SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

J. ARMAND MUSEY,	**Mot. Seq. 8**
Plaintiff,	**Index No. 157316/2014 (J.S.C. Lebovits)**
-against-	
425 EAST 86 APARTMENTS CORP.,	
Defendant.	

REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

Tristan C. Loanzon
LOANZON LLP
1345 Avenue of the Americas, 2nd Fl.
New York, NY 10105
(212) 760-1515
Attorneys for Plaintiff J. Armand Musey

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REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

Plaintiff J. Armand Musey, by his attorney, submits this memorandum of law in support of Plaintiff's cross-motion for leave to amend.

PRELIMINARY STATEMENT

The proposed Second Amended Complaint ("SAC") contains two causes of action: one for breach of lease and the other for breach of the implied covenant of good faith and fair dealing.[1] The first was approved by the court in its June 21, 2019 D&O. The SAC contains updated procedural history and facts that occurred after January 2019 (the date when the proposed amended complaint ("PAC") was submitted to the court). The second claim for breach of implied covenant of good faith and fair dealing was not in the PAC, but the second claim does not allege new facts because it arose from the same transactions and occurrences. The First Amended Complaint was filed on July 27, 2021, concededly, two years after the June 2019 D&O. As explained in Musey Reply Affidavit (NYSCEF Doc. # 309), the two-year delay is the result of health issues, the Covid-19 pandemic, motion practice and settlement negotiations. The proposed SAC sufficiently states

[1] The two claims are also found in the First Amended Complaint ("FAC") (NYSCEF Doc. # 297), and remain unchanged in the proposed SAC (NYSCEF Doc. # 313).

two causes of action, which contain facts that were already known to Defendants as argued below in Point II (C).

Defendant's Opposition Memo of Law and the affidavit accompanying it do not withstand scrutiny. Both selectively cite documents while omitting material parts of the same document that in effect defeat their propositions. For example, Defendant argues that the Lease allows it to counterclaim for attorney's fees that it "incurred in defending against an action or proceeding brought by the Lessee." (NYSCEF Doc.# 328, p.8). But Defendant's interpretation omits the prefatory clause "[i]f the Lessee shall at any time be in default hereunder," which is a necessary condition as argued below in Point I (C)(ii).

In another example, Defendant's property manager Kaswaree Narine Cleary claims that a report by one of Plaintiff's architects "opines only that the roof membrane is 'not of the type best suited for setback terrace' but not that a terrace surface could not be installed thereover." (NYSCEF Doc. # 319, at ¶ 9). This is not true. The report provides a long list of issues to resolve before installing anything "thereover" as described below in Point I (B) below.

In yet another example, Defendant's opposition claims that Plaintiff's "Amended Complaint" challenges the court's prior exclusive use ruling for merely referencing the issue as it relates to the claim of breach of the implied covenant. (NYSCEF Doc. # 328, pp. 10-11). Plaintiff's moving papers, the FAC, and the proposed SAC make no challenge to the court's ruling on exclusive use, but Defendant argues to the contrary citing a non-existent portion of Plaintiff's moving brief: "Contradicting himself, Plaintiff also argues why this claim has merit and should not be dismissed." Id. (referring to page 14 of Defendant's Opposition Memo of Law, NYSCEF Doc. # 317). But nowhere on page 14 or anywhere else in Plaintiff's moving brief does Plaintiff

state or suggest what Defendant attributed to it, or any hint that Plaintiff is challenging a prior ruling.

ARGUMENT

POINT I: PLAINTIFF SHOULD BE GIVEN LEAVE TO FURTHER AMEND HIS COMPLAINT IN THE FORM OF THE SECOND AMENDED COMPLAINT.

A. The first cause of action has been resolved because Defendant paid the claim.

Because of Defendant's payment of the claim relating to the terrace doors on or about September 14, 2021, Plaintiff is not pursuing the claim in the proposed SAC.

B. The second cause of action has NOT been rendered moot.

Defendant's steps to cure its breach of contract do not absolve the original breach of lease. Defendant cites no case law to support its position that since Defendant argues it provided a coverable terrace after Plaintiff's filing of the FAC, then the past breach and damages arising from the continued breach should be excused or resolved. Instead, Defendant submits the Affidavit of Cleary, sworn to on October 7, 2021 (NYSCEF Doc. # 319) who falsely claims that the report prepared by Plaintiff's architect Michael Granville "opines only that the roof membrane is 'not of the type best suited for setback terrace,' but not that a terrace surface could not be installed thereover." (Id. at ¶ 10). Hence, Defendant claims that the Granville report supports its position that the roof membrane was "suitable for terrace pavers" that Plaintiff has wanted to install since 2013. (NYSCEF Doc. # 328, p. 7). This is a brazen misrepresentation of that report's important conclusions.

In fact, the Granville report made seven recommendations to carry out before installing any pavers, including identifying the products used in the roof membrane, verifying its adhesion and dryness, investigating leaks, confirming energy code compliance, restoring adequate drainage, and either the full replacement of the un-warrantied membrane, or "if the existing roofing

membrane … [is] a suitable substrate, a layer of fluid-applied, reinforced catalyzed resin membrane could be applied over it." (NYSCEF Doc. #323, p. 8, ¶ 4).

Granville noted that "it is not advisable to perform any roofing work or to install pavers and other finishes until all leaks are inspected and their causes identified and repaired." (Id. at p.2, ¶ 3). He also noted: "Off-street parapets at the PHA terrace level are very close to the required minimum height of 42", without any provision having been made for the required surfacing to protect the roofing membrane from the expected occupancy. Railing heights will need to be raised to maintain the 42" height above the finished walking surface." (Id. at p. 5, ¶ 9.c).

The Granville report in reality, instead of supporting Defendant's position, provides compelling evidence that the terrace surface was not in a condition that can be used by Plaintiff.

C. The third cause of action for breach of implied covenant of good faith and fair dealing is sufficiently alleged.

In the proposed SAC, the second cause of action specifically alleges that Defendant breached the implied covenant by:

a. withholding information necessary to prepare a technical plan to make the Terrace usable; and/or
b. withholding information necessary to address or cure any alleged violations of the Lease or the Standards; and/or
c. drafting and promulgating the Standards with the deception that there was a warranty for the roof membrane; and/or
d. unreasonably denying approval of design plans for the Terrace; and/or
e. wrongfully challenging Plaintiff's exclusive use of the Terrace. (SAC ¶ 157).

Defendant argues that each of the above allegation are without merit. Plaintiff addresses them as follows:

(i) The Co-op withheld from Plaintiff information about the roof membrane that would have allowed Plaintiff to submit a design plan for the terrace.

Plaintiff claims in the SAC that Defendant withheld information necessary for Plaintiff to prepare a design plan. Defendant responded that "Co-op may choose to review shareholder renovation requests as it sees fit" and that the "Co-op has been telling Plaintiff, since at least 2014, that it needs information from Plaintiff first, in order to advise what will be required by the Co-op to ensure that the roof membrane will be adequately protected." (NYSCEF Doc. # 328, p. 7).

This makes no sense because to determine what Plaintiff could place over the roof membrane, i.e., type of pavers and their weights, etc., Plaintiff's architects needed and requested the membrane's technical specifications. (SAC ¶¶ 114-118). The architects advising Plaintiff requested the information to inform their calculations and design plans. (SAC ¶ 117). The second recommendation in the Granville report states: "Investigate the existing terrace roofing membrane, confirming Energy Code Compliance of the current assembly and identifying the products used. If necessary make probes to check adhesion, dryness and number of roofing plies." (NYSCEF Doc. #323, p. 8, ¶ 2). Plaintiff was reluctant to spend thousands of dollars on a design only for Defendant to respond "No, go fish."

Defendant does not deny that it withheld the technical specifications from Plaintiff and his architects. Its position has always been that the burden was on Plaintiff to propose a plan and it would respond as it saw fit.

(ii) The Co-op takes the position that Plaintiff is in default of the lease and owes attorney's fees, but refuses to disclose that default despite Plaintiff's request.

Defendant counterclaimed for attorney's fees "incurred in defending against an action or proceeding brought by a Lessee," pursuant to Par. 28 of the Lease. (NYSCEF Doc. # 18, p. 79). Plaintiff alleges that Defendant withheld information necessary to address or cure any alleged

violations of the Lease or the Standards. (SAC ¶ 157(b)). In response, Defendant argued that the Co-op never "charged Plaintiff with a violation of the Lease." (NYSCEF Doc.# 328, p.8-9).

In its counterclaim for attorney's fees Defendant has misread the Par. 28 of the Lease, which allows Defendant to interpose a counterclaim for attorney's fees under, only if Plaintiff is in default. Par. 28 states in full:

> If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, [then] the expense thereof to the Lessor, including reasonable attorney's fees and disbursements, shall be paid by the Lessee to the Lessor, on demand as additional rent.

(see NYSCEF Doc. # 265) (emphasis added). Although this single-sentence paragraph is complex, there is no doubt that the initial conditional clause ("If the Lessee shall at any time be in default hereunder …") is necessary and conjunctive with expenses incurred variably:

- "in performing acts which the Lessee is required to perform, or
- in instituting any action or proceeding based on such default, or
- [in] defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee...."

Plaintiff has requested that Defendant disclose his alleged default but Defendant has declined to respond with more than "any violation is subject of litigation." (SAC ¶ 101) Because the necessary condition – default - has not been met, the request for attorney fees is improper.

(iii) The SAC has sufficiently alleged that Defendant deceived Plaintiff about the existence of a warranty for the roof membrane.

SAC Par. 157(c) alleges that Defendant "draft[ed] and promulgat[ed] the [Roof] Standards with the deception that there was a warranty for the roof membrane." The details of the deception are alleged in the Complaint. (SAC ¶¶ 38-43). Plaintiff is not challenging the Roof Rules, contrary to Defendant's contention. (NYSCEF Doc.# 328, p. 9-10). As already explained in Plaintiff's moving papers, the FAC (and the proposed SAC) do not challenge the Roof Rules but only allege

that Defendant misrepresented to Plaintiff that the roof membrane had a warranty (FAC ¶¶ 38-42; SAC ¶¶ 37-41), which would be relevant in case the Defendant or any third party complain that Plaintiff's work caused the damage. Defendant does not deny that it did not have a warranty for the roof membrane, despite years of representing that it existed. (FAC ¶¶ 38-42, 44, 66, 120; SAC ¶¶ 37-41, 43, 65, 119).

(iv) Defendant has unreasonably denied approval of Plaintiff's design plans for the terrace, which required Plaintiff to incur unnecessary expenses.

The FAC and the SAC allege that Defendant unreasonably denied approval of Plaintiff's design plans. In its opposition for leave to amend, Defendant responds that the plan has been approved albeit recently (August 9, 2021) (Cleary Affid. ¶7), and therefore the claim must be dismissed. But the breach and the resulting damages do not go away just because the breach was remedied. The SAC alleges that Defendant refused to provide information on the roof membrane or its fictional warranty, and that between December 2018 and April 2021, Plaintiff submitted and re-submitted his design plans on ten occasions. (SAC ¶¶ 44-46). Each time, Defendant responded to each submittal with non-substantive requests, e.g., for information about the height of blades of artificial grass or for five architectural printouts of a ten-page plan. (Musey Reply Affid. ¶¶ 12).

(v) Plaintiff is not challenging the issue of exclusive use.

It is clear from the FAC and the proposed SAC that Plaintiff does not challenge the issue of exclusive use, after it had been an issue perpetuated by Defendant. However, Defendant continues to misrepresent Plaintiff's position – in Defendant's opposition brief (NYSCEF Doc. 328, p. 11), it claims that Plaintiff is still challenging "exclusive use" and is "argu[ing] why this claim has merit and should be dismissed." Defendant purports to cite to Plaintiff's brief (NYSCEF Doc. 317, p. 14) and claims that "[t]his is a shining example of Plaintiff's insistence on fighting when there is no disagreement over which to dispute." (NYSCEF Doc. 328, p. 11). But there is

nothing in Plaintiff's brief, FAC, or proposed SAC that comes close to suggest that Plaintiff is disputing a prior decision.

(vi) Paragraph 29(a) of the Lease does not preclude the claim for damages for breach of lease.

In the proposed SAC ¶ 158, Plaintiff alleges that as a result of the breaches outlined Par. 157**, "**Plaintiff has suffered damages in an amount to be determined at trial, along with abatements, prejudgment interest, and costs of this action, including attorney's fees." Defendant contends that no damages are permitted pursuant to Lease Par. 29(a). The paragraph reads in full:

> The Lessor shall not be liable, except by reason of Lessor's negligence, for any failure or insufficiency of heat, or of air conditioning (where air conditioning is supplied or air conditioning equipment is maintained by the Lessor), water supply, electric current, gas, telephone, or elevator service or other service to be supplied by the Lessor hereunder, or for interference with light, air, view or other interests of the Lessee. **No abatement of rent or other compensation or claim of eviction shall be made or allowed because of the making or the failure to make or delay in making any repairs, alterations or decorations to the building, or any fixtures, or appurtenances therein**, or for space taken to comply with any law, ordinance or governmental regulations, or for interruption or curtailment of any service agreed to be furnished by the Lessor, due to accidents, alterations or repairs, or to difficulty or delay in securing supplies or labor or other cause beyond Lessor's control, unless due to Lessor's negligence.

See NYSCEF Doc. # 265 (emphasis added). Defendant cites the sentence in bold for its argument. Defendant does not parse the provision or cite any case law but only concludes that since that sentence is there, Plaintiff's damage claim under the third cause of action is "unavailable." (NYSCEF Doc. # 328, p. 11). But the bolded sentence appears to apply only to Lessor's failure or delay in making "repairs, alterations or decorations to the building, or any fixtures or appurtenances." Par. 29(a) is inapposite for two reasons. First, a full reading of the paragraph indicates the liability limitation only applies to "factors beyond the lessor's control" and even then, is does not apply if the loss is due to the lessor's negligence. Any other reading would be illogical and render the Lease an illusory agreement and contrary to public policy. Second, Par. 29(a) does

not apply to structural features like a roof membrane of the terrace. If Defendant's reading is followed, then Par. 29(a) would have immunized Defendant from liability for not replacing the terrace doors (a structural feature), but that issue is now settled because Defendant reimbursed Plaintiff for replacing the terrace doors. See supra Point I.A.

POINT II: PLAINTIFF'S MOTION FOR LEAVE TO AMEND SHOULD BE GRANTED

A. Counsel properly entered its appearance on behalf of Plaintiff with the filing of the amended complaint so its submissions should be considered by the court.

Plaintiff's counsel, Loanzon LLP, filed a notice of appearance on October 11, 2021 belatedly as a result of an oversight. See Reply Affirmation of Tristan C. Loanzon, dated October 14, 2021, ¶ 2. He mistakenly believed that he had efiled a notice of appearance on July 27, 2021, the same day that the FAC was efiled. Despite Defendant's protests, Defendant's counsel was fully aware that Plaintiff was represented by Loanzon LLP because Defendant's counsel wrote a letter to Loanzon LLP the day after it filed the FAC. Defendant suffered no prejudice from Loanzon LLP's failure to file or belated filing of a notice of appearance.

There is no statute that requires plaintiffs' counsel to file a notice of appearance, unlike for defendants' counsel (C.P.L.R. 320) or for substitution of counsel (C.P.L.R. 321(b)). Loanzon LLP did not substitute in, but simply was added as another counsel for Plaintiff. In fact, based on the NYSCEF records, there are other counsel of record for Plaintiff.

Defendant cited cases to argue that the FAC should be struck because Loanzon LLP failed to file a notice of appearance. In Spallone v. Spallone, 171 A.D.3d 527 (1st Dep't 2019), the court held that an attorney did not have standing to appear at inquest on behalf of defendant because he failed to file a proper substitution. In Elite 29 Realty LLC v. Pitt, 39 A.D.3d 264 (1st Dep't 2007), the court precluded the law firm from submitting a motion on defendant's behalf because it was

not properly substituted. In Dobbins v. Erie County, 58 A.D.2d 733 (4th Dep't 1977), the court held that defendant's counsel was not properly substituted and so it had no standing to file a motion to dismiss. These cases are not applicable because Loanzon LLP was not a substitute counsel, but an additional counsel for Plaintiff.

Finally, in Barlas v. Johnson Elec. Co , 44 Misc.2d 918 (N.Y. Sup. Ct., Queens Co. 1964), the court barred the new attorney from serving a notice of deposition and demand for bill particulars because it was not counsel of record and plaintiff had another counsel that filed the action. The new attorney appeared in the action only to defend plaintiff on a counterclaim by defendant. But the court in Barlas barred the new plaintiff's attorney because plaintiff would have been represented by different attorneys on different part of the lawsuit, which "would substantially affect the rights of the defendant." Id. at 919. Here, Loanzon LLP served the First Amended Complaint, a type pleading that routinely serves as an appearance, see Siegel, New York Practice 5th § 110, and have litigated all motion (MSQ 7 and 8) since making an appearance on July 27, 2021. There has been no other attorney handling the litigation since Loanzon LLP's appearance on July 27, 202, so there is no risk of confusion or duplication as was the case in Barlas. Moreover, any failure in filing of or delay in Loanzon LLP's notice of appearance does not prejudice Defendant or affect Defendant's substantial rights.

B. Plaintiff has presented a reasonable explanation for the delay in amending the complaint and defendant has not been prejudiced in any way.

The two-year delay of the filing of the FAC is the result of health issues, intervening settlement negotiations, motion practice, plaintiff's change of counsel, and the Covid-19 shutdown, (Musey Reply Affid. ¶¶ 2, 4-7, 9-10, NYSCEF Doc. # 309), and not because of frivolous reasons. It goes without saying that Plaintiff was not the only party affected by Covid-19. In fact,

Defendant delayed the installation of the new membrane by more than a year because of the Covid-19 pandemic. (Clearly Affid. ¶¶ 3, 6).

But delay on the part of the Plaintiff is not sufficient to deny the proposed amendment. See Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 653-54 (1st Dep't 2009). Defendant must also show prejudice. Here, the only prejudice that Defendant claims is that if Plaintiff is allowed to serve the SAC, Plaintiff "will be encouraged to expand his pleading and expand the scope of litigation." (NYSCEF Doc. # 328, p. 17). Jacobson rejected that argument, holding that "[p]rejudice does not occur simply because a defendant is exposed to greater liability … or because a defendant has to expend additional time preparing its case." Id. at 655.

Defendant relies on Café Lughnasa Inc. v. A & R Kalimian LLC, 176 A.D.3d 523, 523 (1st Dep't 2019) where the court denied leave to amend to a plaintiff "based on the unexplained delay in bringing such claim and the prejudice to the defendant." (NYSCEF Doc. # 328, p. 15-16). But Plaintiff has explained his delay and Defendant has failed to show that it has been hindered in any way.

Defendant cites another inapplicable case. In Sutton Apts. Corp. v. Bradhurst 100 Dev. LLC, 160 A.D.3d 508, 509-10 (1st Dep't 2018), the First Department held that the trial court had "appropriately denied [leave to amend] in light of plaintiffs' long delay, which they do not adequately explain, and which occurred notwithstanding that the facts and issues that underlie the proposed amendments were known to them from the outset of the case." Here, the facts and issues underlying the FAC and SAC were not known by Plaintiff at the outset of the case (e.g., the non-existent warranty) or had not yet transpired.

C. Plaintiff's claims have merit: this court has granted leave to plead a breach of contract claim for Defendant's alleged failure to provide a sound terrace surface to Plaintiff.

Plaintiff alleges in the SAC facts sufficient to state claims for breach of contract and breach of the implied covenant of good faith and fair dealing. This Court correctly allowed for the former to proceed. Permitting the latter claim will not needlessly complicate or delay this case. Plaintiff addressed the merits of the new causes of action in Point III of its opposition memorandum of law (NYSCEF Doc. # 317, pp. 14-16). Neither cause of action has been heard by this court or the Appellate Division.

The request for leave to amend should be granted because the facts and claims alleged in the proposed SAC have been known to Defendant since the filing of the suit in July 2014 or from January 2019 when Plaintiff submitted the proposed PAC. (NYSCEF Doc. # 218).

Defendant countered that it could not have known facts that occurred after January 2019, referring specifically to events described in the following paragraphs of the SAC:

- Paragraphs 4-10 (procedural history)
- Paragraphs 21-23 (communications with Defendant regarding on-going work)
- Paragraphs 45-47 (update from Defendant about roof membrane replacement plan and specifications, and an allegation that Defendant, as of May 26, 2021, still had not provided the then-existing membrane information requested by Plaintiff)
- Paragraphs 66-69 (update on May 2019 report from Plaintiff's architect Teeter, which report was emailed to Defendant on June 5, 2019) (Musey Reply Affid. ¶ 9).
- Paragraph 70 (update that Defendant was cited by NYC DOB on May 8, 2019 for violations relating to cracks and damaged mortar joints in the penthouse apartments)
- Paragraph 105 (Plaintiff application for a home loan and rejection on June 9, 2021)
- Paragraphs 123-124 (Plaintiff's receipt from Defendant of the technical specs and warranty information for the "future" roof membrane, and update that Defendant still did not provide the same information about the existing roof membrane)
- Paragraph 139 (allegation that Defendant informed its shareholders in October 2019 that its insurance carrier "continues to pay for the attorney defending" against Plaintiff's action)

Apart from Paragraph 105, all the allegations that Defendant cited were known to it as it was party to those communications, often the originator of the communication. Defendant is being disingenuous by arguing in its opposition that "it could not have known" of those facts. (NYSCEF Doc. # 328, pp. 16-17).

D. Defendant offers a slippery slope fallacy to not only oppose Plaintiff's cross-motion but to immunize itself from future liability.

According to the Defendant, "an order should issue precluding Plaintiff from commencing any new lawsuit against [Defendant] without leave of court." But Defendant's claims – that Plaintiff seeks to relitigate matters previously decided – remain unsupported. This Court rejected Defendant's previous allegations of frivolous litigation. See Decision & Order, dated January 26, 2017 (NYSCEF Doc. # 197). Defendant did not address the arguments in Plaintiff's opposition memorandum of law at Point II (B) and (C) with respect to the application of the law of the case doctrine.

In the FAC and the proposed SAC, Plaintiff alleges new facts post-January 2019. Defendant claims that if allowed to do so, Plaintiff "will be encouraged to continue to expand his pleading and expand the scope of the litigation whenever he perceives a slight by the Co-op." (NYSCEF Doc. # 328, p.17). Defendant believes that granting leave to amend only encourages parties to amend their pleadings, and therefore courts should deny them.

As explained in Point II (C) above, the additional facts were procedural history (FAC ¶¶ 1-11), summary of unresolved issues (FAC ¶¶ 12-25), and events that occurred in the parties on-going relationship since the PAC was filed in January 2019 (FAC ¶¶ 46-48, 67-72, 106, 124-125, 135, & 140). Those same allegations are in the proposed SAC, which differs only from the FAC in that it removes the first cause of action (for the door) and Par. 165(e) regarding unequal

treatment. The third claim for breach of implied covenant did not allege any new facts but relied on facts already alleged in the PAC.

Defendant cites Jacobson v. McNeil Consumer & Specialty Pharms for support, but there the court granted a motion for leave because "[t]he second amended complaint did not allege any new facts or occurrences, but merely set forth an additional legal theory'.... As such, we conclude that the initial pleading provided sufficient notice of the series of occurrences from which the [] claims arise." 68 A.D.3d 652, 654 (1st Dep't 2009).

CONCLUSION

For the above reasons, Plaintiff respectfully requests the Court to grant Plaintiff's cross-motion for leave to amend, and for any order that the Court deems just and proper.

Dated: New York, New York
October 14, 2021

Respectfully submitted,

/s/Tristan C. Loanzon

_____

By: Tristan C. Loanzon
LOANZON LLP
1345 Avenue of the Americas, 2nd Fl.
New York, NY 10105
(212) 760-1515
Attorneys for Plaintiff

TO: Tracy Peterson, Esq. (via NYSCEF)
Braverman Greenspun, P.C.
110 East 42nd St., 17th Floor
New York, NY 10017
Attorneys for Defendant

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 202.8-b(c) that the foregoing reply memorandum of law was prepared on a computer using Microsoft Word.

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