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COUNTY OF ERIE

MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

MARK C. POLONCARZ
COUNTY EXECUTIVE
DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

August 11, 2014

Mr. Scott W. Kroll, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Kroll:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Town of Sardinia, Erie County Sheriff's Detectives, Graham Noecker and McCarthy v. Megan Shimburski*
Document Received:	Notice of Motion with Motion
Name of Claimant:	Megan Shimburski 12879 Pratham Road East Concord, New York 14055
Claimant's attorney:	Matthew Albert, Esq. Vandette Penberthy LLP 617 Main Street, Suite M108 Buffalo, New York 14203

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enc.

VANDETTE PENBERTHY LLP

August 10, 2014

RECEIVED
AUG 11 2014
ERIE COUNTY
DEPARTMENT OF LAW

Erie County Sheriff Timothy Howard
10 Delaware Avenue
Buffalo, New York 14202

Dear Sheriff Howard,

I represent Megan Shimburski, who is currently facing a dangerous dog petition on behalf of her two year old dog, "Lady." As I'm sure you are aware by now due to the public outcry surrounding this case, Deputy Sheriffs Graham, Noecker, and McCarthy filed a dangerous dog petition on August 5th, 2014. Please allow me to give you a brief outline of the factual nature of this case, with the hopes that you will take immediate action and direct your Officers to withdraw their complaint immediately.

On July 25th, 2014, the above-referenced deputies arrived at a dwelling located at 12879 Pratham Road, East Concord, New York, 14055 at or about 2:00 pm. The property belongs to my client's parents, John Shimburski and Martha Spaulding. Upon arrival, Lady was shot by Deputy McCarthy. The only people home at the time Lady was shot were my client, a 25 year old female, her five year old daughter, and her one year old son. No officers were bit, and witness accounts as well as forensic evidence indicate that Lady was several yards away from Deputy McCarthy at the time she was shot in her head. However, my client's daughter was within roughly five feet when Lady was shot, and witnessed the incident. Needless to say, she is traumatized. Lady is her best friend. There are other misdeeds alleged by client against the Officers, but for the sake of brevity, I will spare those at this time.

Lady has grown up with cats, dogs, and babies. She is sometimes off leash, as she is fortunate to have large front and back yards to roam. Strangers, including delivery men, guests, utility people, etc., approach Lady all the time. All state what an unbelievably friendly dog she is. The local dog warden, Duane DeGolier, also concurs with that assessment.

My client feels strongly that Deputy McCarthy's actions are criminal, and I agree with that assessment after doing a full investigation of the case, including speaking with veterinarians and others whose professional and unbiased opinions completely discredits the Officers' account of events. At any rate, my client began to exercise her First Amendment right to speech, and began to recount the event on Facebook. Many people also became sufficiently outraged concerning the Officers' actions. To wit, a Facebook Group was formed on August 3rd, 2014, in

716.808.8400 716.408.0308 vandettepenberthy.com

James M. VanDette vandette@vandettepenberthy.com
Brittany Lee Penberthy bpenberthy@vandettepenberthy.com ALSO ADMITTED IN CONNECTICUT

which it was stated that Officer McCarthy shot Lady. Also, on the page were contact numbers and suggestions that people call the sheriff's department to voice their concerns.

On August 5th, 2014, the above-referenced Officers all petitioned Sardinia Town Judge Gene Heintz to find probable cause that Lady was a dangerous dog, as defined by Agricultural and Markets Law §123. However, on their complaint which is included in these materials, when asked what Lady did…they merely state "dangerous dog, pit bull." Functionally, that would be the equivalent of a criminal complaint, when asking what a criminal did to read… "dangerous: white male." Ignoring the idiocy reflected in the complaint, one doesn't have to be a lawyer to understand that the complaint is woefully insufficient. Further, the ineptitude of the complaint in conjunction with the timing of the complaint, some 11 days after Lady had been shot, clearly reveals that the complaint was completely retaliatory in nature.

Somehow though, the three deputies were able to get Judge Heintz to find probable cause within the completely bare complaint, and have Lady seized from her home. Furthermore, he scheduled the hearing for August 12, 2014, though the law is clear the hearing must be scheduled within five days after the dog is seized. Weekends do NOT toll the time in relation to the relevant statute, namely Agricultural and Markets Law §123. Upon other aspects of the case, I would ask you to investigate how a Judge could have signed off on such a woefully insufficient complaint. There are only two possible answers to that question: incompetence or something more sinister

At any rate, Lady, still recovering from her gunshot wound, was ordered to be seized by the dog warden and housed by the same. Despite the physical pain she was enduring and the injustice she was facing, she maintained her affable demeanor upon being seized.

On August 8th, my client went to visit Lady at the shelter so that she can receive follow up care for her gunshot wound to the head that was inflicted by Deputy Sheriff Greg McCarthy. At this time, new wounds in form of significant facial sores were evident on Lady's face. The wounds were not present when Lady was seized. My client had to endure more veterinary expenses to try and treat these new wounds that happened while Lady was in the County's custody.

Simply put, Sheriff Howard, I think I am speaking for the masses when I ask that the County stop torturing this innocent animal. I am asking that the complaint be withdrawn ***immediately***, while you conduct a full internal investigation into this incident. If for no other reason, the complaint must be withdrawn due to the insufficiency of the Officers' complaint. The sheriff's department can still refile the complaint at a later juncture if you find any merit in the

Officers' complaint, though of course, I doubt you will. I am submitting motion papers to this effect as well, but, the fact is, Lady should not have to wait until Tuesday to obtain some measure of humanity and justice. For your review, I have included in these materials new photos of Lady depicting her new sores on August 8th, 2014, and the motion papers, which are also being forwarded to the County Attorney's and County Executive's Office. It is also my position that the shelter that Lady is now inhabiting is causing her unjustifiable pain and suffering, in violation of Agricultural and Markets Law §353 and §353-b. It is also my position that all those responsible for having her placed there or keeping her placed there are furthering an act of cruelty towards an animal, also in violation of Agricultural and Markets Law §353. Of course, I will respectfully await your own prospective internal investigation to see what your determinations are.

It should be noted that numerous media sources are taking an interest in this story. While I think the public should be made aware of this situation so that they can properly protect themselves from the above-referenced Officers, I will hold off on forwarding this letter with the hopes that you do both the right and lawful actions to have this animal released forthwith.

Sincerely,

Matthew Albert

Enc.

CC: Erie County Attorney's Office

STATE OF NEW YORK
SARDINIA TOWN COURT: COUNTY OF ERIE

TOWN OF SARDINIA,
ERIE COUNTY SHERIFF'S DETECTIVES
GRAHAM, NOECKER, AND MCCARTHY
Plaintiffs

NOTICE OF MOTION

v.

MEGAN SHIMBURSKI

Index No. UNKNOWN

Defendant.

PLEASE TAKE NOTICE:

MOTION MADE BY:	Matthew Albert, Esq., VANDETTE PENBERTHY, LLP Attorneys for Megan Shimburski
DATE, TIME & PLACE:	August 12, 2014, Hon. Judge Gene Heintz Sardinia Town Court, Erie County 12320 Savage Road Sardinia, NY 14134
RELIEF DEMANDED:	Motion to Dismiss, pursuant to CPLR § 3211 (7)
SUPPORTING PAPERS:	Affirmation of Matthew Albert, Esq., with exhibits.

DATED: Buffalo, New York
August 11, 2014

STATE OF NEW YORK
SARDINIA TOWN COURT : COUNTY OF ERIE

TOWN OF SARDINIA,
ERIE COUNTY SHERIFF'S DETECTIVES
GRAHAM, NOECKER, AND MCCARTHY
Plaintiff,,

ATTORNEY AFFIRMATION

v.

MEGAN SHIMBURSKI, Index No: UNKNOWN

Defendant.

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

MATTHEW A. ALBERT, ESQ., being duly sworn, deposes and says under penalties of perjury, pursuant to CPLR §2106:

RELEVANT BACKGROUND

1. I am a member of the law firm of VANDETTE PENBERTHY, LLP, attorneys for Megan Shimburski, and as such, I am fully familiar with the facts and circumstances surrounding this case.

2. This Affirmation is made in support of plaintiff's motion for summary judgment on the issue of the Plaintiff's to state a Cause of Action in their complaint. Plaintiff's motion is limited to the issue of Plaintiff's Failure to state a Cause of Action pursuant to §3211 (7) of the Civil Procedure Law.

3. This action arises out of an incident that occurred on July 26, 2014 at the home of the Defendant's parents, located at 12879 Pratham Road, East Concord, New York 14055.

4. Certain aspects of the incident and the following events are documented and cannot be in dispute. It is only those aspects of the incident that are also relevant to the subsequent Dangerous Dog claim brought by the Plaintiffs that are set forth in these motion papers.

5. On July 25, 2014, Erie County Sheriff Detectives Graham, Noecker, and McCarthy arrived at the above-referenced property at or about 2:00 pm. The Plaintiffs did not have a warrant and were in plainclothes. At the time, Defendant was on the property with her two children and her two dogs.

6. Detective McCarthy discharged his firearm, injuring Defendant's two year old dog named Lady.

7. Defendant strongly feels and alleges that Detective McCarthy fired his weapon unjustifiably and cruelly, and that all Officers committed numerous other grievances while on her parent's property.

8. Defendant began to voice those grievances on Facebook over the next several days following the incident.

9. The incident generated attention on social media, and, as of August 3rd, a Facebook Page was formed on Lady's behalf, encouraging supporters of Megan and Lady to call and voice their complaints with the Sheriff's Department. Numerous calls began to come in to the Sheriff's Department regarding the conduct of the Plaintiffs.

10. On August 5th, some 11 days after Detective McCarthy shot Lady, all three Plaintiffs swore out a complaint before the Honorable Judge Gene Heintz accusing Lady of being a Dangerous Dog as defined by § 108 (24a) of the Agricultural and Markets Law. The Honorable Gene Heintz evidently found probable cause within the complaint, and scheduled a hearing for 5:00 pm, August 12, 2014. That complaint is attached hereto as Exhibit A.

11. In conjunction with the hearing, the Honorable Gene Heintz also issued an Order to Town of Sardinia Dog Control Officer Duane DeGolier to seize Lady on August 5th, 2014. Lady was seized by the same on that date. That Order is Attached Hereto as Exhibit B.

12. For the following reasons, the complaint needs to be dismissed forthwith pursuant to §3211 (7) of the Civil Procedure Law as a matter of law.

Argument 1: The Plaintiff's Complaint Fails to State a Cause of Action

13. The action that the Plaintiff's attempt to bring is to have Defendant's dog, Lady, be deemed a dangerous dog pursuant to §108 (24a) of the Agricultural and Markets Law. That section reads as follows:

> (a) "Dangerous dog" means any dog which (i) without justification attacks a person, companion animal as defined in subdivision five of section three hundred fifty of this chapter, farm animal as defined in subdivision four of section three hundred fifty of this chapter or domestic animal as defined in subdivision seven of this section and causes physical injury or death, or (ii) behaves in a manner which a reasonable person would believe poses a serious and unjustified imminent threat of serious physical injury or death to one or more persons, companion animals, farm animals or domestic animals or (iii) without justification attacks a service dog, guide dog or hearing dog and causes physical injury or death.

14. For the Plaintiffs to file a proper pleading, it is necessary that they abide by §3013 of the Civil Procedure Law.

15. §3013 provides that: Particularity of statements generally. Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the **material elements** of each cause of action or defense.

16. Under the Civil Practice Law and Rules, the sufficiency of a pleading to a cause of action or defense will generally depend upon whether or not there was substantial compliance with section 3013 providing that "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." These provisions are declared to be "the heart of the pleading requirement and [represent] an attempt to set up a realistic requirement of pleading" (First Preliminary Report of Advisory Committee on

Practice and Procedure [1957], p. 63). See Foley v. D'agostino, 21 AD 2d 60 - NY: Appellate Div., 1st Dept. (1964).

17. Plaintiff's complaint alleges that "the said dog did at the Town of Sardinia, County of Erie: Dangerous Dog-Pit Bull." There are no other allegations that the dog in question did anything aside from evidently being a pit bull.

18. Given the complaints' lack of any kind of proper construction, it is difficult to even try and impute any coherence as to how the Plaintiff's complaint could conceivably contain a cause of action within it.

19. However, if one were to very liberally and generously try and make sense of the complaint from the standpoint of stating a cause of action, one would have to assume that the Plaintiffs were stating that Lady is a dangerous dog merely because she is a pit bull.

20. However, there is no law in New York that any dog can be considered dangerous from the mere fact that an individual dog belongs to a certain breed. New York does not recognize any kind of breed specific legislation. See University Towers v. Maxine Gibson, 2007 NY Slip Op, 27481 (2007).

21. Therefore, even if the Plaintiff's establish beyond clear and convincing evidence all facts contained within their complaint, that Lady is in fact a Pit Bull, they still have not stated any kind of cause of action for which relief can be given.

22. Therefore, it is necessary that the Plaintiff's complaint be dismissed immediately, with prejudice.

Argument 2: The dangerous dog proceeding was scheduled in violation of §123(2) of the Agricultural and Markets Laws and is a nullity

The relevant portion of §123(2) of the Agricultural and Markets Law reads as follows:

> Thereupon, the judge or justice shall immediately determine if there is probable cause to believe the dog is a dangerous dog and, if so, shall issue an order to any dog control officer, peace officer, acting pursuant to his or her special duties, or police officer directing such officer to immediately seize such dog and hold the same pending judicial determination as provided in this section. Whether or not the judge or justice finds there is probable cause for such seizure, he or she shall, **within five days** and upon written notice of not less than two days to the owner of the dog, hold a hearing on the complaint.

23. Lady was seized on August 5th, 2014. At the time of this writing, Sunday, August 10th, 2014, 5 days have passed.

24. Notably, there is no exception provided in the statute for weekends or holidays, as may be set forth in other similar statutes, such as § Criminal Procedure Law 180.80.

25. Therefore, it is clear that as of August 11, 2014, Lady is being held unlawfully based on the fact that the time to run the hearing has expired. Of course, it is our submission that Lady is being held unlawfully for a number of reasons, though those are outside the scope of this argument.

26. It is worth mentioning that the shelter Lady has been provided is also unlawful in nature, in that it has caused her severe facial sores that were not present when she was seized. Her new injuries are fairly and accurately depicted in Defendant's exhibits C and D, which are attached hereto accordingly.

27. Upon information and belief, Town of Sardinia dog warden Duane DeGolier states that her injuries are being caused by Lady rubbing her face against the bars from which she is caged.

28. Regardless, those injuries have caused her suffering, meaning the shelter provided by the Town of Sardinia and requested by Erie County Sheriff Deputies Graham, Noecker, and McCarthy's complaint is inadequate, in violation of Agricultural and Markets Laws §353-b.

29. Further, the shelter she has been provided also is causing Lady unnecessary pain and suffering, which is furthering an act of cruelty towards an animal, in violation of §353 of the Agricultural and Markets Laws.

30. Clearly, the longer Lady is unlawfully confined to a shelter that is causing her unnecessary pain and suffering, the more an act of cruelty is being furthered upon her.

WHEREFORE, Defendant respectfully requests the following forms of relief:

1. That the Erie County Sheriff's Department recognize the faultiness of their complaint, even just if strictly on procedural grounds, and IMMEDIATELY withdraw their petition. Further, it is requested that they seek out the Honorable Judge Heinz and have him issue an Order directing that Lady be released to her owner immediately.
2. That the Honorable Judge Heinz recognize the faultiness of the complaint and corresponding Order, even just on procedural grounds, and immediately dismiss the Complaint, thereby releasing Lady to her owner.
3. An Order granting summary judgment on Plaintiff's Failure to state a Cause of Action pursuant to §3211 (7) of the Civil Procedure Law, and for such other an further relief as this Court deems just and proper.

DATED: August 10, 2014

Buffalo, NY

VANDETTE PENBERTHY LLP

MATTHEW A. ALBERT, ESQ.

VanDette Penberthy LLP
Attorneys for Megan Shimburski
Office and Post Office Address
617 Main Street, Suite M108
Buffalo, NY 14203
(716) 803-8400

VANDETTE PENBERTHY LLP

MATTHEW A. ALBERT, ESQ.

VanDette Penberthy LLP
Attorneys for Megan Shimburski
Office and Post Office Address
617 Main Street, Suite M108
Buffalo, NY 14203
(716) 803-8400

TO:

County Attorney's Office
Michael Siragusa, Esq.
95 Franklin Street, Suite 1634.
Buffalo, New York 14202.

Sardinia Town Attorney's Office
David Dimatteo
12320 Savage Road
Sardinia, New York 14134

Erie County Sheriff's Office
Sheriff Timothy Howard
10 Delaware Avenue
Buffalo, New York 14202

Sardinia Town Court
Honorable Judge Gene Heintz
12320 Savage Road
Sardinia, New York 14134

At a Civil Term of the Sardinia Town Court, held in and for the Town of Sardinia, at the Sardinia Town Courthouse, in the Town of Sardinia, New York scheduled for the 12th day of August, 2014.

PRESENT: Honorable Gene Heintz, J.S.C.
Justice Presiding

STATE OF NEW YORK
SARDINIA TOWN COURT : COUNTY OF ERIE

TOWN OF SARDINIA,
ERIE COUNTY SHERIFF'S DETECTIVES
GRAHAM, NOECKER, AND MCCARTHY
Plaintiff,

ORDER

v.

MEGAN SHIMBURSKI,
Defendant.

Index No.

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1. Defendant Megan Shimburski having moved ~~for summary judgment~~ to dismiss on the issue of Failure to State a Cause of Action pursuant to §3211 (7) of the Civil Procedure Law, and this motion having been had;

NOW upon reading of the Notice of Motion dated August 11, 2014, with supporting Affirmation of Matthew A. Albert, Esq. dated August 9, 2014 with Exhibits attached thereto;

NOW upon the written submissions of VanDette Penberthy LLP, Matthew A. Albert Esq. of Counsel for Defendant Megan Shimburski, and opposing Counsel for Plaintiffs, and due deliberation having been heard, it is hereby;

2. ORDERED that Defendant's Motion to Dismiss on the issue of Failure to State a Cause of Action pursuant to §3211 (7) of the Civil Procedure Law is granted in all respects, and it is further;

ORDERED that copies of the Notice of Motion dated August 11, 2014, with supporting Affirmation of Matthew A. Albert, Esq. dated August 9, 2014, with Exhibits attached thereto may be filed at the Sardinia Town Court's office as if they were originals;

_____

HON. GENE HEINTZ, J.S.C.

GRANTED

DL-42 (REV. 2/11)

NOTICE OF HEARING
TO OWNER OF DOG UNDER SECTION 123 OF THE AGRICULTURE AND MARKETS LAW

Copies- 1 – Dog Owner
1 - DCO
1 – Justice or Judge

To Megan Shimbursk
Address 12879 Pratham Road East Concord NY 14055

This is to notify you that a complaint has been filed with the undersigned pursuant to the provisions of Section 123 of the Agriculture and Markets Law, alleging that a dog owned by you is a dangerous dog in that said dog did at the City, Town, Village of Sardinia, County of Erie, N.Y.*

Dangerous Dog - Pit Bull

Further, take notice that a hearing on said complaint will be held at 12320 Savage Road (Location of Hearing) Sardinia NY 14134 in said City/Town/~~Village~~, on the 12th day of August, 2014, at 5:00 P.M.**

Dated at Town of Sardinia, N.Y.
this 5th day of August, 2014 Dane R. Heinz (Justice or Judge)

*Fill in the particular act complained of, bringing the case within the provisions of said Section 123. **GIVE DOG LICENSE NUMBER.**

**Date fixed for the hearing shall be within five days of the receipt of the complaint. Written notice of not less than two days must be given to the owner.

County of Erie)
: SS.:
City/Town/~~Village~~ of Sardinia)

I hereby certify that on the 5 day of August, 2014, I served the foregoing notice on the person to whom the same is directed by delivering to and leaving with him personally a true copy thereof.

Fee $ _____

Dane R. Heinz
(Signature and Official Title)

DL-39 02/11

ORDER TO SEIZE A DOG

Under the Provisions of Section 123
Of the Agriculture and Markets Law

State of New York, County of Erie

City, Town Village of Sardinia

The E.C.S.O. Detectives Graham, Hoecker McCarthy against Megan Shimburski

Defendant — Justice Court of the City, Town, Village of Sardinia County of Erie, NY

To Duane DeGolier Dog Control Peace Officer City, Town, Village of Sardinia County of Erie, NY.

Complaint having been made that the above named defendant

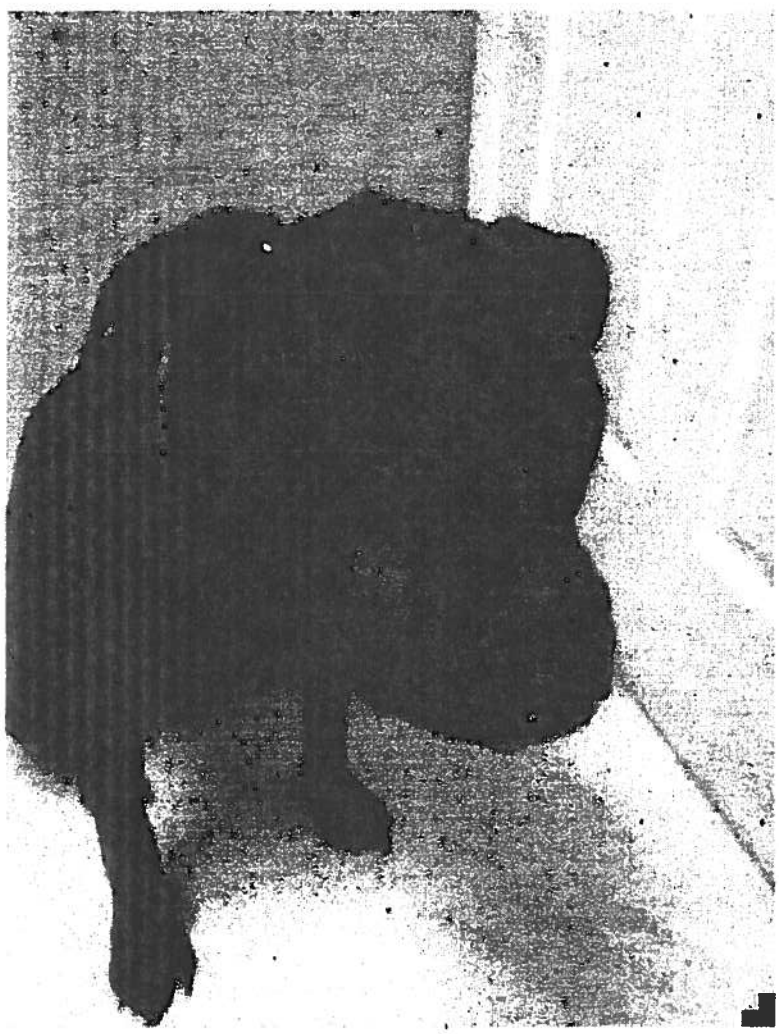
- [x] Harbors a dog within the meaning of Section 123 of the Agriculture and Markets Law.
- [ ] Failed to destroy and securely confine a dog which has been determined to be dangerous within the meaning of Section 123 of the Agriculture and Markets Law.
- [ ] Other: _____ within the meaning of _____

Said dog is a, Pit Bull age 2yrs, sex F, known as "Lady"

ID No. unknown and harbored at 12879 Prathum Road Sardinia, NY.

Now therefore, pursuant to the authority found in Article 7 of the Agriculture and Markets Law of the State of New York or _____, you are hereby ordered to seize the said dog so harbored by the said Megan Shimburski defendant, and hold, care for or dispose of said dog pursuant of the provisions of Article 7.

City, Town, Village of Sardinia, Judge or Justice Gene R. Heinty
Gene R. Heinz

Dated 8-5, 2014

COMPLETE THREE COPIES: ORIGINAL COPY/DEFENDANT 2ND COPY/COURT 3RD COPY/SEIZING OFFICER