J. Armand Musey
425 East 86th Street, PH-A
New York, NY 10028

March 18, 2019

Mr. Herbert L. Cohen, Esq.
Stiefel Cohen & Foote, P.C
770 Lexington Avenue
New York, NY 10065

Dear Mr. Cohen,

Thank you for your March 7, 2019 response to my request asking you to identify the inaccuracies you referred to in your sworn affidavit dated February 2, 2019, which stated: "Both the proposed amended complaint ("PAC") and other papers submitted in support of the motion contain a number of factual inaccuracies." Your March 7 response was also submitted to the court by the co-op's attorney, and for that reason alone, I am compelled to respond as a matter of due process.

Your March 7, 2019 Response Contradicts your Sworn Affidavit

As a preliminary matter, I need to point out that your March 7, 2019 letter materially contradicts your affidavit with respect to the September 1999 Board minutes. In your February 4, 2019 sworn affidavit, you stated:

> "Where in Exhibit C [the September 2019 Board Minutes] it states that, '[t]he board concluded that there is no legal basis for any claim to be made to any part of the roof area,' the 'roof area' had to refer to the main roof, not the roof over the penthouse apartments. **This conclusion is based not only on my independent recollection, but it is also clear from the document itself."** [emphasis added][1]

However, your March 7, 2019 letter was written *after* the Board (and presumably, you) became aware that we had copies of the full meeting minutes and other contemporaneous documents indicating the Board clearly differentiated between the "roof" above the apartment and "terrace" at the same level. In your March 7, 2019 letter, you stated:

> "the **minutes are inaccurate** as to which part of the building about which I rendered my advice. [emphasis added]"

Apparently, your new opinion is that the official Board approved minutes themselves are "inaccurate." These statements are irreconcilable – the minutes are cannot be both "clear" and support your truthful recollection while also being "inaccurate." This material shift in your position alone requires you to withdraw your sworn affidavit.

[1] Significantly, you quote the board minutes out of context as they continue, "Penthouse owners have exclusive use of those **areas."** (plural original, emphasis added). This clearly implies more than one area (i.e., the roof and terrace).

Moreover, your apparent inability to remember in the main point of a sworn affidavit a month after writing it undermines your credibility in recalling the events nearly 20 years ago. Quite frankly, your shifting opinion appears to be another act of treating shareholders differently. A prospective buyer should be able to reasonably rely on the co-op's formally adopted official minutes. If not, all of our property values are in jeopardy.

Response to You Asserted Specific Inaccuracies

Your March 7, 2019 letter was in response to my good-faith effort to identify what factual inaccuracies you were referring to you when stated in your sworn February 4, 2019 affidavit that my amended complaint contained "a number of factual inaccuracies." As I understand your March 7, 2019 letter, you asserted the following are true:

A. Mr. Greenberg has corrected violations of the Roof/Terrace Standards including:
    1. Emptying his planters
    2. Disconnecting his illegal gas connection to his grill; and
    3. Disconnecting his automatic plant watering system
B. The Board merely offered me a "courtesy" in providing notice before others can enter my terrace and by allowing me to install a heater/AC compressor on the roof
C. The Board offered me flexibility with respect to the Roof/Terrace Standards as it did with Mr. Greenberg.
D. The Co-Op board is not discriminating against me or my apartment, and in favor of Mr. Greenberg's Co-Op obligations regarding his apartment.

I address these assertions below and show why each one is false and provide no reason for me to update any of my court filings:

1. Greenberg Has Not Made Material Changes to Comply with the Roof/Terrace Standards

From what knowledge we have, Mr. Greenberg has not himself made any changes to his terrace in 5.5 years other than allow his terrace to fall further into disrepair. The Board could have simply corrected the violations on Mr. Greenberg's terrace themselves and billed Mr. Greenberg for the cost of the correction, as it clearly has the right to do. The Board's "compliance demands" for Mr. Greenberg appear to be merely a charade as opposed to a good faith effort to bring Mr. Greenberg's terrace into compliance. Moreover, the building has a legal obligation to ensure compliance with applicable building and fire codes, an obligation that it has undeniably breached for over 5.5 years. The following are out of compliance, <u>today</u>, on Mr. Greenberg's terrace:

a. Your letter states that Mr. Greenberg removed his gas grill. However, the gas grill is still in place. We saw Mr. Greenberg using it as recently as Thanksgiving weekend 2018. (Standards for Roof Terraces – Rule 22)
b. Mr. Greenberg's plant watering system remains in place. We have never seen anyone watering the plants on Mr. Greenberg's terrace. It is highly unlikely they would have survived over 5.5 years without water. (Standards for Roof Terraces – Rule 25)
c. Mr. Greenberg's outdoor plants with planters remain, including the heaviest ones holding trees that are well above the six-foot height limit established by the Co-

Op. They are closer to 10 feet tall. See attached pictures. (Standards for Roof Terraces – Rule 24F)

d. Your letter does not contend that Mr. Greenberg will be making the significant steps to correct the violations on his terrace including removing his illegal rubber tiles and awnings. (Standards for Roof Terraces – Rules 4, 7, 9)

Please see the attached photos of the PH-B terrace in Exhibit 1 documenting the above in (taken from PHA Terrace and also viewable from surrounding areas on May 8 and 9, 2019). We can arrange for you to come over and look at the violations on Mr. Greenberg's terrace from our side. We are able to see them every day, and we want you to see them as well. We want to record cleared. We are concerned about the inaccuracies in your affidavit and letter of March 7 filed with the court and ask you to correct them.

2. No "Courtesy" was Ever Provided

Your March 7, 2019 letter states that the Co-Op was merely extending a "courtesy" when it agreed to 1) provide prior notice to us before needing non-emergency access to the terrace area immediately adjacent to our dining room window; and 2) grant me permission to install the heater and air conditioner compressor on the roof.

It is indisputable that access to my terrace is needed to access the "PHA Ladder" to reach the roof above the penthouse. We are happy to show this to you in person. As your April 1, 2014 letter indicates, "Unquestionably, the terrace is part of Mr. Musey's apartment." The Proprietary Lease has no provision for exclusive use of an area that is not part of the apartment such as a "limited common element." The Board also has strict rules about non-emergency access to shareholder apartments. You stated that notice to non-emergency access to my apartment is a "courtesy" and is not required to enter my terrace area. Your contention is: 1) an explicit denial of my exclusive use of the terrace; and 2) treating my apartment different from those of other shareholders which are granted exclusive use.

We have extensive documentation around the Board's approval for the AC compressor on the roof. You may have been misinformed that permission was ever expressed as a mere "courtesy." If you still believe your statement is true, please provide the basis for your conclusion.

3. No Flexibility Offered

You indicate the Board was flexible about making changes to the Roof/Terrace Rules. I am surprised that you were not aware that the Board made it clear in its many court filings that the rules were final on August 23, 2013, and there were no expectations that any material changes that would be made after that date. The Board successfully argued that any offers of flexibility were only settlement discussions and not indications of lack of finality. This was upheld on appeal and August 23, 2013 was held to be the starting date for the 120-day statute of limitations. Even after making massive changes to accommodate Mr. Greenberg, the Board argued in court that the August 23, 2013 Roof/Terrace standards were in place for me. This is a fully settled matter and undisputable.

4. The Board blatantly discriminated against us and in favor of Mr. Greenberg.

The Board can say as many times as it wants that it is not discriminating against us, but that doesn't make it so. We would glad to show you personally the terrace and the areas we discuss in this letter.

a. The Board prevented us from enjoying our terrace in the way Mr. Greenberg is able to enjoy his terrace. We have photos showing examples of Mr. Greenberg's not following the Co-Op's Roof/Terrace standards and applicable building and fire code. The photos were taken on March 7-8, 2019 shortly *after* you sent your email to me stating that Mr. Greenberg had cured these violations to the satisfaction of the Board. (See attached You were misled as to the actual facts.

b. The Co-Op asserted in its court filings that Mr. Greenberg complied with the Roof/Terrace Standards by installing rubber pavers. Such rubber pavers are not allowed by the code to cover more than 20% of the terrace area. At the same time as the filing, the Co-Op claimed that we were out of compliance with Roof/Terrace Standards merely by leaving the terrace in the condition the Co-Op's own contractor created after his "repairs." The contractor happened to be the former board president's brother-in-law. This is indisputable and shows that the Board discriminated against us and favored Mr. Greenberg.

c. The Co-Op also submitted an affidavit from Mr. Greenberg's personal attorney arguing that Mr. Greenberg had different property claims to his terrace than I had to my terrace. This is undisputable.

d. The Board has also been charging me for all of your services (not just the ones I agreed to pay for) and deducting these extra services – not approved my me - from my bank account. I am sure the Board is not doing the same to Mr. Greenberg or any other shareholder.

e. Mr. Greenberg himself has acknowledged disparate treatment. On March 25, 2018, Mr. Greenberg approached me about agreeing to a form of "second class citizenship" whereby he would have different rights with respect to the terrace than me. In my letter describing the incident to the Board, I recounted that I told Mr. Greenberg that I had the same lease as him and I expected to be treated the same as he was treated by the Board. He responded, "that will never happen." In its response, the Board does not dispute this encounter, only indicating that Mr. Greenberg was acting of his own accord and his actions were not authorized by the board.

Even if you don't agree with the above, my position that the Board has discriminated against us cannot be a "factual inaccuracy." It would be a difference of opinion as to whether the facts collectively constitute discrimination. This is an ultimate conclusion is for the court to make.

Other Outstanding Issues

Let me know if I did not address all of your points. I am still looking forward to your addressing points in my February 27, 2019 letter (Attached as EXHIBIT 2):

1. The demonstrably false Narine and DeBoer affidavits submitted by the Board that caused Judge Wooten to rule, “exclusive use of the terrace is unsettled.”

2. Why I was not able to rely on your April 1, 2014 letter to my attorney -- a letter assuring us that “Unquestionably, the terrace is part of Mr. Musey’s apartment and unquestionably he has the exclusive right to occupy it” (see attached EXHIBIT 3). This issue is highly problematic. Not only have you still not notified the court or persuaded your client to correct the record regarding a known material falsehood the court replied upon, but you also appear to be actively participating in a continued scheme to deprive me of my rights as a shareholder.

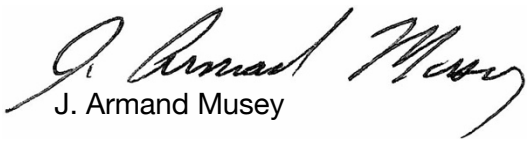
When we cannot even rely on assurances in a formal letter from the co-op’s corporate counsel, or the Board’s officially adopted minutes, it is extremely difficult to reach an agreement on anything out of court.

Conclusion

As shown by: 1) your own prior written words; 2) the co-op court filings and court decisions; and, 3) by photos taken immediately after receiving your response letter, the statements you made about me in your sworn affidavit are false with respect to facts you should have been aware when you signed the affidavit. In addition, for quite some time, you have been aware of materially false statements made by your client that the court relied upon.

I respectfully request that you retract your affidavit before we challenge it in court and that you take appropriate steps to correct the record and the harm done by the prior false affidavits submitted on behalf of your client.

Regards,



J. Armand Musey

EXHIBIT 1:
PICTURES OF PHB TERRACE VIEWED FROM PHA TERRACE AND ALSO VIEWABLE FROM SUROUNDING AREAS
DATED MAY 8 & 9, 2019

May 7, 2008 - View of PHB terrace from PHA Terrace – Northwest corner
Violations:

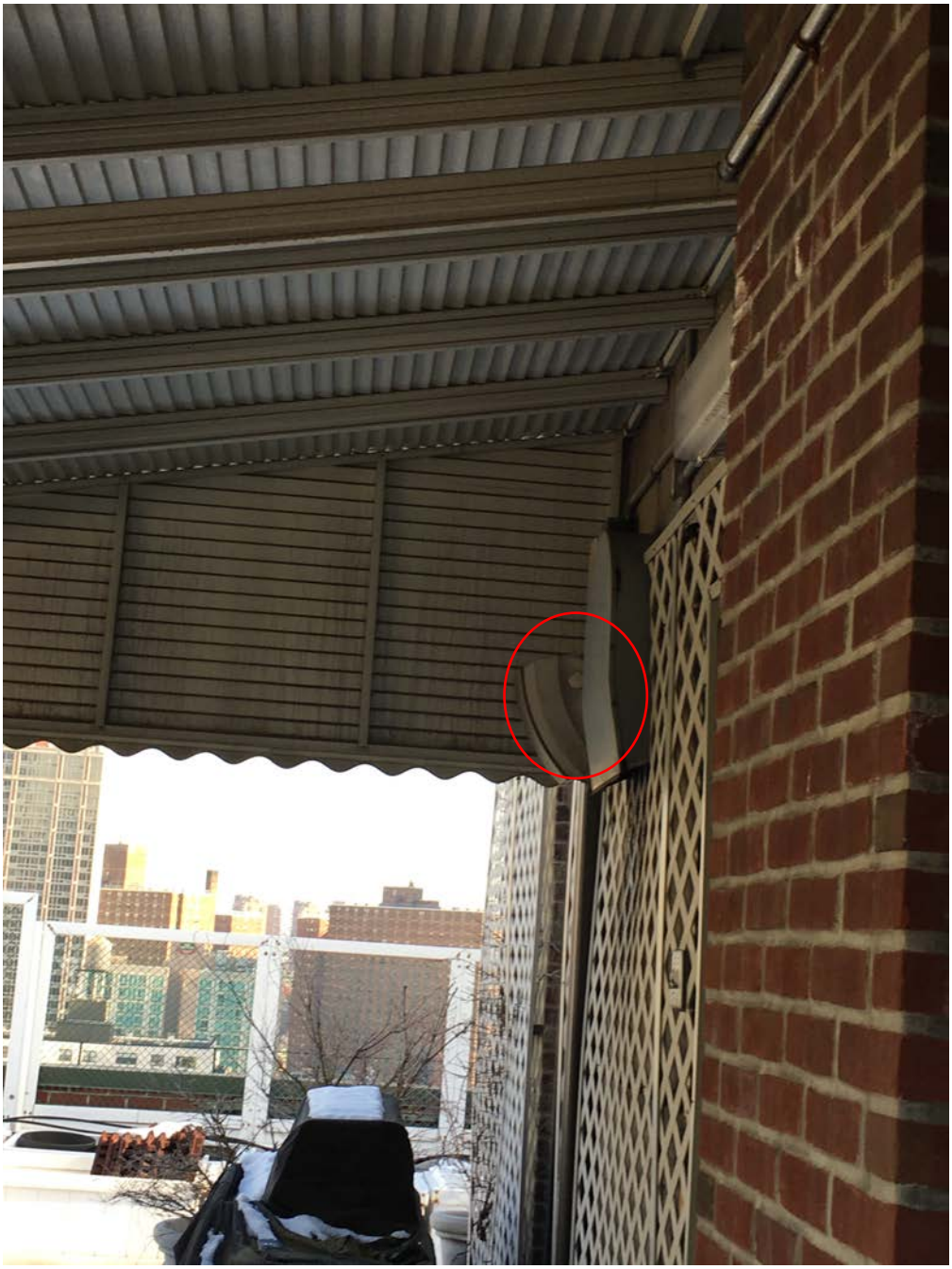
1. Circles around gas line going from apartment and attached to grill in a non-standard installation. (Standards for Roof Terraces - #22)
2. Water hose attached after September and before April (temp high on March 7: 32 degrees; low: 18 degrees). (Standards for Roof Terraces - #25)

May 8, 2008 - View of PHB terrace from PHA Terrace – Northeast corner
Violations:

1. Circles around irrigation system (Standards for Roof Terraces - #25)
2. Planters with plants (Standards for Roof Terraces - #11, 12)
3. Household storage items on the terrace (Standards for Roof Terraces - #16)

May 8, 2008 - View of PHB terrace from PHA Terrace – Northwest corner
Violations:

1. Circles around irrigation system (Standards for Roof Terraces - #25)
2. Planters with plants (Standards for Roof Terraces - #11, 12)



May 8, 2008 - View of PHB terrace from PHA Terrace – Northwest corner
Violations:

Circled: Outdoor sound system (Standards for Roof Terraces - #26)

May 8, 2008 - View of PHB terrace from PHA Terrace – Northeast corner
Violations:

1. Trees in planters (Standards for Roof Terraces - #11)
2. Trellises against parapet wall Standards for Roof Terraces - #15)
3. Trees in planters are well above 6 feet tall, closer to 10 feet tall Standards for Roof Terraces - #11F)

EXHIBIT 2

LETTER FROM A. MUSEY TO H. COHEN DATED FEBRARY 27, 2019

J. Armand Musey
425 East 86th Street, PH-A
New York, NY 10028

February 27, 2019

Mr. Herbert L. Cohen, Esq
Stiefel Cohen & Foote, P .C
770 Lexington Avenue
New York, NY 10065

Mr. Cohen,

I am writing to request information about your February 4, 2019 sworn affidavit. Specifically, you stated “Both the proposed amended complaint (the "PAC") and the other papers submitted in support of the motion contain a number of factual inaccuracies.” As this serious allegation was made “under the penalties of perjury and pursuant to N.Y. C.P.L.R. Rule 2106,” I trust you have a sound basis for that allegation.

I kindly request you to identify the specific inaccuracies you are referring to in your affidavit as your earliest convenience. To avoid any burden on your part, I am willing to pay for your reasonable time for this work and waive any related conflicts of interest issues for this request. To be clear, I am agreeing to pay for your time related to this specific request only and authorize you to invoice me directly.

If there are any errors in my court submissions, it is important for me to correct them promptly. As you are aware, I am a member of the NY bar (non-practicing), a chartered financial analyst, and a member of the American Society of Appraisers. I am regularly retained by leading law firms and government agencies with respect to complex valuation matters. As such, I am committed to maintaining the highest level of integrity. As a member of the NY bar yourself, you also have an interest, and perhaps even a duty, to facilitate candor before the court.

In good faith, I am also providing you an initial list of inaccuracies in 425 East 86th Apartments Corp.’s prior affidavits.

1) Affidavit of Kaswaree Narine indicating “Although I have searched, I have not located any documents demonstrating that any portion of the Building's roof area is allocated specifically to PH-A.” (Par 7)
2) Affidavit of Karel DeBoer indicating “space immediately outside the Apartment” was “a 'service' rather than an 'entertainment' roof .... it was set up in such a way so as to facilitate access to building apparatus in the event necessary, but that it was not improved so as to invite or enable comfortable use thereof for dining, entertaining, relaxing, etc." (par 3 and 4).

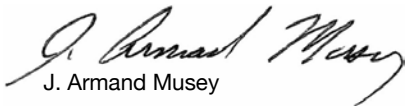
The items above are demonstrably false – you have personal knowledge about the first, and the attached photo from the NY Post addresses the second. Regrettably, both figured prominently in Judge Wooten’s 2015 decision when he concluded, “The issue of exclusivity of use of the

terrace is unsettled."[1] I trust you will ensure this is corrected for the record and advise your client to honorably rectify the damage it has caused.

Finally, on another note, there appears to be an inaccuracy in your own February 4, 2019 affidavit. 425 East 86th'Apartments Corp's board understood of the distinction between the "terrace" and the "roof" of the Apartment around the time of the 1999 board meeting. This is shown in the diagram on page 5 of the December 2007 inspection report (also attached) filed with the Department of Buildings.

I look forward to your response.

Regards,



J. Armand Musey

Cc: Chuck Krieg, Tristan Loanzan

[1] In arriving at this decision, Justice Wooten noted, "An Elliman executive states that, after searching its files, he has "not located any documents demonstrating that any portion of the Building's roof area is allocated specifically to PH-A [the Apartment]" (Narine aff, 1J 7). Further, the "roof area that Mr. Musey appears to believe is part of his apartment, functioning as a terrace for his exclusive use and enjoyment, can be accessed not only from this apartment, but also from the Building stairwell which goes from the ground level all the way to the roof level" (id., 1J 8). Elliman claims that the roof outside the Apartment was "a 'service' rather than an 'entertainment' roof .... it was set up in such a way so as to facilitate access to building apparatus in the event necessary, but that it was not improved so as to invite or enable comfortable use thereof for dining, entertaining, relaxing, etc" (DeBoer aff, fflJ 3-4). The prior owner allegedly only used the doors connecting the Apartment to the roof "to let some fresh air into the apartment" (id., 1J 6)."

EXHIBIT 3:
HERB COHEN LETTER TO S. SUGARMAN DATED April 1, 2014

STIEFEL COHEN & FOOTE, P.C.
ATTORNEYS AT LAW
770 LEXINGTON AVENUE
NEW YORK, NEW YORK 10065

TELEPHONE: (212) 755-2800
FACSIMILE: (212) 755-4199

BY EMAIL
SSugarman@HHK.com

April 1, 2014

Stuart Sugarman, Esq.
Henman, Haward & Kattell, LLP
185 Madison Avenue, 7th Floor
New York, NY 10016

Re: 425 East 86 Apartments Corp. ("Cooperative")/J. Armand Musey

Dear Mr. Sugarman:

Thank you for taking the time last week to get acquainted. As I indicated to you, the members of the Board of Directors of the Cooperative would like nothing better than to resolve the dispute between the Cooperative and Mr. Musey amicably and expeditiously. As I further advised you during our telephone conversation, this letter will serve to respond to your March 11, 2014 letter to the Cooperative.

Before getting into the substance of our clients' differences, I would like to point out a few factual issues that have been overlooked. Mr. Musey purchased his apartment from the Estate of Kaufman. The Cooperative was not a party to that transaction and did not benefit any differently from that estate's sale to Mr. Musey than it would have benefited from a sale to any other purchasers. With all due respect, the members of the Board could not have cared less who purchased the apartment as long as the purchaser satisfied the credit and reference requirements. They had no reason whatsoever to induce Mr. Musey into purchasing. I am advised that Ms. Kaufman never used the terrace adjacent to her apartment and, therefore, never decorated it. Thus, there is no "self-dealing", or "bait and switch". That your client happened to purchase his apartment during the period when the Board was in the process of formulating terrace guidelines happens to be a coincidence. There were numerous drafts of the guidelines prepared over an extended period of time. The guidelines were released when they

were completed. There was no evil intent in the timing. Also, no member of the Board had any discussion with Mr. Musey prior to his purchase of the apartment other than at the obligatory interview as part of the Cooperative's purchase/sale approval process. At that interview Mr. Musey was asked by the two Board members who conducted the interview if he had any plans for alterations to the apartment. He did not mention that he had any plans for the roof terrace and he did not ask any questions about what would be required of him if he did plan to make improvements to the roof terrace. The implication that prior to purchasing the apartment the Board misled Mr. Musey as to his obligations with respect to the roof terrace is simply not true because the Board had no such discussions with him. All of the foregoing can be demonstrated by written evidence and oral testimony.

There seems to be a misunderstanding on Mr. Musey's part regarding the "ownership" of the terrace. Unquestionably, the terrace is part of Mr. Musey's apartment and unquestionably he has the exclusive right to occupy it. However, just as Mr. Musey is a lessee under a preparatory lease and does not "own" the interior apartment, he does not "own" the terrace. The Cooperative "owns" the apartment and the adjacent terrace in the same manner as it owns the rest of the building. Accordingly, as the owner and lessor of the roof terrace, the Cooperative has the authority to make rules regulating its use just as it has the authority to make rules regulating the use of the apartment.

Mr. Musey appears to have taken the position that it is the Cooperative which must protect the roof membrane from potential damage from improvements placed by him on the terrace; in other words, that it is the Cooperative's obligation to provide him with a "ready-to-build" roof terrace such that he should have no obligation whatsoever to protect the roof membrane from his improvements to and use thereof. I must admit that in the many years that I have represented New York City cooperatives I have never heard that argument made before. While the Board of Directors has promulgated regulations aimed at reducing the chance of damage to the roof membrane, the two penthouse shareholders with terraces have to accept the responsibility for protecting the roof membrane if they choose to exercise their right of exclusive use of the roof terrace adjacent to their apartments. All that will be required is that Mr. Musey provide appropriate protection over the roof membrane to avoid damage. The members of the Board cannot now specify the exact covering because they do not know what Mr. Musey will place on the terrace. That is because last August, in reaction to receiving the roof terrace standards, Mr. Musey withdrew his roof terrace plans and to date has

not submitted new plans. However, as the Board has repeatedly told him, the protection required will be the least necessary to ensure the integrity of the roof membrane.

Mr. Musey also appears to have taken the position that the Cooperative is responsible for making repairs to or replacing the roof membrane should improvements he places on the terrace cause damage. Again, this is an argument that I have never heard made before. Every cooperative that I've ever represented has placed the responsibility for repairing damage caused by a penthouse shareholder's use of a roof terrace on that shareholder. There are many cases that support this long held concept. However, should the membrane become damaged for reasons unrelated to a penthouse shareholder's use of the terrace, such as defective manufacture or aging, then the Cooperative assumes repair or replacement responsibility. Certainly, the Cooperative cannot be held responsible for damage caused by overweight objects being placed on the terrace or roots of plants penetrating the roof membrane, for example.

The first emails from your client to the members of the Board seem to have questioned the Board's authority to promulgate rules and regulations for the use of the terraces. Paragraph 13 of the proprietary lease grants the Board that authority. This authority has been long upheld by the New York Courts. I would venture a guess that most cooperatives and condominiums in New York City have similar or more stringent terrace rules than those promulgated by the Board. The Courts have granted boards of directors of cooperatives very wide latitude in promulgating house rules under the protection of the business judgment rule.

Finally, I would like to note that after repeatedly, for five months, declining the Board's offers to meet with him to discuss his issues and concerns with the roof terrace standards, Mr. Musey finally agreed and on February 2nd, two members of the Board met with Mr. Musey and his wife, Ms. Janicek. As a result of that meeting, as I trust Mr. Musey informed you, the Board made a number of modifications to the roof terrace standards that were directly responsive to their concerns, such as to allow the erection of structures such as pergolas, awnings even if visible from the street and the use of propane gas grills. However, the Board did not – and cannot – eliminate or alter the requirement that it is Mr. Musey's obligation to protect the roof membrane prior to erecting improvements on the roof terrace and his responsibility to repair any damage caused by his improvements on and use of the roof terrace. It is simply unreasonable –

and unsupportable as a matter of law – that the Cooperative should bear this responsibility.

We would very much like to resolve Mr. Musey's issues short of litigation and, given the foregoing, we are open to viable suggestions.

Very truly yours,

Herbert L. Cohen