

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

MAPLE CREATIVE LLC,

Petitioner,

v.

Upon Original Jurisdiction  
in Mandamus,

DAVID TINCHER, DIRECTOR OF  
PURCHASING DIVISION,  
DEPARTMENT OF ADMINISTRATION,

Case No. \_\_\_\_\_

Respondent.

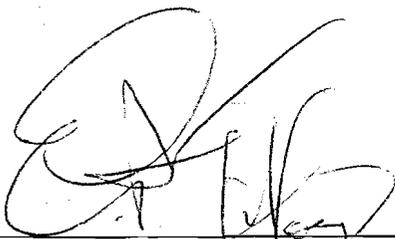
PETITION FOR WRIT OF PROHIBITION

NOW COMES Petitioner Maple Creative LLC by and through its counsel, Edward P. Tiffey of Tiffey Law Practice PLLC, pursuant to *W. Va. Const. Art. VII § 3* and *West Virginia Code § 53-1-1, et seq.*, and respectfully request this Court grant its Petition for Writ of Mandamus and issue a Rule to Show Cause against the Respondent, and require the Respondent to file a response to this original jurisdiction petition. In support thereof, Petitioner attaches its Memorandum in Support of Petition for Writ of Mandamus and incorporates it herein by reference.

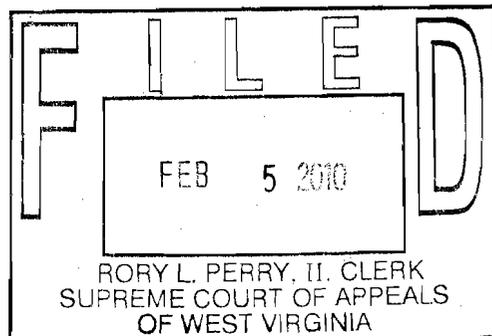
Respectfully submitted,

MAPLE CREATIVE LLC

By Counsel



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Respondent.

**MEMORANDUM IN SUPPORT OF  
PETITION FOR WRIT OF MANDAMUS**

NOW COMES Petitioner Maple Creative LLC by and through its counsel, Edward P. Tiffey and Tiffey Law Practice, PLLC, pursuant to *W. Va. Const. Art. VIII §3* and *W. Va. Code § 53-1-1, et seq.*, and requests this Court to grant its Petition for Writ of Mandamus, and in support thereof, states as follows:

***I. PARTIES***

Petitioner Maple Creative LLC ("Maple Creative") is a West Virginia limited liability company located in Charleston, West Virginia. All of its members and employees are residents of the State of West Virginia.

Respondent David Tinchler is the Director of the Purchasing Division for the West Virginia Department of Administration.

***II. JURISDICTIONAL STATEMENT***

The West Virginia Constitution grants this Court original jurisdiction of proceedings in mandamus. *W. Va. Const. Art. VIII § 3*. Additionally, a Petition for a

Writ of Mandamus falls under the original jurisdiction of this Court, pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure.

### **III. STANDARD OF REVIEW**

A writ of mandamus shall lie to enforce an established right and to enforce a corresponding and comparative duty created or imposed by law. *State ex rel. Bronaugh v. City of Parkersburg*, 148 W.Va. 568, 136 S.E.2d 783 (1964). The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function or imposed by statute. *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994).

Mandamus lies to require the discharge by a public officer of a non-discretionary duty. *State ex rel. Gregory Burdette v. Zakaib*, \_\_\_ W.Va. \_\_\_, 658 S.E.2d 903 (November 2, 2009) (citations omitted); see also *State ex rel. Allstate Insurance Co. v. Union Pub. Serv. Dist.*, 151 W.Va. 207, 151 S.E.2d 102 (1966) (mandamus is a proper remedy to require the performance of non-discretionary legal duties by various governmental agencies or bodies). Mandamus also lies to control the action of an administrative officer in the exercise of his or her discretion when such action is arbitrary or capricious. *Beverly Grill, Inc. v. Crow*, 133 W.Va. 214, 57 S.E.2d 244 (1949).

A writ of mandamus will not issue unless three elements coexist, namely (1) a clear right in the petitioner to the relief sought, (2) a legal duty on the part of respondent to the thing which the petitioner seeks to compel, and (3) the absence of another adequate remedy. *Burdette, supra*; *State ex rel. Rist v. Underwood*, 206 W.Va. 258, 524 S.E.2d 179 (1999); *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

The burden of proof as to all the elements necessary to obtain mandamus is upon the party seeking such relief. *Burdette, supra*.

#### **IV. PROCEDURAL HISTORY**

On January 19, 2010, Maple Creative delivered to the respondent its written protest of a contract award to a non-resident vendor. *See Exhibit O*. The next day, January 20, 2010, Respondent denied Maple Creative's protest by letter of the same date and failed to address the substantive issues presented. *See Exhibit P*.

Regardless, Maple Creative exhausted the administrative process before seeking relief in this Court.

#### **V. STATEMENT OF FACTS**

1. On May 28, 2009, the Department of Administration's Purchasing Division ("Purchasing") issued a Request For Proposal ("RFP") relative to an advertising and public relations services contract with the West Virginia Division of Tourism ("TOR3676"). *See Exhibit A*. A mandatory pre-bid meeting was held on July 8, 2009. Potential vendors submitted their competitive bid proposals by September 8, 2009. *See Exhibit B*.

2. Maple Creative's proposal contained an executed Vendor Preference Certificate. *See Exhibit C*.

3. On October 9, 2009, Maple Creative and three other vendors made oral presentations to the Advertising Contract RFP Review Committee ("Committee"). *See Exhibit B*. The Committee evaluated the oral presentations as well as the qualifications and strategic/creative capabilities of each presenting vendor.

4. On November 5, 2009, the Committee reported to Purchasing that it achieved a consensus decision regarding the qualifications, oral and strategic/creative technical criteria of RFP TOR3676, and presented its scores. *See Exhibit D.*

5. On November 19, 2009, the Director of Administration asked Purchasing in writing for approval of Committee members to serve as the Evaluation Committee for TOR3676. *See Exhibit E.*

6. On November 20, 2009, the Senior Buyer over TOR3676 issued his Buyer Review Certification, which confirmed the verification of the Evaluation Committee member signatures, concurred with the justification and application of point deductions, and verified review of technical scores. The certification concluded with recommending the November 5<sup>th</sup> evaluation by the Committee. *See Exhibit F.*

7. On December 7, 2009, Purchasing opened the cost sheets submitted by the competing vendors. *See Exhibit B.* Two days later on December 9, 2010, the Committee advised the same Senior Buyer by memorandum of their consensus decision regarding the qualifications, oral and strategic/creative technical criteria, and cost of RFP TOR3676. The Committee memorandum does not reflect an evaluation of the competitive bids under a resident vendor preference analysis. *See Exhibit G.*

8. Sometime prior to December 9<sup>th</sup>, the Committee met and completed its cost evaluation. Crucially, the Committee evaluated the bid costs **with and without** the mandatory resident vendor preference. The Committee's dual analysis appears in separate spreadsheet documents, which are part of the bid file. The spreadsheet analysis applying the resident vendor preference shows Maple Creative receiving the highest final score. *See Exhibit H.* The spreadsheet analysis not applying the

preference shows Stonewall Retail Marketing, Inc. of Marietta, Ohio ("Stonewall") receiving the highest final score. *See Exhibit I.*

9. The December 9<sup>th</sup> memorandum reflects the Committee's scoring without applying the resident vendor preference. It recommended non-resident Stonewall as the successful bidder. *See Exhibit G.*

10. On December 11, 2009, the Senior Buyer prepared another Buyer Review Certification confirming the verification of evaluating Committee Member signatures, concurrence with the justification for and application of point deductions, verification of technical scores, and verification of cost scores. The certification concurred with the Committee's December 9<sup>th</sup> evaluation and recommendation. Purchasing approved the second Buyer Review Certification on December 17, 2009. *See Exhibit J.*

11. On December 21, 2009, the Senior Buyer prepared a Bid Tabulation, indicating that Maple Creative did not request resident vendor preference, contrary to its resident Vendor Preference Certificate contained in the bid file. *See Exhibit K.*

12. Also on December 21, 2009, Purchasing printed Purchase Order No. TOR3676 and Open-End Contract ("Contract") in favor of Stonewall. The Attorney General's Office approved the same as to form that day. *See Exhibit L.*

13. Purchasing deemed the Purchase Order certified and encumbered on December 29, 2009, the day in which it sent a fax transmission to Maple Creative advising that it did not win the Contract. The fax transmission indicated that Purchasing's letter will be mailed via "U.S. Postal Service." Maple Creative has not received the letter by mail. *See Exhibit M.*

14. The Contract has an effective date of January 1, 2010, which is a state holiday. Therefore, the first effective business date under the Contract is January 4, 2010.

15. On January 7, 2010, Maple Creative learned that non-resident Stonewall was selected as the prevailing bidder and winner of the Contract. *See Exhibit B.*

16. In response, Maple Creative went to the offices of Purchasing on January 8, 2010. Its review of the bid file revealed two score sheets for the Committee's cost evaluation as well as Maple Creative's certification for resident vendor preference. This led to an inquiry of Purchasing representatives, who confirmed the existence of multiple score sheets and the Committee's application of the resident vendor preference. A Purchasing representative advised that Maple Creative should not see the Committee's scoring spreadsheet which applied the resident vendor preference as it was in error. *See Exhibit B.* Later that same day, Mr. Price called Maple Creative to reiterate that the resident vendor preference did not apply. When Maple Creative indicated that it would protest the bid award to non-resident Stonewall, Mr. Price said Purchasing "will look at it and if we are wrong, we will reverse it, if we are right, it will stay the way it is." *Id.* Relying upon this statement, Maple Creative then delivered a letter to Purchasing on January 8, 2010, advising of its intent to protest the award. *See Exhibit N.*

## **VI. ARGUMENT**

### **A. West Virginia Law Provides for a Resident Vendor Preference Relative to Bids for State Contracts**

The West Virginia Legislature ("Legislature") passed the Jobs for West Virginia Act of 1990 ("Act") during its regular legislative session that year. The purpose of the Act was to promote jobs for state residents through granting a preference for vendors

who reside in West Virginia and employ state residents. Codifying the Act in West Virginia Code § 5A-3-37, the Legislature directed the Secretary of the Department of Revenue to promulgate rules necessary to determine that vendors have met the residency requirement of the Act, establish the procedure for vendors to certify the residency requirement at the time of submitting their bid, establish a procedure to audit bids, and otherwise accomplish the objectives of the Act. *W. Va. Code § 5A-3-37(a)*. The plain language of the Act does not limit or restrict the application of a resident vendor preference to a portion of a bid.

On September 1, 1992, the Department of Tax and Revenue promulgated an interpretive rule to explain and clarify operative procedures for the Act ("1992 Rule"). The 1992 Rule went into effect on October 2, 1992 and is found in Title 110, Series 12C of the Code of State Regulations. The 1992 Rule defines "resident vendor," establishes a resident vendor preference for qualified bids required to be obtained through a competitive bid process, and sets forth a certification procedure for resident vendors to receive a preference. The 1992 Rule prescribes a maximum five percent (5.0%) preference for resident vendors who submit a qualified bid and demonstrate both residency in West Virginia (2.5%) and employees residing in West Virginia (2.5%). *110 CSR 12C-4.3*. Notably, the 1992 Rule does not limit the application of the vendor preference to a portion of a qualified bid. Additionally, the 1992 Rule directs the preference to be applied as between or among resident vendor(s) and non-resident vendor(s). *110 CSR 12C-7*.

More recently, the Legislature passed Senate Bill 172 on April 11, 2009 to explain and clarify operative procedures for the purchase of services by the Purchasing

Division of the Department of Administration. This rule took effect on July 1, 2009, and is found in Title 148, Series 1 of the Code of State Regulations ("2009 Rule"). Under this rule, the Director of Purchasing shall ensure that purchases and contracts for services are based on competitive bid whenever possible, and did so in this instance. 148 CSR 1-4.1. The 2009 Rule sets forth the process for the registration of vendors, bidding of contracts, and awards. 148 CSR 1-6. In this regard, the respondent shall make an award to the lowest responsible bidder meeting minimum specifications in view of factors such as quality and price. 148 CSR 1-6.4.1.

Crucially, the 2009 Rule represents the Legislature's most recent pronouncement on resident vendor preference. Specifically, 148 CSR 1-6.4.4 states in pertinent part:

Vendor Preference -- All purchases of commodities, services or printing made upon competitive bids, with the exception of construction services, are subject to a resident vendor preference in accordance with the rules promulgated by the Secretary of the Department of Revenue . . . .

Because the 2009 Rule was approved by the Legislature, it is a "legislative rule" within the meaning of the State Administrative Procedures Act, W. Va. Code § 29A-1-2(d), and therefore has the force and effect of law. *Smith v. West Virginia Human Rights Comm'n.*, 216 W.Va. 2, 602 S.E.2d 445 (2004). A valid legislative rule is entitled to substantial deference by a reviewing court. *Id.* Every legislative rule, when effective, is determinative on any issue affecting private rights, privileges or interests. *W.Va. Code § 29A-1-2(d)*.

Accordingly, the 2009 Rule is dispositive of the within controversy. Through its plain language, the 2009 Rule grants a specific benefit to Maple Creative in the form of a resident vendor preference. In its own words, the Legislature made it expressly clear

that “[A]ll purchases of . . . services . . . made upon competitive bids . . . are subject to a resident vendor preference in accordance with . . .” the 1992 Rule. This is so without exception or qualification.

***B. Maple Creative is Entitled to the Resident Vendor Preference in this Instance***

Maple Creative was founded in Charleston, West Virginia and opened its doors for business in January 2001. It is authorized to transact business in West Virginia, maintains an office in Charleston, and has paid personal property and business taxes, all in accordance with the resident vendor preference section of the 2009 Rule. 148 CSR 1-6.4.4(a)-(e). Indeed, Maple Creative completed a resident vendor preference certificate, contrary to the December 21, 2009 Bid Tabulation. See Exhibits C and K. Clearly, the Bid Tabulation is in error as Maple Creative completed the preference certificate. Importantly, the Bid Tabulation failed to include the preference in reporting the scores. In any event, Maple Creative’s certificate as a resident vendor establishes its right to the preference and its application by the respondent.

***C. Maple Creative Won the Contract Outright When Purchasing Applied the Resident Vendor Preference to the Cost Component of the Bid***

Sometime between December 7 and 9, 2009, the Committee met and evaluated the cost component of the competing bids. In so doing, the Committee evaluated the bid cost component with and without the resident vendor preference. Crucially, the Committee’s dual analysis appears in the form of separate spreadsheets contained in the bid file. The spreadsheet applying the resident vendor preference shows Maple Creative earning the highest total score and as winner of the Contract.

While the Committee applied the preference in a less than complete manner, see *infra*, Maple Creative won the Contract fair and square. See *Exhibit H*. Even though it applied the preference to the cost component only, Maple Creative proved to be the winner beyond dispute. Yet, the Committee's December 9<sup>th</sup> memorandum to Purchasing's Senior Buyer is void of the required preference. See *Exhibit G*. So are the December 11<sup>th</sup> Buyer Review Certification and December 21<sup>st</sup> Bid Tabulation, both prepared by Purchasing's assigned Senior Buyer. See *Exhibits J and K*. Consequently, Respondent awarded the Contract to non-resident Stonewall improperly. The award is arbitrary and capricious on its face, as it disregarded the application of the resident vendor preference to the cost component.<sup>1</sup>

***D. Respondent's Failure to Apply the Resident Vendor Preference to the Entire Bid Constitutes a Failure to Perform a Nondiscretionary Duty***

The 2009 Rule has the full force and effect of law. It grants a special benefit to Maple Creative as a resident vendor. *W. Va. Code § 29A-1-2(d)(3)*. Consequently, the 2009 Rule is determinative of the within controversy affecting the petitioner's rights, privileges, and interests in the resident vendor preference.

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<sup>1</sup> Respondent is also equitably estopped from denying Maple Creative the Contract as the resident vendor preference was applied to the cost component in fact. Injury will result to Maple Creative without application of this doctrine. A great injustice will result to the public if this doctrine is not applied, as Exhibits H and I show **it will cost the State of West Virginia more to pay non-resident Stonewall to advertise the tourism opportunities within its borders than a resident vendor of its own.** Applying equitable estoppel here will neither impair nor interfere with the functions of Purchasing. Instead, such application will enforce the 2009 Rule properly and direct Purchasing to follow the same as prescribed by the Legislature. Overall, it is highly inequitable and oppressive in this instance not to estop Purchasing. Equitable estoppel protects West Virginia's public interest, promotes its economy, and does not create harm. Compare *Hudkins v. Consolidated Public Retirement Board*, \_\_\_ W.Va. \_\_\_, 647 S.E.2d 711 (2007) (affirming trial court application of equitable estoppel under the factors appearing in 28 Am.Jur.2d *Estoppel and Waiver* §140).

The true legal character of the 2009 Rule imposes nondiscretionary duties upon the respondent, in particular to afford the resident vendor preference to “[A]ll purchases . . . in accordance with the rules promulgated by the Secretary of the Department of Revenue”, namely the 1992 Rule.<sup>2</sup>

Maple Creative qualifies for the maximum preference of five percent (5%) as it has resided in West Virginia continuously prior to the submission of its qualified bid (2.5%), and all of its employees were residents of West Virginia continuously immediately prior to its bid submission (2.5%). *110 CSR 12C-4.1 through 4.3*. The bid file contains Maple Creative’s Vendor Preference Certificate pursuant to the 1992 Rule. *See Exhibit C*. Thus, Maple Creative is entitled to the maximum preference and, in turn, the respondent must grant the same to the entire bid, not just the cost component.

Purchasing could have easily calculated the total scores resulting from the application of the maximum preference to each entire bid. It already knew how to apply the maximum preference to the cost component of the bid. *See Exhibit H*. Applying the same 5.0% multiplier to the technical component of each bid is simple, and yields the true total score under the maximum preference as required by the 2009 and 1992 Rules. Maple Creative wins the Contract without question under a complete application of the maximum preference.

Critically, the 2009 Rule does not limit or qualify the application of the preference to any resident vendor bid. Nor does the 2009 Rule grant the respondent discretion to limit the application of the preference to less than all of the components of a resident

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<sup>2</sup> Exercising its constitutional function, the Legislature incorporated the 1992 Rule into the 2009 Rule. *See 148 CSR 1-6.4.4*.

vendor bid. Overall, the respondent's duty is clear, that is to apply the resident vendor preference to "[A]ll purchases of . . . services . . . made upon competitive bids . . . ." 148 CSR 1-6.4.4.

Purchasing is a state actor. It is duty bound to apply the 2009 and 1992 Rules without exception. It did not and, therefore, failed to perform an affirmative duty. Purchasing acted arbitrarily and capriciously in not applying the preference to Maple Creative's entire bid, contrary to law. Purchasing's award of the Contract to non-resident Stonewall contravenes the respondent's nondiscretionary duty to adhere to the 2009 Rule.

***E. Clearly, Maple Creative Satisfies the Three  
Requisite Elements for a Writ of Mandamus to Issue***

Maple Creative enjoys a clear right to enforcement of the 2009 Rule as a resident vendor in the State of West Virginia. Its right to enforcement of the governing rule corresponds with this Court's necessary enforcement of the respondent's nondiscretionary duties. The plain and clear language of the 2009 Rule presents a legal duty on the part of the respondent to follow it without limitation or qualification. There is no other remedy for Maple Creative to pursue, having exhausted the administrative process to no avail in which the respondent refused to consider Maple Creative's rights and its corresponding duty under the 2009 Rule. Maple Creative submits that it has met its burden of proof as to all requisite elements to secure mandamus relief.

***VII. RELIEF REQUESTED***

**WHEREFORE**, for reasons heretofore stated, Petitioner Maple Creative LLC respectfully requests that this Court (1) accept the within Petition, (2) issue a Rule to Show Cause to Respondent, (3) declare the Contract cancelled pursuant to 148 CSR 1-

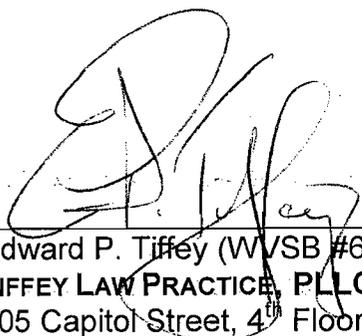
7.16.1(b), (4) declare the Contract void and of no effect pursuant to 148 CSR 1-10.1,  
and (5) direct the award of the Contract to Maple Creative.

Petitioner has attached a memorandum listing the names and addresses of those  
persons upon whom the Rule to Show Cause is to be served, as *Exhibit Q*.

**Respectfully submitted,**

**MAPLE CREATIVE LLC**

**By Counsel**



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Edward P. Tiffey (WVSB #6042)  
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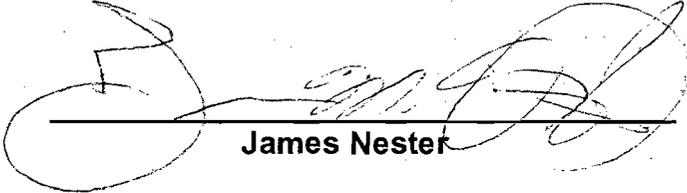
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VERIFICATION

STATE OF WEST VIRGINIA

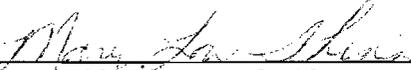
COUNTY OF KANAWHA, TO-WIT:

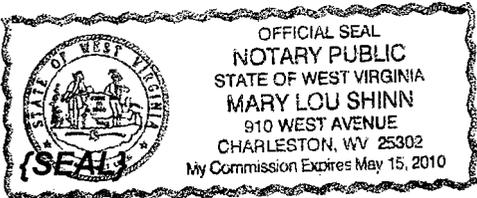
I, James Nester, Vice President of Maple Creative LLC, after being first duly sworn, says that the statements contained in the foregoing Petition for Writ of Mandamus are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, I believe them to be true.

  
James Nester

Taken, subscribed and sworn to before me, this 4<sup>th</sup> day of February, 2010.

My commission expires: May 15, 2011

  
NOTARY PUBLIC



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APPENDIX OF EXHIBITS

NOW COMES Petitioner Maple Creative LLC by and through its counsel, Edward P. Tiffey and the Tiffey Law Practice PLLC, pursuant to Rule 14 of the West Virginia Rules of Appellate Procedure, and submits herewith its Appendix of Exhibit as follows:

- A. May 28, 2009 Request for Proposal issued by the Purchasing Division for the Division of Tourism;
- B. Affidavit of James Nester;
- C. Vendor Preference Certificate for Maple Creative LLC;
- D. November 5, 2009 Memorandum by the Committee to the Senior Buyer;
- E. November 19, 2009 Memorandum from the Director of Administration to the Senior Buyer;
- F. November 20, 2009 Buyer Review Certification;
- G. December 9, 2009 Memorandum from the Committee to the Senior Buyer;
- H. Cost Evaluation applying the Resident Vendor Preference;
- I. Cost Evaluation Sheet without the Resident Vendor Preference;
- J. December 11, 2009 Buyer Review Certification;

- K. December 21, 2009 Bid Tabulation;
- L. December 29, 2009 Contract award to non-resident vendor Stonewall;
- M. December 29, 2009 fax letter from Purchasing to Maple Creative;
- N. January 8, 2010 intent to contest the Contract award;
- O. January 19, 2010 Protest of Contract award by Maple Creative;
- P. January 20, 2010 denial of Maple Creative's Protest by Purchasing; and
- Q. Persons Upon Whom Rule to Show Cause Is To Be Served.

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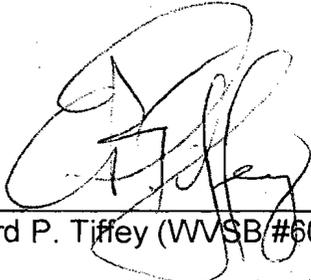
Respondent.

**Certificate of Service**

I, Edward P. Tiffey, counsel for Petitioner Maple Creative LLC, do certify that on February 5, 2010 I served the foregoing **PETITION FOR WRIT OF MANDAMUS, MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, including VERIFICATION and APPENDIX OF EXHIBITS** by mailing a true copy thereof, postage prepaid, addressed to the following:

David Tincher, Director  
Purchasing Division  
Department of Administration  
2019 Washington Street, E.  
P. O. Box 50130  
Charleston, WV 25305-0130

Darrell V. McGraw, Jr.  
Office of Attorney General  
State Capitol Complex  
Building 1, Room E-26  
Charleston, WV 25305

  
\_\_\_\_\_  
Edward P. Tiffey (WVSB #6042)

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**