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Court of Appeals of the State of New York

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

– against –

STEIN LAW FIRM, P.C. and MITCHELL A. STEIN,

Defendants-Respondents.

BRIEF FOR ANITA BERNSTEIN AS *AMICUS CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

ARGUMENT

I. BECAUSE JUDGE-ADDED CRITERIA FOR RELIEF UNDER JUDICIARY LAW § 487 MISREAD THE STATUTE AND HAVE CONFOUNDED THE COURTS OF NEW YORK, THEY SHOULD BE JETTISONED IN FAVOR OF THE STATUTE'S PLAIN MEANING 2

A. Section 487 Says What It Means and Means What It Says 2

B. Lower Courts Have Unfortunately Mixed Ad Hoc Criteria Into Their Readings of the Statute 4

C. Judge-Written Add-On Criteria, Not Surprisingly, Have Been Applied Inconsistently and Unintelligibly in the Lower Courts 8

II. JUDGES NEED NOT WORRY THAT THE CAPACIOUS LANGUAGE OF SECTION 487 MAKES ATTORNEYS TOO VULNERABLE TO GROUNDLESS CLAIMS, BECAUSE THE CPLR AND THIS COURT'S JURISPRUDENCE ADDRESS THIS CONCERN EFFECTIVELY 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Albano v. Dersovitz,
941 N.Y.S. 2d 536 (Sup. Ct. 2011) 12

Amalfitano v. Rosenberg,
12 NY 3d 8 (2009)..2, 4

Ambra v. Awad,
16 Misc.3d 1128(A) (Sup. Ct. Nassau 2007) 7

Andryeyeva v. New York Health Care, Inc.,
- NY 3d - , 2019 WL 1333030 (Mar. 26, 2019)...3

Armstrong v. Blank Rome,
126 A.D. 3d 427 (1st Dep't 2015)...13

Armstrong v. Blank Rome,
2014 WL 912263 (N.Y. Sup., Mar. 6, 2014) 13

Betz v. Blatt,
160 A.D. 3d 689 (2d Dep't 2018) 13, 14

Boglia v. Greenberg,
63 A.D. 2d 973 (2d Dep't 2009) 9

DaimlerChrysler Corp. v. Spitzer,
7 NY 3d 653 (2006)...3

Dupree v. Voorhees,
102 A.D. 3d 912 (2d Dep't 2013) 9

Duszynski v. Allstate Insurance Co.,
107 A.D. 3d 1448 9

Englert v. Schaffer,
61 A.D. 3d 1362 (4th Dep't 2009) 7

Facebook, Inc. v. DLA Piper LLP (US),
134 A.D.3d 610 (1st Dep't 2015), *lv. denied*, 28 N.Y. 3d 903
(2016)... 7, 9, 12, 13

Gelwan v. Yuni Gems Corp.,
151 A.D. 3d 638 (1st Dep’t 2017)..7

Izko Sportswear Co. v. Flaum,
25 A.D. 3d 534 (2d Dep’t 2006) 9

Jaroslawicz v. Cohen,
12 A.D. 3d 160 (1st Dep’t 2002)..7

Kaminsky v. Herrick, Feinstein LLP,
59 A.D. 3d 1 (1st Dep’t 2008), *lv. denied*, 12 N.Y. 3d 715 (2009) 7

Kirk v. Heppt,
532 F. Supp. 2d 586 (S.D.N.Y. 2008)..7

Makinen v. City of New York,
30 NY 3d 81 (2017)...3

Mestecky v. City of New York,
30 NY 3d 239 (2017)...2

Mintz v. Rosenberg, Minc, Falkoff & Wolff,
53 Misc. 3d 132(A) (Sept. 30, 2016)..9

Pellegrino v. File,
291 A.D. 3d 60 (1st Dep’t 2002)..7

Pludeman v. Northern Leasing Sys.,
10 NY 3d 486 (N.Y. 2008)..12

Ray v. Watnick,
182 F. Supp. 3d 23 (S.D.N.Y. 2016), as amended (May 3, 2016), *aff'd*,
688 F. App'x 41 (2d Cir. 2017) 11

Sargiss v. Magarelli,
12 NY 3d 527 (N.Y. 2009)..12

Savitt v. Greenberg Traurig, LP,
126 A.D. 3d 506 (1st Dep’t 2015)... 9, 10

Scarborough v. Napoli, Kaiser & Bern LLP,
63 A.D. 3d 1531 (4th Dep’t 2009) 9

Schwartzman v Pliskin, Rubano, Baum & Vitulli,
2019 WL 1003148 (Sup. Ct. Queens, Jan. 18, 2019)..8

Shawe v. Elting,
161 A.D.3d 585 (1st Dep't 2018) ... 6

Tall Trees Construction Corp. v. Zoning Board of Appeals of Town of Huntington,
97 NY 2d 86 (2001) ... 3

Wiggin v. Gordon,
115 Misc. 2d 105 (Civ. Ct. Queens Cty. 1982) ... 5, 6

Statutes

Education Law § 2855(1)(d) ... 7

Judiciary Law § 487 ... *passim*

Judiciary Law § 487(2) ... 6, 12

Labor Law § 218(1) ... 7

Vehicle & Traffic Law § 415-a(6) ... 7

Rules

CPLR 3016 ... 12

CPLR 3016(b) ... 14

CPLR 3211 ... 13

Other Authorities

5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1296 (4th ed. 2008) ... 11

Anita Bernstein, "First Department Rolls Own Criteria for a Judiciary Law § 487 Claim," NYLJ, Dec. 8, 2016 ... 4, 5

Anita Bernstein and John Crain, "Particularity Pleading for Judiciary Law § 487 Complaints That Allege Attorney Deceit," NYLJ, Jan. 30, 2019 ... 12

Eric Lane, How to Read a Statute in New York: A Response to Judge Kaye and Some More, 28 Hofstra L. Rev. 85 (1999) ... 2

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus, the Anita and Stuart Subotnick Professor of Law at Brooklyn Law School, teaches and writes on the law of torts and professional responsibility. She also teaches a seminar on legal malpractice and since 2015 has been writing about that subject for the *New York Law Journal*. The author of numerous academic books and articles, she has a scholarly interest in the task this Court launched ten years ago in *Amalfitano v. Rosenberg*: clarifying the application of the misdemeanor statute Judiciary Law § 487 to disputes between attorneys and their clients or adversaries.

Amicus mentions her affiliation with Brooklyn Law School for purposes of identifying herself, and notes that the work of John Crain, a recent graduate of Brooklyn Law School and her co-author of "Particularity Pleading for Judiciary Law § 487 Complaints That Allege Attorney Deceit," New York Law Journal, January 30, 2019, and "Here's a Good Judiciary Law § 487 Question for the Second Circuit to Certify in 'Bounkhoun'," New York Law Journal, December 2, 2018, strengthened this memorandum. Neither amicus, Brooklyn Law School, nor Mr. Crain has a financial interest in this case.

ARGUMENT

I. BECAUSE JUDGE-ADDED CRITERIA FOR RELIEF UNDER JUDICIARY LAW § 487 MISREAD THE STATUTE AND HAVE CONFOUNDED THE COURTS OF NEW YORK, THEY SHOULD BE JETTISONED IN FAVOR OF THE STATUTE'S PLAIN MEANING

A. Section 487 Says What It Means and Means What It Says

As it did ten years ago in Amalfitano v. Rosenberg, 12 NY 3d 8 (2009), this Court has before it a task of statutory interpretation. In contrast to the questions certified to the Court in *Amalfitano*, which called for attentions beyond language in the statute, this appeal falls within the foundational canon of "plain meaning." The plain meaning canon, as phrased by a scholar with expertise in New York state government, provides that "[i]t is the text that the legislature enacts, and only through such an enactment can that law be legislatively made. The New York Court of Appeals often reiterates this constitutional truism." Eric Lane, How to Read a Statute in New York: A Response to Judge Kaye and Some More, 28 Hofstra L. Rev. 85, 92 (1999).

In the two decades following the publication of that statement about a commitment with respect to the understanding of New York legislation, this fidelity to the plain meaning of clear statutory language has continued in this Court's jurisprudence. *See, e.g.*, Mestecky v. City of New York, 30 NY 3d 239,

243 (2017); Andryeyeva v. New York Health Care, Inc., - NY 3d - , 2019 WL 1333030 (Mar. 26, 2019) (reaffirming "plain meaning" in the context of interpreting a regulation, in contrast to a statute); Tall Trees Construction Corp. v. Zoning Board of Appeals of Town of Huntington, 97 NY 2d 86, 91 (2001). For this Court, plain meaning extends to a variety of contexts and applications, including the context that is at the center of this memorandum: When a statute lacks the substantive content of what parties might want as a source of advantage in litigation, persons thus disadvantaged must accept this omission.

New York courts, in other words, cannot give litigants what the legislature as creator of a statutory cause of action did not provide. Plaintiffs and defendants of this state alike have had to live with this consequence. Compare DaimlerChrysler Corp. v. Spitzer, 7 NY 3d 653, 661 (2006) (because the New Car Lemon Law does not make reference to the condition of an automobile at the time of an arbitration, a consumer need not prove that a defect existed at that time) with Makinen v. City of New York, 30 NY 3d 81, 85-86 (2017) (responding to a certified question: because the New York City Human Rights Code does not include perception of untreated alcoholism among the disabilities it recognizes, plaintiffs cannot recover for discrimination on this basis).

Judiciary Law § 487 may have been unclear before 2009 on a couple of other points—especially on whether the word deceit means "successful deceit" or "deceit that has the effect of fooling a court," see Amalfitano v. Rosenberg, 12 N.Y. 3d 8, 12-15 (2009)—but it has always been clear on its elements of the cause of action. With respect to deceit, its most frequently litigated provision, the statute identifies actionable conduct unambiguously by condemning attorney "deceit or collusion," or "consent[] to any deceit or collusion, with intent to deceive the court or any party."

Lawyers can debate what the nouns in this sentence cover but cannot disagree about the absence of additional elements. There are none. Plaintiffs do not have to show that they filed a notice of claim, or that they are older than some minimum age, or that $e=mc^2$, or that equity favors the granting of relief to them. All the elements of a good claim stand before New York courts in plain view.

B. Lower Courts Have Unfortunately Mixed Ad Hoc Criteria Into Their Readings of the Statute

In a 2016 article, amicus noted the rise of judicial add-ons to simple and spare statutory language. Anita Bernstein, "First Department Rolls Own Criteria for a Judiciary Law § 487 Claim," NYLJ, Dec. 8, 2016. The First Department is not alone among the Appellate Divisions in adding hurdles to the cause of action,

but its embellishments are exceptionally varied. Newer decisions in multiple lower courts, including this one now before this Court, continue the practice.

"Chronic, extreme." The most repeated add-on in published § 487 case law is this phrase (sometimes rendered as "chronic and extreme," less often "chronic or extreme"). To judges who recite these words, merely fulfilling the elements in the statute does not suffice for a plaintiff to survive CPLR dismissal. Misconduct by the defendant attorney has to meet judicially written adjectival criteria.

"First Department Rolls Its Own" reports the picaresque journey of "chronic, extreme" from an obscure judgment in Queens County Civil Court in 1982 into the mainstream of Supreme Court and Appellate Division decisional law of today. Unlike most contemporary § 487 litigation, Wiggin v. Gordon, 115 Misc. 2d 105 (Civ. Ct. Queens Cty. 1982), makes no reference to deceit. Judge William T. Friedmann, who started his opinion by describing § 487 as "little-known and seldom-used," ruled in favor of the plaintiff, Ethel Wiggin, who had given her lawyer a check for $1200 at his behest.

Attorney Gordon had told Wiggin that he would use this money to pay taxes he said were owed by her mother's estate. *Wiggin* held that Gordon's apparent pocketing of the money rather than paying taxes amounted to "the willful receiving

of money which he has not laid out," and thus violated Judiciary Law § 487(2). At the end of his decision Judge Friedmann made a grand announcement:

> "Section 487 of the Judiciary Law should be applied only to the chronic, extreme pattern of legal delinquency as illustrated by this proceeding and contemplated by this statute."

Id. at 1077. All due respect to Judge Friedmann and his decision, but Civil Court lacks authority to narrow the reach of a New York statute by assertion. Before Judge Friedmann was only the question of whether Ethel Wiggin was entitled to treble damages for her loss of $2,690.19 attributable to Arthur Gordon's misconduct. The court's "chronic, extreme" criterion came with neither analysis nor citations.

Judge Friedmann may have thought that relief should reach only the fraction of persons injured by violations of § 487 who can prove something extra, but the New York Legislature has never provisioned that limitation—and neither did any earlier judicial decision. Nevertheless, variations on "chronic, extreme" as a necessary ticket to court for § 487 actions proliferate. Westlaw reports 62 published decisions, not counting their grandparent *Wiggin*, that contain this addition.

"Egregious." This add-on appears almost exclusively in First Department decisional law. *See, e.g.*, Shawe v. Elting, 161 A.D.3d 585, 588 (1st Dep't 2018);

Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d 610, 615 (1st Dep't 2015), *lv. denied*, 28 N.Y. 3d 903 (2016); Gelwan v. Yuni Gems Corp., 151 A.D. 3d 638, 638 (1st Dep't 2017); Kaminsky v. Herrick, Feinstein LLP, 59 A.D. 3d 1, 13 (1st Dep't 2008), *lv. denied*, 12 N.Y. 3d 715 (2009). Occasionally it turns up in the jurisprudence of other courts. Englert v. Schaffer, 61 A.D. 3d 1362, 1363 (4th Dep't 2009); Kirk v. Heppt, 532 F. Supp. 2d 586, 593 (S.D.N.Y. 2008); Ambra v. Awad, 16 Misc.3d 1128(A) (Sup. Ct. Nassau 2007).

"Egregious" has no foundation in the text of § 487. New York legislators are perfectly capable of writing this word into statutory law if they so choose. *See, e.g*., Labor Law § 218(1) (referencing the egregious withholding of wages by an employer); Education Law § 2855(1)(d) (referencing egregious violations of antidiscrimination law by charter schools); Vehicle & Traffic Law § 415-a(6) ("an egregious and willful violation … of the environmental conservation law"). They did not do so when they codified § 487.

"Pattern," as in "pattern of delinquency." This judge-written add-on to the statute usually travels with "chronic, extreme," but not always. In a pair of 2002 cases, the First Department declared that § 487 plaintiffs must show a pattern of wrongdoing, without modifying the word with "chronic" or "extreme." Pellegrino v. File, 291 A.D. 3d 60, 64 (1st Dep't 2002); Jaroslawicz v. Cohen, 12 A.D. 3d

160, 161 (1st Dep't 2002). *See also* Schwartzman v Pliskin, Rubano, Baum & Vitulli, 2019 WL 1003148 (Sup. Ct. Queens, Jan. 18, 2019) (requiring a "[p]attern of intentional deceit or wrongdoing.").

C. Judge-Written Add-On Criteria, Not Surprisingly, Have Been Applied Inconsistently and Unintelligibly in the Lower Courts

In contrast to the clear language of a statute that anyone can look up, ad hoc criteria for relief that judges recite without reflection or analysis are vulnerable to inconsistency in their repetition. Case law manifests confusion on recurring points with respect to judicial glosses on § 487.

The basic problem with multiple add-on criteria created ad hoc in decisional law is that a judge or litigant cannot know which, or how many, of them apply in a particular case. "Chronic" and "pattern" seem to express the same or a similar idea—that the defendant's misbehavior occurred more than once—but they may have slightly different meanings. Are they one element or two? Does "chronic, extreme" mean chronic *and* extreme or chronic *or* extreme? Just as "pattern" might cover the same territory as "chronic," the adjectives "egregious" and "extreme" might mean the same thing. Or might not.

The Appellate Divisions appear to disagree on the question of single versus multiple add-on criteria, although their disagreement does not divide neatly

by division. The Second and Fourth Departments have set up deceit and "chronic, extreme pattern of legal delinquency" as alternatives: a plaintiff satisfies the element of § 487 with one or the other. Boglia v. Greenberg, 63 A.D. 2d 973, 975 (2d Dep't 2009); Izko Sportswear Co. v. Flaum, 25 A.D. 3d 534, 537 (2d Dep't 2006); Duszynski v. Allstate Insurance Co., 107 A.D. 3d 1448, 1449 (4th Dep't (2013); Scarborough v. Napoli, Kaiser & Bern LLP, 63 A.D. 3d 1531, 1533 (4th Dep't 2009). In Dupree v. Voorhees, 102 A.D. 3d 912, 913 (2d Dep't 2013), however, the Second Department ruled that the two elements were not alternatives and plaintiffs must prove intentional deceit to prevail under § 487. *Dupree* declared that the alternative-criterion approach taken in earlier Second Department decisions should be rejected. *Id.*

The First Department, for its part, adopted an alternative-elements approach in Savitt v. Greenberg Traurig LP, 126 A.D. 3d 506, 507 (1st Dep't 2015) and has cited *Savitt* with approval in its later decisions. Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d 610, 615 (1st Dep't 2015), *lv. denied*, 28 N.Y. 3d 903 (2016); Mintz v. Rosenberg, Minc, Falkoff & Wolff, 53 Misc. 3d 132(A) (Sept. 30, 2016). But its alternatives are different from those in the Second Department's *Boglia* and *Izko Sportswear*. According to the First Department, § 487 plaintiffs have to prove either deceit that rises to the level of egregious conduct or "a chronic

and extreme pattern of behavior on the part of defendant attorneys." *Savitt*, 126 A.D. 3d at 507. In the judge-made game of Pick and Choose or Mix and Match, courts shuttle from one articulation of an add-on standard to another.

II. JUDGES NEED NOT WORRY THAT THE CAPACIOUS LANGUAGE OF SECTION 487 MAKES ATTORNEYS TOO VULNERABLE TO GROUNDLESS CLAIMS, BECAUSE THE CPLR AND THIS COURT'S JURISPRUDENCE ADDRESS THIS CONCERN EFFECTIVELY

Although New York courts have not spoken clearly on where exactly they found their irregular add-on criteria for § 487 relief, it is fair to infer that these superimpositions originate in concern about meritless pleadings. This judicial worry is understandable, especially for the large subset of § 487 actions that allege attorney deceit. Lawyers are permitted to engage in puffery when they negotiate. In criminal matters, they may put the state to its proof with full knowledge of their client's guilt. These behaviors, though familiar and accepted, might look like deceit in the eyes of discontented clients or opponents.

Accusations of deceit can be easy to tack onto a malpractice action, where they could unjustly increase the settlement value of a questionable claim. Lawyers

are vulnerable to harm here because they trade on their honesty. A claim of deceit that makes it to discovery could threaten the goodwill in a lawyer's practice. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1296 (4th ed. 2008).

Another valid possible concern in the minds of New York judges is the prospect of unnecessary delays in litigation. In Ray v. Watnick, 182 F. Supp. 3d 23, 32 (S.D.N.Y. 2016), as amended (May 3, 2016), *aff'd*, 688 F. App'x 41 (2d Cir. 2017), for example, plaintiffs brought their § 487 claims afresh "after eighteen long and hard-fought years of litigation." The court saw their complaint as an attempt to derail the long-awaited trial. It found the add-on criterion of "egregiousness" attractive, in part, for preventing frivolous investigation into attorneys' conduct under these circumstances.

For these reasons and others, keeping some § 487 claims out of the New York courts is desirable. But judges do not need to rewrite clear statutory language to achieve this result, because a mandatory procedural rule does this job effectively. "'Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence,' says CPLR 3016(b), 'the circumstances constituting the wrong shall be stated in detail.' This rule, known as 'particularity pleading,' see Weinstein Korn & Miller CPLR

Manual 19.09(b), applies to § 487 because § 487 remedies attorney fraud, willful default, and breach of trust." Anita Bernstein and John Crain, "Particularity Pleading for Judiciary Law § 487 Complaints That Allege Attorney Deceit," NYLJ, Jan. 30, 2019.

Decisional law issued by this Court has enhanced the application of particularity pleading. Under CPLR 3016, said this Court in Pludeman v. Northern Leasing Sys., 10 NY 3d 486, 492 (N.Y. 2008), the facts of a fraud must be pleaded in detail. Facts about it must plausibly link each individual party-defendant to the fraud, and must allow the court to infer the defendant's culpable state of mind. Sargiss v. Magarelli, 12 NY 3d 527, 530-31 (N.Y. 2009).

The standard has been applied in § 487(2) cases. For instance, in Albano v. Dersovitz, 941 N.Y.S. 2d 536 (Sup. Ct. 2011), the Nassau County Supreme Court dismissed a claim that an attorney had presented false documents to the court, as plaintiff gave no 3016-required details as to which documents were altered, when, or how. In *Facebook v. DLA Piper*, a § 487 plaintiff alleged that defendant attorneys represented a client in a contract action against it with knowledge that the contract underlying the claim was a forgery. Applying the particularity standard, the Court did not find circumstances sufficient to infer a deceitful state of mind: first, because the letter supposedly revealing the forgery was dated after the

commencement of the action; second, because the client who had committed the forgery plausibly maintained to his attorneys that the contract was genuine. Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d 610, 615 (1st Dep't 2015), *lv. denied*, 28 N.Y. 3d 903 (2016). Particularity pleading as provisioned in the Civil Law and Practice Rules achieves screening, in short.

At the same time, this rule of procedure is not a rocklike barrier in the way of § 487 claims. Plaintiffs can clear the particularity bar. For example, in Armstrong v. Blank Rome, 126 A.D. 3d 427 (1st Dep't 2015) plaintiffs alleged that a law firm had concealed a conflict of interest in a divorce action, where the plaintiff's husband was an employee of one of the firm's major clients. Because the plaintiff could point to specific instances where the firm had undervalued her husband's securities, the court held that she had alleged deceit with sufficient particularity. (Specifics about the misconduct are given in the trial court opinion that the First Department affirmed. *See* 2014 WL 912263, at *3 (N.Y. Sup., Mar. 6, 2014).)

The recent decision of Betz v. Blatt, 160 A.D. 3d 689 (2d Dep't 2018) shows both a trial and appellate court in harmony with respect to the issue of particularity in a § 487 claim. Supreme Court initially granted a CPLR 3211 dismissal of that action, and the Appellate Division affirmed. In response to this loss in court, the

plaintiff worked harder to find evidence of actionable deceit. As the Second Department explained, "the depositions conducted subsequent to the Supreme Court's August 2012 order yielded substantial additional evidence which permitted the plaintiff to state the causes of action alleging violation of Judiciary Law § 487 against the defendants in greater detail and to refine the cause of action alleging aiding and abetting fraud…." 160 A.D. 3d at 693.

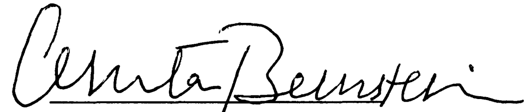
This new information that plaintiff obtained "provided a strong basis upon which to change the court's prior determination of the defendants' respective motions." *Id*. Similar to the earlier round, both the trial and appellate courts agreed on the result: but this time they came together by concluding that the plaintiff had hoisted her claim over the particularity hurdle. While *Betz* uses the word "specificity" instead of particularity, its result is exactly what the CPLR 3016(b) reference to particularity, "shall be stated in detail," sets out to achieve.

CONCLUSION

Erratic, opaque, and ill-reasoned additions to the criteria needed for relief under Judiciary Law § 487 have accreted in New York judicial decisions. This pile-up has caused judges, attorneys, and prospective litigants to lack good guidance on what this statute asks of them. Disarray has ensued. Regardless of whether Bill Birds, Inc. and William Pelinsky or the Stein Law Firm and Mitchell

A. Stein deserve to prevail in this appeal, Judiciary Law § 487 deserves clarity in its application.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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