal for which they Lack Standing.**

As set forth more fully in Ms. Fekadu's Reply Brief (p. 12-14), Ms. Fekadu had standing to challenge the Eighth District's decision granting the Writ. The Eighth District's Journal Entry denying her Combined Motion was ambiguous with respect to whether it intended to deny both the motion for relief from judgment, as well as the motion to intervene, or solely the motion for relief. The January 14, 2015 Journal Entry (the "Appealed Journal Entry") stated, "Combined motion to intervene as respondent S.F. and emergency motion for relief from order is denied." However, the Eighth District proceeded to cite only facts relevant to the denial of Ms. Fekadu's motion for relief from the Writ. Hence, Ms. Fekadu was entitled to appeal the Eighth District's decision as set forth in the Appealed Journal Entry, which necessarily entailed addressing the merits of the Writ in response to the Eighth District's findings on the same.

Ms. Fekadu did not "clearly and unambiguously" lack standing, as the Appellee has claimed in his Motion. (Motion at 2). To this end, each party in this Appeal has a different position on the procedural posture of this case in the Eighth District. Ms. Fekadu has consistently maintained, as discussed above, that the Appealable Journal Entry was unclear with respect to its procedural impact. Appellee contends that Ms. Fekadu's motion to intervene was denied. The other Appellees in the case, the Cuyahoga County Court of Common Pleas, Juvenile Division, and the Honorable Alison L. Floyd (the "Juvenile Court"), maintained that the Eighth District *allowed* Ms. Fekadu to intervene, stating "But nothing in the text of the Court of Appeals' January 14, 2015 order indicates that it had precluded Mother from intervening to be heard in the case." (See Merit Brief of the Juvenile Court at 13). It does not follow that Ms. Fekadu "clearly and unambiguously" lacked standing for her appeal of the decision upholding the Writ, when

each of the parties to the appeal has a different understanding of the procedural posture in the Eighth District.

Further, the legal precedent Appellee provided with respect to the issue of standing is distinguishable from Ms. Fekadu's appeal. As argued in her Reply Brief (See Reply Brief at 14), unlike the appellant in *Sawicki v. Court of Common Pleas of Lucas County, et. al.* ("*Sawicki*"), 121 Ohio St.3d 507, 20019-Ohio-1523, 905 N.E.2d 1192, ¶18, Ms. Fekadu is not using her motion to intervene as a vehicle to challenge the underlying judgment. Rather, she is directly challenging the Appealed Journal Entry, wherein the Eighth District denied her *Combined Motion to Intervene as Respondent Senayt Fekadu and Emergency Motion for Relief from Order* (the "Combined Motion"), and issued findings in support of the Writ. Appellants are permitted to appeal the denial of both a motion to intervene and a motion to vacate a judgment. *See Dep't of Pub. Safety v. Buckley*, 11th Dist. No. 2006-L-101, 2007-Ohio-4628, ¶11 (Eleventh District considered appellants' motion to vacate and motion to intervene simultaneously where the facts relating to each assignment of error were interrelated). Thus, Ms. Fekadu has support in law and in fact for her arguments seeking to appeal the granting of the Writ. Accordingly, Appellee's Motion should be denied.

### III. CONCLUSION

As set forth above and more fully in Ms. Fekadu's Merit Brief and Reply Brief, Ms. Fekadu has good grounds to support the arguments contained therein. Ms. Fekadu's appeal in this matter is not frivolous, and it was not brought with intent to delay or otherwise harass Appellee. In fact, if any pleading were submitted in a blatant attempt to delay these proceedings, or to harass Ms. Fekadu and her counsel, it is Appellee's instant Motion. Therefore, Ms. Fekadu respectfully requests that this Court **deny** Appellee's Motion.

Respectfully submitted,

/s/ Robert J. Dubyak

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**Counsel for Appellant Senayt Fekadu**

**CERTIFICATE OF SERVICE**

Pursuant to S.Ct.Prac.R. 3.11(B)(1), a true copy of the foregoing **REPLY BRIEF OF APPELLANT SENAYT FEKADU** was served this 21<sup>st</sup> day of August 2015 by e-mail upon:

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*Counsel for Relator/Appellee N.G.*

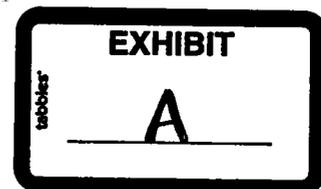
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*Counsel for Respondents/Appellees*

/s/ Robert J. Dubyak  
Robert J. Dubyak\* (0059869)  
*Counsel for Appellant Senayt Fekadu*

**AFFIDAVIT OF PAUL R. SMOLLAR, ESQUIRE**

1. My name is Paul R. Smollar. I am a licensed attorney in Virginia. My state bar number is 28428. My office address is 1350 Connecticut Avenue N.W. Suite 600 Washington, D.C. 20036. My telephone number is 202-331-7522. My fax number is 202-331-0388. My email address is [psmollar@ksfmlaw.com](mailto:psmollar@ksfmlaw.com).
2. I represent the Mother, in the Arlington County Virginia court proceedings. My representation began on June 15, 2012 after the Juvenile and Domestic Relations Court Order of June 5, 2012.
3. I have read the Affidavit of John Kelsey Cottrell, Esquire (Mr. Cottrell). His description of the structure of the Virginia Court System is accurate.
4. However, I disagree with his characterization of what occurred in this case in Virginia.
5. The Virginia Juvenile and Domestic Relations District Court (J&DR Court) never held an evidentiary hearing on the issue of whether Virginia was the home state for the children. The Order entered by that Court on June 5, 2012, was entered while the Ohio proceedings to determine the issue of whether Ohio was the home state were going on. The underlying Complaint in the Virginia case had been filed one month after the initial Custody Complaint was filed in Ohio.
6. During the Appeal to the Circuit Court in 2012 - 2013, the Ohio trial court entered a decision based upon the Ohio Court Of Appeals remand, that Ohio was the home state. The Judge for the Circuit Court in Virginia then decided on April 21, 2014 that Virginia was not the home state and did not have subject matter jurisdiction over the children. Therefore there was no jurisdiction to go forward and the appeal was



dismissed. I submit the Circuit Court decision clearly had the impact of vacating the J&DR Order. The father did not appeal the 2013 Circuit Court Order. The father made no effort at that time or thereafter, to enforce the June 5, 2012 Order until September, 2014. Instead, the children were then returned to their mother in Ohio in May, 2014, pursuant to the Ohio Order. Whether the J&DR Order remained an enforceable order despite the fact that Virginia did not have subject matter jurisdiction at the time to enter its order is the issue in the current pending appeal.

7. On September 9, 2014, the J&DR Judge, upon reviewing the Circuit Court Orders, decided that his decision still remained binding. That decision has been appealed and is now on appeal. That decision remains unresolved, that is, whether his June 5, 2012 Order was still binding. Nevertheless, in lieu of deciding the question at this time, that is, whether the J&DR Order still remained binding, the Circuit Court has decided instead to stay the appeal until the Ohio Court decides the instant case on the Writ of Prohibition. If Ohio decides that Ohio still is the home state, then the Virginia Court will most likely dismiss the appeal again and arguably vacate the J&DR Order. That is my expectation. However, if Ohio decides that Ohio is not the home state, then Virginia will be placed in the posture of having to hold an evidentiary hearing on the issue of home state. The critical evidence at that hearing will be the same as the critical evidence that was presented in Ohio at the time the Ohio trial court decided that Ohio was the home state.
8. Mr. Cottrell and I clearly disagree on what has happened and is likely to happen in Virginia. The September 9, 2014 Order, which resurrected the June 5, 2012 Order, has been appealed. Whether it will remain a final Order depends upon what happens

in this Appeal in Virginia. Since the Circuit Court has already previously decided the Ohio is the home state based upon the decision by the Ohio trial court on remand and that Virginia does not have subject matter jurisdiction, I submit that the Circuit Court will dismiss the appeal and vacate the J&DR Order if Ohio again decides that it is the home state. I know that Mr. Cottrell disagrees. The reason I am submitting this affidavit is to provide some balance for the Ohio Court regarding what has happened in Virginia.



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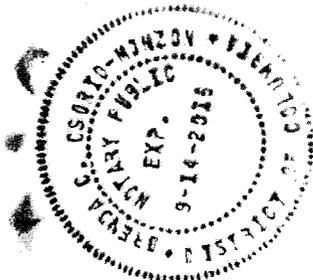
DISTRICT OF COLUMBIA            )  
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The foregoing Affidavit was acknowledged before me this 18<sup>th</sup> day of November, 2014 by Paul R. Smollar.



Notary Public

My Commission Expires:            BRENDA C. OSORIO-MONZON  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires September 14, 2016



**AFFIDAVIT**

I, **PAUL R. SMOLLAR, Esquire**, do hereby swear and affirm that the foregoing Affidavit is true and correct to the best of my knowledge as follows:

1. I represent the Mother in the case pending before the Ohio Court of Appeals. I am an attorney in good standing with the Virginia State Bar, Bar number 28428.
2. I have read the Affidavit submitted in this case by Demian J. McGarry, Esquire (Mr. McGarry).
3. I have no recollection of having been handed the Ohio pleading call a Writ of Complaint, as has been mentioned by Mr. McGarry. I do understand from Ohio counsel that he was not given such a copy. I am not sure why I would be given a copy if Ohio counsel was not given a copy and why that would even be relevant. Nevertheless, I have no such recollection.

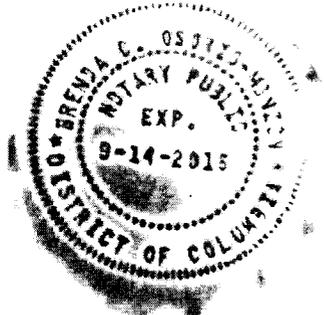
*Paul R. Smollar*

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DISTRICT OF COLUMBIA            )  
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The foregoing Affidavit was acknowledged before me this 18<sup>th</sup> day of November, 2014 by Paul R. Smollar.



*Brenda C. Osorio-Monzon*  
Notary Public

My Commission Expires: BREND A. C. OSORIO-MONZON  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires September 14, 2015



Pleas, Juvenile Division, Case Nos. PR 12703234 and PR 12703235, the appeal of that original action before this Honorable Court, Case No. CA-12-098652, and now Ms. Fekadu's instant *Combined Motion to Intervene as Respondent Senayt Fekadu and Emergency Motion for Relief from Order* (the "Combined Motion") before this Honorable Court, Case No. CA-14-101425.

4. I was never served, personally or otherwise, with a copy of Relator's Complaint for Writ of Prohibition (the "Complaint") at any time after it was filed in May 2014.

5. I was never contacted or informed by Relator's counsel that the Complaint had been filed, nor was I ever provided with any information related to the case title, number, or any other identifying information.

6. Further, I do not recall participating in any discussion on June 12, 2014, in Judge Floyd's room where I acknowledged the existence of the Complaint.

7. In fact, I did not learn the Complaint had been filed in May 2014 until October 16, 2014, when Ms. Fekadu called me to inform me that Relator arrived at Ms. Fekadu's minor children's school in Pepper Pike, Ohio, to remove them and take them to Virginia.

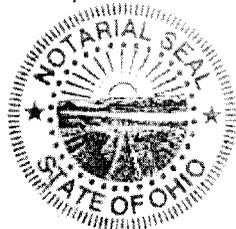
8. Thereafter, I filed the instant Combined Motion as soon as practicable, to protect Ms. Fekadu's interests, and those of her children, as more fully set forth in the Combined Motion.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
ROBERT J. DUBYAK

SWORN TO BEFORE ME and subscribed in my presence by the said Robert J. Dubyak on this 21<sup>st</sup> day of November, 2014.

  
\_\_\_\_\_  
Notary Public



Venera Ilievska  
Notary Public, State of Ohio  
My Commission Expires  
April 6, 2018