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

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

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF THE CROSS-MOTION FOR LEAVE TO AMEND**

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**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF THE CROSS-MOTION FOR LEAVE TO AMEND**

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

## PRELIMINARY STATEMENT

The first amended complaint ("FAC") (NYSCEF Doc. # 297), filed on July 27, 2021, is not identical to the proposed amended complaint ("PAC") that was filed with the court on January 11, 2019 (NYSCEF Doc. # 218) as part of Plaintiff's motion for leave to amend (Mot. Seq. # 4). The FAC differs from the PAC because Plaintiff incorporated facts that have accumulated in the two and a half years between the filing of a proposed amended complaint and the filing of the FAC. See FAC ¶¶ 46-48, 67-72, 106, 124-125, 135, & 140. The FAC also added the procedural history of the case (FAC ¶¶ 1-11) and a summary the unresolved issues (FAC ¶¶ 12-25). Plaintiff believes it is important to be provide a complaint that contains the most updated events, and not a complaint that was frozen on January 11, 2019. In essence, Plaintiff simply conformed his pleading to the facts truthfully.

Even after the addition of the post-January 2019 events, procedural history, and summary, Plaintiff has limited his legal claims to two causes of action for breaches of contract that were approved by the court. The only added claim in the FAC is for breach of the implied covenant of good faith and fair dealing, which arises from facts, transactions, and occurrences already alleged in the PAC and facts that arose after the filing of the PAC.

Defendant wrongfully accuses Plaintiff of "asserting material facts in the Amended Complaint that are patently false." (Deft's Memo of Law p. 20 n.7). Yet Defendant only cites one purported falsity: "For example, the allegation at paragraph 3 of the Amended Complaint that [t]he Court has disposed of several of the [initial claims and] counterclaims [following motions by the Parties]," NYSCEF Doc. No. 297 at ¶ 3, is patently false, as this Court has not disposed of any counterclaims in this matter."

Defendant exaggerates. FAC ¶ 297 alleged that claims were and counterclaims were disposed of by the court in its decision dated January 26, 2017 (NYSCEF Doc. # 197) which decided both parties' motions for reargument; Plaintiff's motion for leave to amend; and Defendant's motions to quash a subpoena, for summary judgment, and for sanctions for frivolous litigation. In that decision, one claim was dismissed on summary judgment, a subpoena was quashed, and Defendant's motion for sanctions was denied. So, the FAC allegation is not "patently false" since a claim was dismissed and more importantly, Defendant's claim for sanctions was denied.

In her July 28, 2021 letter to Plaintiff's counsel (Exhibit B to Loanzon Affirmation), Defendant's counsel stated similarly: "Certain of the allegations additionally are [sic] patently false. At no time during the course of this litigation has the Co-op denied that Mr. Musey has exclusive use of the Terrace." The falsity of that statement is shown in Point III.A below. There

appears to be a pattern of Defendant labeling something in the plural ("certain of the allegations" and alleging "material facts") as "patently false," but only citing one example that turns out not to be patently false.

In the alternative, Plaintiff requests leave of Court to amend the First Amended Complaint (NYSCEF Doc. # 297) with a proposed Second Amended Complaint ("SAC") (see Exhibit A to Loanzon Affirmation) that differs only in two respects from the FAC: (1) the omission of the first cause of action for the breach of lease for reimbursement for the terrace doors because Defendant reimbursed the Plaintiff on September 14, 2021, and (2) omission of FAC 165(e) regarding unequal treatment because Plaintiff acknowledges that the claim is not part of breach of implied covenant of good faith and fair dealing. 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).

Plaintiff could have initiated a new complaint under a separate Index Number for breach of the implied covenant of fair dealing, but Defendant would likely have filed a motion to consolidate or motion to dismiss and the parties then would be engaged in other and additional procedural motions. Plaintiff believed that given the continuing breaches of the Lease by the Co-op, it is more efficient and less costly to amend the instant complaint to include post-January 2019 facts. Cf. Torre v. Town of Tioga, 2018 N.Y. Slip Op. 30131, 5 (N.Y. Sup. Ct. 2018) ("It is well-settled ... that injuries to property caused by a continuing nuisance involve a 'continuous wrong' and, therefore, generally give rise to successive causes of action that accrue each time a wrong is committed.").

## ARGUMENT

### POINT I: THE FAC ASSERTED TWO CAUSES OF ACTION APPROVED BY THE COURT AND ADDED ONE CAUSE OF ACTION THAT ARISES FROM THE SAME SET OF FACTS ALREADY ALLEGED.

A. **With respect to the first cause of action for breach of contract, Defendant's counsel stated herself that Defendant "has no objection to conforming the pleading to the facts" and was therefore aware or in fact in agreement that the first cause of action had evolved over time.**

Defendant contends that Plaintiff sought replacement of the terrace doors in the PAC but has now changed that claim for monetary relief. (Deft's Memo of Law pp. 10-11). Despite the indignant tone of Defendant's contention, the facts show that Defendant's own counsel acknowledged on December 12, 2019 in open court that the claim regarding the terrace doors had morphed into one for reimbursement and not replacement. In the December 19 open court proceeding, Defendant's counsel made the following statement to the Court: "In the interim period, plaintiff has gone ahead and replaced those doors himself. So you know, the co-op has no objection to conforming the pleading to the facts in that the cause of action has been transformed into one for reimbursement for the cost of those doors." See Exhibit A, p. 13 of J. Armand Musey Affidavit, sworn to on September 21, 2021 ("Musey Affid."). Plaintiff noted Defendant counsel's statement and revised the claim regarding the terrace doors in the FAC. For that reason, Defendant's indignation is misplaced.

B. **With respect to the second cause of action for breach of contract, the FAC merely elaborates on the specific lease provisions that were breached, and the FAC most importantly, does not seek to litigate the previously decided issue of "exclusive use."**

Defendant further argued that the second cause of action for breach of lease exceeds the approved claim arising from Defendant's alleged "failure to provide the plaintiff with a Terrace that is capable of being covered and converted into a habitable area." (Deft's Memo of Law p. 11). This argument is plainly wrong because the FAC did not "exceed" the approved claim – the claim

proposed in the PAC (NYSCEF Doc. # 218 ¶¶ 83-88) for breach of lease is the same claim raised in FAC ¶¶ 148-162. The only difference is that while the PAC alleges that the Defendant breached the Proprietary Lease, the FAC spelled out the specific provisions of the Proprietary Lease that was breached, namely sections 2, 3, 7, and 28.

C. **The third cause of action for breach of the implied covenant of good faith and fair dealing arises out of the same transactions and occurrences alleged in the original complaint and the PAC.**

About the FAC's third cause of action for breach of the implied covenant of good faith and fair dealing, Defendant claims that Plaintiff did not propose it and the Court already dismissed the yet to be asserted claim, and that Plaintiff incorporated facts that occurred after the June 2019 D&O. Defendant is correct that Plaintiff did not include the claim in the PAC. However, the facts that form the bases of the breach of the implied covenant arose from the same transactions and occurrences already alleged in the PAC; the FAC incorporated those same transactions and occurrences. The FAC also added facts that occurred after January 2019 or after the filing of the PAC, which is expected given the continuing relationship between Plaintiff and the Co-op. See FAC ¶¶ 46-48, 67-72, 106, 124-125, 135, & 140. As proof of the continuing relationship, Defendant reimbursed Plaintiff last week (on September 14, 2021) the amount of money alleged in the first cause of action for breach of contract. (Musey Affid. ¶ 14).

**D. Defendant's plea for sanctions is not supported by facts and should be denied.**

Defendant cites McCagg v. Schulte Roth & Zabel LLP, 74 A.D.3d 620, 625 (1st Dep't 2010) for its argument for sanctions. McGagg presents facts very different from the one here. First, McGagg did not involve an ongoing contractual relationship between a lessor and lessee like the one in this case. McGagg involved a one-time contractual agreement that was breached and therefore at the time of the breach, the rights and obligations of the parties were settled. Here, the

shareholder (Musey) and the Co-op entered into a proprietary lease in 2013 that continues today to govern the parties' rights and obligations. As proof of the ongoing relationship, even as recent as May 26, 2021, Defendant provided a future plan for membrane replacement and specifications that omitted any mention of the existing roof membrane, which Plaintiff requested in 2013. (FAC ¶¶ 43, 46-48).

Second, the plaintiff in McGagg exceeded the scope of the court's permission to amend by adding new facts and claims and expanding the basis of claims against defendant. Here, the FAC asserts the same breaches of contract that were contained in the PAC and approved by the Court. The only 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). The third claim for breach of implied covenant did not allege any new facts but relied on facts already alleged in the PAC.

Third, the First Department in McGagg found that – notwithstanding plaintiff's broad expansion of its claims in the amended complaint – the trial court erred in dismissing the amended complaint with prejudice, and that plaintiff did not show a pattern of willful or contumacious conduct. (Id. at 627). Here, there is no evidence that the FAC was served to harass Defendant or is frivolous, particularly when the two claims for breach of contract were permitted by the Court, and the additional claim for breach of implied covenants arose from facts already known to Defendant since at the latest in January 2019 (when the PAC was filed).

Even assuming arguendo that the FAC went beyond the PAC, courts have denied request for sanctions in similar situations. In Pomerance v. McGrath, 2014 N.Y. Slip Op. 31686, 13-14 (N.Y. Sup. Ct. 2014)[1], the defendant sought sanctions because the plaintiff filed an amended

[1] A copy of the unpublished case Pomerance v. McGrath is attached as Exhibit C to the Loanzon Affirmation.

complaint with a new cause of action that was not approved by the court. The court denied the motion for sanctions after finding that the amendment was not frivolous and not intended to harass. In Nelson v. Patterson, 2010 N.Y. Slip Op. 31799, 6 (N.Y. Sup. Ct. 2010)[2], the plaintiff served an amended complaint with breach of contract claims that were not expressly permitted in a prior court order. Defendant moved for sanctions, among other things, for having to make a motion to dismiss. The court permitted the amended complaint and denied the motion for sanctions, holding that the amendment did not prejudice the defendant, that discovery has not yet begun, and that the proposed amendment was "premised upon the same facts, transactions or occurrences alleged in the original complaint." (Id. at 6-7).

**POINT II: THE FIRST AMENDED COMPLAINT SUFFICIENTLY ALLEGES CAUSES OFACTION FOR BREACHES OF CONTRACT AND IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**.

There is no merit to Defendant's argument that the FAC should be dismissed on an alleged law of the case doctrine, purported discovery violation, and party admission.

When evidentiary material is considered on a pre-answer motion to dismiss, the appropriate criterion is whether the proponent of the pleading has a cause of action, not whether s/he has stated one. See Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999) (reversing denial of dismissal motion). In its motion, Defendant has failed to negate any essential facts from the FAC, particularly in the allegations that Defendant enumerated as having occurred after the June 2019 D&O. In fact, the only allegation that Defendant has described (up until this point in the memorandum of law) as false is a confusing tale involving ambiguous statements made about the terrace doors in Point I, supra.

[2] A copy of the unpublished case Nelson v. Patterson is attached as Exhibit D to the Loanzon Affirmation.

**A. The first cause of action for breach of contract for the replacement of terrace doors was approved by the court and was endorsed by Defendant during a court conference in December 2019.**

Contrary to Defendant's claim, Plaintiff has not attempted to prolong this litigation unnecessarily. The delay in filing the FAC was due primarily to Plaintiff's attempt to negotiate a fair settlement. (Musey Affid. ¶ 8). It cannot be ignored that more than eight years after purchasing his apartment, Plaintiff has never been able to use the Terrace, which likely accounts for a significant portion of the purchase price. (Id. at ¶ 11). Defendant has also informed Plaintiff that no settlement talks could include matters not before this court. See Musey Affid. at ¶ 8.

**B. With respect to the second cause of action for breach of lease, the law of the case doctrine is inapplicable.**

In Point II(C) of Defendant's Memo of Law p.14, Defendant argues: "This Court has already decided – more than once – that the Terrace is Plaintiff's responsibility, and as such, Plaintiff's breach of contract claims alleging a failure to maintain and repair unspecified elements of the Terrace otherwise lack merit."

The FAC does not allege anything about failure to maintain or repair unspecified elements of the terrace. Defendant is employing a red herring, i.e., a fallacy of misdirection. This is a clear attempt to divert attention away from the relevant issue (the soundness of the surface) by introducing another, irrelevant issue – who was responsible for covering the terrace – which Plaintiff does not even challenge.

Another example of misdirection: "Specifically, this Court has previously determined that Plaintiff is not entitled to a declaration directing the Co-op 'to take all actions required to make the terrace habitable, including, but not limited to, the installation of flooring surface over the terrace membrane enabling it to withstand ordinary expected use.'" (Deft's Memo of Law p. 14).

The FAC seeks no such declaration. This is another red herring, which is followed directly by another: "On reargument, this Court reiterated that 'the lessee [Plaintiff] bears sole financial responsibility for protecting the roof membrane from the consequences of the lessee's use of the terrace." (Id.). Nothing in the FAC contests this statement as Plaintiff accepts this responsibility. Defendant elides the gravamen of the June 2019 Decision and Order to "add a breach of contract claim based on the failure to provide plaintiff with a Terrace that is capable of being covered and converted into a habitable area."

In the subsequent paragraph Defendant continues to misdirect the Court's attention to decided issues, e.g., "the Lease does 'not obligate the Co-op to renovate the [Terrace] and render it usable as a terrace at its own expense.'" Again, the FAC does not seek any such relief.

Nor does the FAC "attempt to repackage [Plaintiff's] grievances as a breach of the proprietary lease…." as the Appellate Division stated about the Roof/Terrace Rules. The FAC attempts only to address the changes that have occurred since the initial complaint was filed in 2014 "consistent with this decision" or the June 2019 D&O. Defendant's obligation to maintain a sound roof surface is not part of the Roof/Terrace Rules. Otherwise, the Court would not have granted its leave to amend in June 2019.

The second cause of action in the FAC is indeed limited to Defendant's "failure to provide plaintiff with a Terrace that is capable of being covered and converted into a habitable area." This issue was only presented to the Court in January 2019 and Plaintiff received leave to pursue it. The soundness of Terrace surface has not been litigated and the Amended Complaint only seeks a full and fair opportunity to do so.

Plaintiff disagrees that his second cause of action is rendered moot by Defendant starting "a renovation project of the Terrace area that will allow Plaintiff to install pavers and make other

improvements necessary to use the Terrace." (Deft's Memo of Law p. 15 (citing to NYSCEF Doc. No. at ¶ 10)). Plaintiff's citation to a NYSCEF document number is wrong or missing. Plaintiff assumes that Defendant is referring to FAC ¶ 10.

The renovation project of the roof membrane follows seven short years after a renovation of the same membrane. (FAC ¶¶ 10, 16). To this day, Defendant has failed to provide a Terrace capable of being covered. (FAC ¶ 4). On information and belief, the FAC alleges that the apartment below the Terrace (and below the membrane) has been experiencing leaks for years and continues unabated. (FAC ¶¶ 21, 64(f)).

Here, Defendant belatedly argues against the holding of the June 2019 D&O which allowed Plaintiff to bring a breach of contract claim. Defendant then dissembles the nature of the breach and argues that the FAC is barred by the law of the case. The law of the case doctrine is inapplicable to the question of whether Defendant failed to provide Plaintiff with a sound surface for the addition of pavers. Yet Defendant leads us through the procedural history as if the court had in fact ruled on this matter.

Furthermore, to the extent Plaintiff's second cause of action relies upon allegations of wrongdoing by the Co-op with respect to the roof membrane, Plaintiff admits that such claims have now been rendered moot by his allegation in the Amended Complaint that "[the Co-op] began a renovation project of the Terrace area that will allow Plaintiff to install pavers and make other improvements necessary to use the Terrace." (Deft's Memo of Law p. 15). However, the fact that Defendant finally took steps to cure its breach of contract does not absolve the original breach.

Defendant contends that "Plaintiff's claims about the Co-op having 'prevented Plaintiff from covering and converting the Terrace into a usable area at his own cost' at any time prior to now … are undermined by Plaintiff's prior admission that he voluntarily withdrew his Terrace

renovation plans in October 2013," citing to the original summons and complaint (NYSCEF Doc. # 1, par. 27. (Deft's Memo of Law p. 15).

Defendant mischaracterizes the withdrawal of the Terrace renovation plans in October 2013. While a plan was indeed withdrawn in 2013, Plaintiff has alleged in the FAC that he has continued to request that Defendant provide any information regarding the roof membrane that Defendant installed in 2011-2013, but Defendant never provided the information. (FAC ¶¶ 43,109). Plaintiff needed the information about the membrane before he can place anything on top of it, or in other words, before he can prepare and submit a terrace renovation plan. (FAC ¶¶ 115-125).

**C. The third cause of action sufficiently alleges a claim and Defendant's bald argument that it is barred by the law of the case doctrine and party admission lacks merit.**

"Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." Jaffe v. Paramount, 222 A.D.2d 17, 22-23 (1st Dep't 1996).

The broad applicability of the implied covenant of the duty of good faith and fair dealing by its very nature acts as a "catch-all" claim for damages that might otherwise be difficult to categorize or recover. The FAC specifically and accurately states the necessary elements of such a breach. Defendant cannot immunize its conduct by associating that conduct with claims that were previously decided. Defendant makes the following arguments:

First, Defendant argues that Plaintiff is the one complicating "matters by insisting that he needed information about the roof membrane before he could submit any proposal instead of simply advising the Co-op what type of Terrace surface he wanted to install over the roof

membrane and get its feedback on that request." (Deft's Memo of Law p. 16). This argument makes no sense because to determine what Plaintiff can place over the roof membrane, i.e., type of pavers and their weights, etc., Plaintiff's architects needed to know the membrane's technical specifications. (FAC ¶¶ 116-118). The architects advising Plaintiff requested the information to inform their calculations and design plans. (FAC ¶ 117). Understandably, Plaintiff was reluctant to submit an uninformed design plan at the cost of thousands of dollars only for Defendant to respond "No, go fish." The FAC alleged that Defendant only admitted to Plaintiff in December 2018 that there was no roof membrane warranty despite the fact that the Roof/Terrance Standards were premised on the existence of such a warranty. (FAC ¶¶ 37-39, 120). Thus, it was not unreasonable for Plaintiff to determine the membrane's specifications before investing in a very expensive design plan.

Second, Defendant maintains that Par. 165(b) of the FAC should be dismissed because Plaintiff failed to allege that the "Co-op ever actually served Plaintiff with any notice to cure concerning violations of the Lease or the Standards." Defendant is being disingenuous. Defendant actually counterclaimed for attorney's fees "incurred in defending against an action or proceeding brought by a Lessee [Plaintiff]," pursuant to Paragraph 28 of the Lease. (NYSCEF Doc. # 18, p. 79). Paragraph 28 of the Lease (see NYSCEF Doc. # 265) provides that the Lessor (Defendant) can seek expenses against Lessee (Plaintiff) "[i]f the Lessee shall at any time be in default." Thus, Defendant has counterclaimed that Plaintiff defaulted on the Lease, despite its statement that it never served a notice to cure.

Third, Defendant maintains that the FAC is attempting to "back-door" a "challenge to the Roof Rules." (Deft's Memo of Law p. 17). No statement is farther from the truth than Defendant's statement. First, it is notable that Defendant does not deny that Defendant did not have a warranty

for the roof membrane, despite years of representing that it exists. (FAC ¶¶ 38-42, 44. 66, 120). Second, the FAC is not challenging the Roof Rules but only alleges that Defendant misrepresented to Plaintiff that the roof membrane had a warranty (FAC ¶¶ 38-42), which would be relevant in case the Defendant or any third party complain that Plaintiff's work caused the damage.

Fourth, Defendant claims that the FAC "baldly alleges that the Co-op 'unreasonably den[ied] approval for design plans for the Terrace' … without alleging when approval purportedly was denied or on what basis the Co-op denied approval." (Deft's Memo of Law p. 17). Therefore, Defendant argues that "Plaintiff cannot plead a conclusory breach of implied covenant of good faith and fair dealing claim as an end-run around the express terms of the Lease." (Id.) Instead of making bald allegations, the FAC in fact 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. (FAC ¶¶ 45-47). 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 Affid. ¶¶ 12).

Fifth, Defendant claims that FAC ¶ 165(e) – that Defendant treated Plaintiff differently from another similarly-situated shareholder – is a "repackaging" of claims (PAC Third and Fifth Causes of Action) already rejected by the Court in the June 2019 D&O. (Deft's Memo of Law pp. 17-18). There is no repackaging and Plaintiff is not bringing causes of action that the court deemed insufficient in June 2019. The FAC alleges a breach of implied covenant of good faith and fair

dealing, an example of which is the factual allegation that Defendant treated Plaintiff differently from a similarly situated shareholder.[3] (FAC ¶¶ 128-137).

To the extent that Defendant is arguing that June 2019 D&O denial of the third and fifth causes of action is the "law of the case" and therefore the factual allegation in FAC ¶ 165(e) is precluded. With that reasoning, Defendant wrongly conflates a factual allegation with a cause of action. The doctrine of the law of the case holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (U.S. 1988) (citing Arizona v. California, 460 U.S. 605, 618 (1983)).

The court in Cherry v. Koch, 129 Misc. 2d 346, 491 N.Y.S.2d 934 (N.Y. Sup. Ct. 1985) addressed a similar situation where it had dismissed the plaintiff's initial complaint and the defendants opposed an amended complaint citing the rule of the case doctrine, and stated: "The doctrine is limited to questions of law and is frequently applied as a matter of judicial discretion."

In its final point, Defendant argues that it never argued that Plaintiff did not have exclusive use of the terrace, but only argued that to the extent Plaintiff was asserting ownership of the terrace, Plaintiff had "no standing." (Deft's Memo of Law p. 18). However, Defendant submitted to court several affidavits that contradict its present position. See infra Point III.

**POINT III: THE FAC BRINGS THREE CAUSES OF ACTION BASED ON MERIT AND NOT ON ALLEGED FRIVOLOUS BASIS.**

The first and second causes of action for breach of contract were approved by the court, and the third cause of action is interposed as an alternative theory of liability and derived from the

[3] However, Plaintiff seeks to discontinue the factual allegation about unequal treatment because he believes that it constitutes a breach of fiduciary duty – and not breach of the implied covenant of good faith and fair dealing – which is not a claim in this action. (Musey Affid. ¶ 16).

set of facts already alleged in the PAC. Moreover, the two-year delay of the filing of the FAC is the result of intervening settlement negotiations, motion practice, plaintiff's change of counsel, and the Covid-19 shutdown, (Musey Affid. ¶¶ 2, 4-7, 9-10), and not because of frivolous reasons.

Defendant offers that the FAC is frivolous because Defendant has never challenged Plaintiff's exclusive use of the terrace. (Deft's Memo of Law p. 18). In the moving papers, Defendant writes that "Paragraph 7 of the Lease affords Plaintiff the exclusive use of that portion of the Building's main roof, on the same level as the floor of the Apartment," (Deft's Memo of Law p. 8) and "the roof area in question is the main roof of Building, a portion of which is for the exclusive use of the owners of the two penthouse apartments, the floors of which are level with such roof," (id. at p. 15). However, Defendant has long and strenuously argued the opposite, i.e., that the Lease did not allocate even the terrace to Plaintiff's apartment (which Defendant calls the "Roof outside the Apartment"). For examples:

> 1) In Defendant's memo of law in support of its motion to dismiss, Defendant stated: "Moreover, Plaintiff has no standing to bring this lawsuit. The entire basis of Plaintiff's complaint is that he owns the roof space immediately outside the Apartment -i.e., that is part and parcel of the Apartment. However, Plaintiff cannot demonstrate that this space belongs to him, in which case he has no standing."[4] Defendant continued: "there does not appear to be any documentation demonstrating that any portion of the roof area (what Plaintiff calls the 'terrace') is 'allocated exclusively to' the Apartment."[5]
>
> 2) In an affidavit, the property manager of the Coop wrote in October 2014: "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."[6]
>
> 3) In a reply memorandum of law, Defendant wrote: "The Lease does not expressly allocate the roof area outside the Apartment to Plaintiff. As there is no documentation to support the bald contention that any roof space immediately

[4] NYSCEF Doc. # 55, pp. 8-9.
[5] NYSCEF Doc. # 55, p. 9.
[6] NYSCEF Doc. # 31, ¶ 7.

> outside the Apartment has been deemed to be incorporated as part and parcel of the Apartment, it is not 'appurtenant' thereto.[7]"
>
> 4) Even Frank Chaney, the former president and current director of the Co-op, wrote in an email to Plaintiff on February 26, 2014: "We find no provision of the Lease that includes the roof terrace as part of your apartment."[8] This is the same Chaney who submitted an affidavit in opposition in the instant motion, in which he offered that he is an attorney "with expertise in zoning and land use" for "approximately 30 years."[9]

It is clear from Defendant's submission that it once challenged Plaintiff's exclusive right to use the terrace.

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

In the alternative, Plaintiff seeks leave to amend his complaint with a second amended complaint, which is attached as Exhibit A to Loanzon Affirmation. The second amended complaint is redlined to emphasize its differences with the FAC. There are two changes compared to the FAC: first is the omission of the first cause of action for reimbursement of the terrace doors because Defendant recently made a $14,400.00 check payment to Plaintiff on September 14, 2021 -- $14,400 was exactly the claim in the first cause of action. As a result of the payment, the claim is satisfied and Plaintiff does not seek to pursue it. (Musey Affid. ¶ 15). The second change is omission of FAC ¶ 165(e), which alleged that Defendant breached the implied covenant by treating Plaintiff less favorable compared to similarly situated shareholder. (Id. at ¶ 16).

Leave to amend a pleading "shall be freely given" in the absence of prejudice or surprise. Zaid Theatre Corp. v Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005); Stroock Stroock Lavan v Beltramini, 157 A.D.2d 590, 591 (1st Dep't 1990). A party is prejudiced within the

[7] NYSCEF Doc. # 76, p. 7 n.5.
[8] NYSCEF Doc. # 63, p. 117 of 147.
[9] NYSCEF Doc. # 40, p. 6 n.3

meaning of C.P.L.R. 3025(b) when it "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." Loomis v Civetta Corinno Const. Corp., 54 N.Y.2d 18, 23 (1981). The argument that defendant will be compelled to expend additional resources in preparing its case or that it now faces greater liability as a result of the amendment does not constitute prejudice. Jacobson v McNeil Consumer & Specialty Pharm., 68 A.D.3d 652, 654, 891 N.Y.S.2d 387 (1st Dep't 2009). To avoid needless and costly litigation, courts should examine the causes of action sought to be added. See Zaid Theatre Corp., 18 A.D.3d at 354-55.

Here, the only additional cause of action is the action for breach of the implied covenant of good faith and fair dealing. The merit of the breach is explained in the Point II.C, supra, and the claim includes allegations that went beyond the breach of the lease, see SAC ¶ 157 (attached as Exhibit A to the Loanzon Affirmation).

Defendant is not likely to suffer prejudice from the amendment because the breach of implied covenant is based on facts already alleged in the PAC, which Defendant received in January 2019. The third cause of action is only an additional theory of recovery based on the facts already alleged. Jacobson, 68 A.D.3d at 654 (holding that "[w]here an amended complaint does not "allege any new facts or occurrences, but merely set[s] forth an additional legal theory, the initial pleading provide[s] sufficient notice of the series of occurrences from which the...claims arise."); 274 Madison Co. v. Ramsundar, 2013 N.Y. Slip Op. 33046, 13-14 (N.Y. Sup. Ct. 2013) (permitting amendment of claim because it arose out of the same transaction and there is an absence of demonstrated prejudice on defendant); Panto v. J & M Salvage Co., 157 A.D.2d 582 (1st Dep't 1990) (holding that "[d]efendants cannot establish that they will be prejudiced by the amended complaint, since they were placed on notice of such theory by the allegations in the initial

complaint; in that case, [l]eave to amend a complaint to add an additional theory of liability is generally granted."

Moreover, because discovery has not closed and is not near completion (depositions have yet to be scheduled), Defendant cannot show prejudice. Jacobson, 68 A.D.3d at 654. "Moreover, the need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment." Id. (citing Rutz v. Kellum, 144 A.D.2d 1017, 534 N.Y.S.2d 293 (4th Dep't 1988)). For those reasons, Plaintiff's motion for leave to amend to interpose the second amended complaint should be granted.

**CONCLUSION**

For the above reasons, Plaintiff respectfully requests the Court to deny Defendant's motion to dismiss and for sanctions, and 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
September 21, 2021

Respectfully submitted,

/s/Tristan C. Loanzon

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