

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

-----X

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

LEWIS FAMILY FARM, INC.,
SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

-----X

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

-----X

NOTICE OF CROSS-
MOTION TO TRANSFER

INDEX No. 332-08

INDEX NO. 315-08
RJI No. 15-1-2008-0109

PLEASE TAKE NOTICE that, upon the affirmation of Assistant Attorney General Loretta Simon dated April 21, 2008, the exhibits annexed thereto, and the accompanying memorandum of law, the Adirondack Park Agency (APA) (plaintiff in No. 332-08 and respondent in No. 315-08) will move this Court, at a Special Term thereof to be held on the 24th day of April 2008, at 9:30 am or as soon thereafter as counsel may be heard, at the Essex County Courthouse, Elizabethtown, New York, for an order:

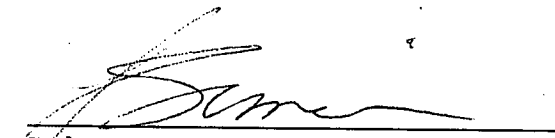
(1) Transferring both actions: APA v. Lewis Family Farm, Inc., Salim B. Lewis, and Barbara Lewis, (Index No. 332-08), and

Lewis Family Farm, Inc. v. APA, Sup. Ct., Essex Co., (Index No. 315-08) to the Honorable Kevin K. Ryan consistent with 22 NYCRR §§ 202.3 and 202.6, because a related case, Lewis Family Farm, Inc. v. APA, Essex Co. Sup. Ct., (Index No. 498-07), was assigned to Justice Ryan; and

(2) Such other and further relief as the Court deems just and appropriate.

Dated: Albany, New York
April 21, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for State Respondent

By: 
Robert C. Glennon
Assistant Attorney General
Loretta Simon
Assistant Attorney General
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The Capitol
Albany, New York 12224
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TO: John J. Privitera, Esq.
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677 Broadway
Albany, NY 12207-2503

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

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ADIRONDACK PARK AGENCY,

Plaintiff,

INDEX NO. 332-08

v.

LEWIS FAMILY FARM, INC.,
SALIM B. LEWIS, and BARBARA LEWIS,

Defendants.

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LEWIS FAMILY FARM, INC.,

Petitioner,

INDEX NO. 315-08

RJI No. 15-1-2008-0109

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

-----X

MEMORANDUM OF LAW IN RESPONSE TO LEWIS DEFENDANTS' MOTION
TO CONSOLIDATE AND IN SUPPORT OF PLAINTIFF APA'S
CROSS-MOTION TO TRANSFER TO THE IAS JUDGE
ASSIGNED TO A PREVIOUSLY-FILED RELATED CASE

JOHN J. SIPOS
LORETTA SIMON
Assistant Attorneys General

Of Counsel

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency
New York State Department of Law
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Albany, New York 12224
Tel No. (518) 474-2724

Dated: April 21, 2008

PRELIMINARY STATEMENT

Plaintiff Adirondack Park Agency ("APA" or "Agency") respectfully submits this memorandum of law in Reply to the Lewis Defendants' Motion to Consolidate and in Support of APA's Cross-Motion To Transfer civil actions Nos. 332-08 and 315-08 to the Honorable Kevin K. Ryan consistent with 22 NYCRR §§ 202.3 and 202.6 since Justice Ryan was the IAS Judge assigned Justice to a related matter, Lewis Family Farm, Inc. v. APA, (Index No. 498-07), and the Lewis Defendants failed to disclose this information to this Court when they applied for two separate Requests for Judicial Intervention ("RJI") in Nos. 332-08 and 315-08 .

All three matters, APA v. Lewis Family Farm, Inc., Salim B. Lewis, and Barbara Lewis, (Index No. 332-08), Lewis Family Farm, Inc. v. APA, (Index No. 315-08), and Lewis Family Farm, Inc. v. APA, (Index No. 498-07), involve the APA's application of the Adirondack Park Agency Act ("APA Act"), and the Wild, Scenic, and Recreational River System Act (the "Rivers Act")¹ to development activities on the Lewis Family Farm ("Lewis Farm"). These actions arise from Lewis Farm's subdivision of property and construction of three single-family dwellings, without an APA permit, on land located

¹ These statutes are codified at Executive Law § 809 and Executive Law § 810 and Environmental Conservation Law ("ECL") § 15-2701.

in the Town of Essex, Essex County ("the Site"), in violation of the APA Act and the Rivers Act.

STATEMENT OF FACTS

The relevant facts are set forth in the Affirmation of Paul Van Cott dated April 10, 2008, which previously was submitted to the Court in Lewis Family Farm, Inc. v. APA, (Index No. 315-08) and is submitted again here in support of the APA's present cross-motion. See Affirmation of Loretta Simon ("Simon Aff.") dated April 21, 2008, Exhibit A (Affirmation of Paul Van Cott ("Van Cott Aff.") dated April 10, 2008, with APA determination dated March 25, 2008). A summary of the these litigation matters is provided in the Simon Aff., ¶¶ 9-19, Exhibits B-H.

On or about March 14, 2007 Lewis Farm applied to the APA for a permit to construct three single-family dwellings. On or about March 15, 2007, APA informed Lewis Farm that the Application was incomplete. See Van Cott Aff., ¶¶ 8, 9. As set forth in Mr. Van Cott's affirmation, over the past 13 months the APA staff and Lewis Farm have been engaged in administrative proceedings concerning the propriety of certain development on the Lewis Farm. These proceedings resulted in an Agency determination dated March 25, 2008. See Van Cott Aff., ¶ 27, Exhibit A.

In 2007, during the pendency of the APA administrative proceedings, Lewis Farm sought to challenge the APA's assertion of jurisdiction over the subdivision and construction activities by

filing a civil complaint. This first complaint by Lewis Farm was randomly assigned to Acting Justice Kevin K. Ryan to serve as the IAS Judge. Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, See Simon Aff. ¶ 2, Exhibit A. The State moved to convert the complaint to a CPLR Article 78 and dismiss. Oral argument was held on the motion to dismiss on August 8, 2007, before Justice Ryan. See Simon Aff. ¶ 11, Exhibit D. In a Decision and Order of Justice Ryan dated August 16, 2007, the Court converted the complaint to an Article 78, and iter alia, stated that the APA had jurisdiction over the project and dismissed the matter. See Simon Aff. ¶¶ 10-16, Exhibit E.

On September 26, 2007 Lewis Farm filed a Notice of Appeal, and the nine month deadline for perfection has not passed. See Simon Aff. Exhibit E.

ARGUMENT

POINT I

CONSISTENT WITH 22 NYCRR §§ 202.3, 202.6 THESE
MATTERS SHOULD BE TRANSFERRED TO THE JUDGE WHO
WAS ASSIGNED TO CIVIL ACTION 498-07, A
PREVIOUSLY-FILED, RELATED CASE

Under 22 NYCRR § 202.3, an Individual Assignment System (IAS) was established which provides for the continuous supervision of each action and proceeding by a single judge:

202.3 Individual assignment system; structure
(a) General. There shall be established for all civil actions and proceedings heard in the Supreme Court and County Court an individual assignment system which

provides for the continuous supervision of each action and proceeding by a single judge. Except as otherwise may be authorized by the Chief Administrator or by these rules, every action and proceeding shall be assigned and heard pursuant to the individual assignment system.

(b) Assignments. Actions and proceedings shall be assigned to the judges of the court upon the filing with the court of a request for judicial intervention pursuant to section 202.6 of this Part.

(emphasis added). When Lewis Farm initiated its 2007 judicial challenge to the APA's assertion of regulation jurisdiction, the Hon. Kevin K. Ryan was assigned to hear the litigation (Index No. 498-07). See Simon Aff., ¶ 2, Exhibit B (complaint). Likewise, § 202.6 requires the filing of a Request for Judicial Intervention, which require disclosure of related proceedings.

The law in New York State is clear: consistent with 22 NYCRR § 202.3, a related action should be assigned to the same Judge. See Morfesis v. Wilk, 138 A.D.2d 244 (1st Dep't 1988) (Court approval of practice that permitted a Judge who had arguably-related case to determine if subsequently filed cases were related). In discussing related cases, the Court noted: "The assignment demonstrates the ongoing practice in the Individual Assignment System (IAS) of assigning related cases to the same Judge." Id. at 246; see also United Community Insur. Co. v. State Farm and Cas. Co., 143 Misc.2d 954, 955-956 (Sup. Ct. New York County 1989) (Court granted motion to transfer action stating "If there is a related action, it should be referred to the same Justice").

In United Community, the Court noted "The Request for Judicial Intervention ("RJI") provides that the party must identify a related action." Id. at 955. In a matter where a party filed an RJI and failed to disclose the existence of related cases, the First Department noted "...but for [defendant's] failure to disclose the numerous and pending related cases this matter should and would have been assigned to Justice Cahn..." See Warburg, Pincus & Co. et. al. v. QoS Networks Lmt., 25 A.D.3d 468, 470 (1st Dep't 2006). To remedy that failure, the Appellate Division referred all the matters to Justice Cahn who was handling the pending cases.

Here, Lewis Farm has twice failed to disclose the existence of a previously filed related case to the Court. Lewis Farm's first failure occurred when it initiated civil action 315-08 and failed to identify the existence of civil action 498-07 and its assignment to Justice Ryan on the April 2008 RJI it filed in No. 315-08. See Simon Aff., ¶ 20, Exhibit I (RJI dated 4/7/08). Therefore, this Court was not alerted to the fact that there was a prior, related action and that it was assigned to Justice Ryan. Since a Notice of Appeal was filed in Judge Ryan's action, dated September 26, 2007, and the nine month abandonment period for perfection of the appeal has not expired, civil action 498-07 is still a "live" controversy. See Rules of App. Div., 3d Dep't (22 NYCRR 800.12); see also Simon Aff., ¶ 15, Exhibit E (Notice of Appeal, Index No. 498-07).

Thereafter, petitioner Lewis Farm failed a second time to identify the existence of civil action 498-07 and its assignment to Justice Ryan when it submitted the April 14, 2008 RJI in the State's civil enforcement action that the Lewis Defendants seeks to consolidate here: APA v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, (Index No. 332-08). See Simon Aff., ¶ 21, Exhibit J (RJI dated 4/14/08).

In accordance with New York case law and 22 NYCRR §§ 202.3 and 202.6, the second and third judicial actions should be assigned to the IAS judge who was randomly selected to resolve the first proceeding.

POINT II

THE APA DOES NOT OPPOSE CONSOLIDATION

For the same reasons the two recently filed matters should be transferred to the IAS Judge who already has heard a related case, the APA does not object to consolidation of civil actions Nos. 332.08 and 315.08. Such consolidation will promote efficiency and conserve judicial resources.

CONCLUSION

For all of the foregoing reasons, the Adirondack Park Agency's Cross-Motion for Transfer to Justice Ryan should be granted.

Dated: April 21, 2008

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondent
Adirondack Park Agency
New York State Department
of Law

By: 

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JOHN J. SIPOS
LORETTA SIMON
Assistant Attorneys General
of Counsel

STATE OF NEW YORK SUPREME COURT
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AFFIRMATION OF AAG SIMON
IN SUPPORT OF
CROSS-MOTION TO TRANSFER

INDEX NO. 332-08

INDEX NO. 315-08
RJI No. 15-1-2008-0109

Loretta Simon, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty for perjury pursuant to CPLR § 2106:

1. I serve as an Assistant Attorney General in the Environmental Protection Bureau of the Office of the New York State Attorney General and am litigation counsel to the Adirondack Park Agency ("the APA" or "the Agency"). As such, I am familiar with the facts of this matter.

2. I am also familiar with this matter and the underlying

Affirmation of AAG Simon in Support
of APA Cross-Motion to Transfer

facts having represented the APA in a previous action brought by Lewis Family Farm, Inc. ("Lewis Farm"), against the APA in 2007 (Lewis Family Farm, Inc., v. APA, Essex Co. Sup. Ct., Index No. 498-07, RJI No. 15-1-2007-0153, assigned to Hon. Kevin K. Ryan).

3. I submit this affirmation: (1) in reply to the Lewis Farm's Motion to Consolidate the APA's civil enforcement action (APA v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Index No. 332-08) with Lewis Farm's Article 78 proceeding (Lewis Family Farm, Inc. v. APA, Sup. Ct., Essex Co., Index No. 315-08); and (2) in support of the APA's Cross-Motion to Transfer these two matters to the Honorable Kevin K. Ryan.

4. These three civil actions all arise from the same matter: Lewis Farm's subdivision of land and construction of three single-family dwellings on land located in the Town of Essex, Essex County ("the Site") in violation of the Adirondack Park Agency Act ("APA Act") and the Wild, Scenic, and Recreational River System Act (the "Rivers Act"). See Executive Law § 809 and Executive Law § 810; Environmental Conservation Law ("ECL") § 15-2701. The APA maintains that Lewis Farm's construction of three single-family dwellings, installation of foundations and septic systems, and subdivision of land, all without APA permits, interferes with the protection of Adirondack Park lands and the scenic view-shed along a recreational river and undermines the Agency's regulatory mandate.

STATEMENT OF FACTS

5. The relevant facts are set forth in this affirmation and in the affirmation of Paul Van Cott dated April 10, 2008, ("Van Cott Aff.") previously submitted to the Court in proceeding No. 315-08, and which also is provided herein as Exhibit A.

6. On or about March 14, 2007 Lewis Farm applied to the APA for a permit to construct three single-family dwellings. On or about March 15, 2007, APA informed Lewis Farm that the Application was incomplete. See Van Cott Aff., ¶¶ 8, 9.

7. As set forth in Mr. Van Cott's affirmation, over the past 13 months the APA staff and Lewis Farm have been engaged in administrative proceedings concerning the propriety of certain development on the Lewis Farm. These proceedings resulted in an Agency determination dated March 25, 2008. See Van Cott Aff., ¶ 27, Exhibit A.

LITIGATION SUMMARY

1. **The First Judicial Action:**
Lewis Family Farm Inc., v. APA (Index No. 498-07) 2007

8. In 2007, during the pendency of the underlying APA administrative proceedings, Lewis Farm commenced a judicial action by serving a complaint against the Agency in New York State Supreme Court, Essex County, seeking a declaratory judgment that the Agency had no jurisdiction over construction of farm

worker housing, or if it did, that the Agriculture and Markets Law, § 305-a, superceded the APA Act and divested the APA of jurisdiction over such development. See Exhibit B (Complaint Index No. 498-07). Attorneys Joseph R. Brennan of Brennan & White, and David L. Cook and Jena R. Rotheim of Nixon Peabody LLP, represented Lewis Farm in this proceeding.

A. Lewis Farm Seeks an Ex Parte Stay Against the APA (Index No.498-07)

9. The complaint was amended on or about July 3, 2007. At that time the Lewis Farm also sought an ex parte stay against the APA. The application for ex parte stay was presented to Acting Supreme Court Justice Kevin K. Ryan, who declined to sign it. See Exhibit C (OSC dated 7/13/07 and correspondence).

B. Decision and Order of Justice Ryan Dated August 16, 2007 (Index No.498-07)

10. On or about August 1, 2007, the State filed a Motion to Dismiss the Amended Complaint for: lack of subject matter jurisdiction (CPLR § 3211[2]); prematurity; and failure to state a cause of action pursuant to CPLR § 3211(7) because Agriculture and Markets Law § 305-a does not preclude the APA from requiring a permit for the subdivision of land and construction of single-family dwellings. The APA also requested an order rejecting plaintiff's request for injunctive relief for failure to establish the elements required for injunctive relief.

11. On August 8, 2007, oral argument was held on the motion to dismiss before Justice Ryan. See Exhibit D (transcript).

12. In a Decision and Order dated August 16, 2007, Justice Ryan denied Lewis Farm's motion for a restraining order against the Agency for failure to show irreparable damages and granted the Agency's motion to dismiss the proceeding. See Exhibit E (Decision and Order, Lewis Family Farm, Inc. v. APA, [Sup. Ct. Essex Co., August 16, 2007]) the August 2007 Decision. The Court's Decision and Order further stated that the APA had jurisdiction over the dwellings and the subdivisions created by construction of the dwellings. See the August 2007 Decision, pp. 4, 7.

13. The Court's August 2007 Decision also rejected Lewis Farm's argument that the structures are "agricultural use structures" stating that when read in its entirety, the APA Act and the regulations implementing the Rivers Act do not exempt such dwellings from Agency jurisdiction. See August 2007 Decision, p. 5.

14. This Court further stated that Section 305-a of the Agriculture and Markets Law did not supersede Agency authority under the Adirondack Park Agency Act or its regulations, and dismissed the action as not ripe for judicial intervention and referred it back to the Agency to proceed with its enforcement procedures. See August 2007 Decision, p. 6.

15. On September 26, 2007, Lewis Farm filed a Notice of Appeal of the August 2007 Decision. See Exhibit E. Upon information and belief, as of Friday, April 19, 2007, Lewis Farm has not perfected its appeal to the Appellate Division, Third Department.

16. Consistent with the August 2007 Decision, the APA administrative process continued. On March 13, 2008 the APA Enforcement Committee heard oral argument from Lewis Farm and APA Staff. Attorney John Privitera of McNamee, Lochner, Titus & Williams, P.C. represented Lewis Farm during the APA proceeding. On March 25, 2008 the APA Enforcement Committee issued a determination that Lewis Farm was in violation of the APA Act and the Rivers Act. See Van Cott Aff., Exhibit A.

2. The Second Judicial Action:
Lewis Family Farm, Inc. v. APA (Index No. 315-08) 2008

17. On or about April 8, 2008, Lewis Farm, represented by John J. Privitera of McNamee, Lochner, Titus & Williams, P.C., initiated a second judicial challenge against the APA by filing an Article 78 proceeding in Essex County Supreme Court. Lewis Farm's 2008 Article 78 petition challenges an APA determination on the same underlying facts and violations that were at issue in this Court's August 2007 Decision, e.g., the subdivision of land, the construction of three single-family dwellings in the Adirondack Park without an APA permit, and the relationship

between APA Act and Agriculture and Markets Act.

A. Petitioner Obtains an Ex Parte Stay Against the APA

18. The Article 78 petition was served on the Office of the Attorney General with an Order to Show Cause ("OSC") and stay against the State on or about April 8, 2008. As in the 2007 litigation, Lewis Farm sought an ex parte stay against the State. The ex parte stay was signed by Acting Supreme Court Justice Richard B. Meyer. The stay was later vacated after objection of the Office of the Attorney General, and replaced with an Amended Order to Show Cause on April 9, 2008. See Exhibit F (ex parte stay order), Exhibit G (letter dated 4/8/08 and Amended Order to Show Cause dated 4/9/08).

19. Oral argument on the OSC and stay application was held on April 11, 2008 before Honorable Richard B. Meyer. In a Decision and Order dated April 11, 2007, Judge Meyer granted in part and denied in part Lewis Farm's request for a stay. See Exhibit H (April 11, 2008 Decision).

**3. The Third Judicial Action:
APA v. Lewis Family Farm, Inc., Salim B. Lewis,
and Barbara Lewis (Index No. 332-08)**

20. On April 11, 2008, on behalf of the APA the Office of the Attorney General filed the summons and complaint herein on behalf of the APA in Essex County, for violations of the Adirondack Park Agency Act ("APA Act") (Executive Law § 801) and

the Wild, Scenic, and Recreational River System Act (the "Rivers Act") Environmental Conservation Law ("ECL") § 15-2701. The APA commenced civil action no. 332-08 for various violation of the permitting requirements and for enforcement of Executive Law §§ 809(2)(a), 810(1)(e)(3), and 810(2)(d)(1), ECL § 15-2701, and 9 NYCRR Part 577, and to enforce prior administrative orders.

21. The Lewis defendants have filed a motion to consolidate civil actions nos. 332-08 and 315-08.

4. Lewis Farm Twice Failed To Alert the Court to the Proceeding Heard by Justice Ryan (Index No. 498-07)

22. A Request for Judicial Intervention ("RJI") form dated April 7, 2008, filed by petitioner in Lewis Family Farm v. APA (Index No. 315-08), failed to list the prior related action heard by Justice Ryan (Index No. 498-07). In response to the last question on the RJI, a sworn statement, Lewis Farm indicated that there were no other related proceedings, notwithstanding the fact that Lewis Farm filed the prior proceeding which had been assigned to Justice Ryan (Index No. 498-07). See Exhibit I.

23. One week later, the RJI form filed by petitioner dated April 14, 2008, in the APA's enforcement action (Index No. 332-08) again failed to alert the Court to the proceeding heard by Justice Ryan (Index No. 498-07). See Exhibit J.

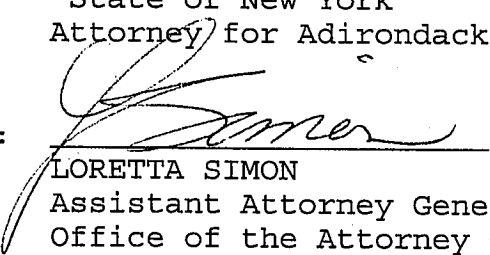
24. The State requests these matters be transferred to Hon. Kevin K. Ryan consistent with the provisions of 22 NYCRR §§ 202.3 and 202.6 that requires all related matters to be handled by the

same IAS judge. Because Justice Ryan was the IAS judge assigned to the first judicial action and because the second and third judicial actions are related to the first action, such a transfer would promote efficiency and conserve judicial resources.

Dated: Albany, New York
April 21, 2008

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Adirondack Park Agency

By:


LORETTA SIMON
Assistant Attorney General
Office of the Attorney General
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LORETTA SIMON AFFIRMATION IN REPLY TO
CONSOLIDATION AND IN SUPPORT OF THE STATE'S
CROSS MOTION TO TRANSFER

EXHIBIT LIST

- Exhibit A Affirmation of Paul Van Cott, dated April 10, 2008 (re: Stay Index No. 315-08) with Exhibit (determination of APA)
- Exhibit B Summons and Complaint Lewis Family Farm Inc. v. APA (Index No. 498-07)
- Exhibit C Letter from Assistant Attorney General Loretta Simon to David Cook, Esq. dated July 2, 2007
- Amended Order to Show Cause dated July 13, 2007 and Amended Complaint
- Letter from Assistant Attorney General Loretta Simon to Honorable Kevin K. Ryan dated July 19, 2007
- Letter from Honorable Kevin K. Ryan to Assistant Attorney General Loretta Simon dated July 19, 2007
- Exhibit D Transcript of argument on Motion for Injunctive Relief and Declaratory Judgment dated August 8, 2007
- Exhibit E Decision and Order of Honorable Kevin K. Ryan, with Notice of Entry dated August 31, 2007 (Index No. 498-07)
- Notice of Appeal dated September 26, 2007
- Exhibit F Ex Parte Stay against New York State Adirondack Park Agency dated April 8, 2008
- Exhibit G Letter from Assistant Attorney General Loretta Simon to Honorable Richard B. Meyer, dated April 8, 2008
- Amended Order to Show Cause dated April 9, 2008
- Exhibit H Decision and Order of Honorable Richard B. Meyer dated April 11, 2008
- Exhibit I Request for Judicial Intervention dated April 7, 2008 (Index No. 315-08)
- Exhibit J Request for Judicial Intervention dated April 14, 2008 (Index No. 332-08)