To Be Argued By:
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Court of Appeals

STATE OF NEW YORK

34-06 73, LLC, BUD MEDIA, LLC
and COORS MEDIA, LLC,

Plaintiffs-Respondents,

against

SENECA INSURANCE COMPANY,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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I. PRELIMINARY STATEMENT

This Memorandum of Law is submitted in reply and in further support of Defendant/Appellant Seneca Insurance Company's ("Seneca") appeal from the Appellate Division's January 28, 2021 Decision and Order, which affirmed the Trial Court's Decision and Order dated October 18, 2019, and its final judgment entered on December 4, 2019.

In opposing Seneca's appeal, Plaintiffs-Respondents, 34-06 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), fail to provide any meaningful distinction between this Court's decision in *Matter of SCM Corp. (Fischer Park Lane Co.*), 40 NY2d 788 (1976), and the instant matter. Simply put, there is no such distinction. Both the instant matter and *Matter of SCM Corp.* involve an attempt by a party to assert a claim to reform a section of a written agreement years after it was alleged that the same section of the written agreement had been breached. In *Matter of SCM Corp.*, this Court did not limit its decision to the type of agreement at issue. The holding there was that reformation claims, by their very nature, cannot relate back to breach of contract claims because the former relate to negotiation and articulation of a written agreement and the latter relate to performance under the agreement. Thus, reformation claims and breach of contract claims are neither factually nor temporally related. Given that, just as in *Matter of SCM Corp.*, Plaintiffs' Complaint only contained allegations related to performance under the

Policy as opposed to allegations related to what took place prior to the Policy becoming effective, the Trial Court was required to conclude that Plaintiffs' reformation claim did not relate back.

Plaintiffs seek to avoid the clear standard for determining whether their amendment was proper under New York law–whether Plaintiffs' Complaint contained any allegations that would have placed Seneca on notice that Plaintiffs intended to assert a reformation claim. Plaintiffs' strategy in this regard is not surprising given that a review of Plaintiffs' three-page Complaint reveals that it is utterly devoid of any allegations related to the negotiation and issuance of the Policy. There is no legal support for Plaintiffs' contention that its reformation claim can be saved by what they contend took place during discovery, motion practice, and at trial. Moreover, Plaintiffs' new argument that its reformation claim would have been before the jury even without the amendment because it was responsive to the Fourth Affirmative Defense is unsupported in law or fact.

It was Plaintiffs' responsibility to put Seneca on notice of the reformation claim long before trial. Plaintiffs had the ability to assert the reformation claim in the Complaint and then to allow the parties to fairly and properly conduct discovery in connection with that claim. Instead, Plaintiffs chose to wait to bring their new reformation theory to light until trial, by which time the damage had been done and Seneca had no meaningful opportunity to defend itself against the surprising new

claim, the only claim upon which the jury found in Plaintiffs' favor. It is respectfully submitted that it was the Trial Court's obligation not to reward Plaintiffs for such gamesmanship and to instead follow this Court's binding precedent of *Matter of SCM Corp.* In doing so, the Trial Court should have found that the reformation claim was time barred.

II. ARGUMENT

A. THE QUESTIONS PRESENTED IN SENECA'S APPEAL ARE PROPERLY BEFORE THIS COURT.

All of the questions Seneca has presented for this Court's review were timely raised at the Trial Court and the Appellate Division and were considered by both courts in issuing their decisions. (*See* Brief for Defendant-Appellant, p. 5; R. 29; 30; 1299-1300; 1305; 1311; 1312; 2459-2463; 2467-70; 2773-75.) The questions presented in this appeal are properly before this Court.

Plaintiffs' contention that this Court has no choice but to affirm the Appellate Division's Decision because that decision was in connection with a motion pursuant to CPLR 4404(a) is incorrect, and only serves to highlight Plaintiffs' desperation. The cases Plaintiffs rely upon for this new proposition are inapposite because they involved CPLR 4404(a) motions based on factual issues.[1] None of the cases

[1] *See McCulley v. Sandwick*, 9 NY3d 976 (2007) (involving a motion to set aside a verdict on the basis that it was illogical and against the weight to the evidence for the jury to find that the defendant was negligent but not a substantial factor in causing the harm); *Aiello v. Garahan*, 58 NY2d 1078 (1983) (involving a decision to set aside a verdict where the jury determined that the defendant was not negligent after being presented with evidence that the defendant fell asleep at

Plaintiffs rely upon involve the legal issue in this case—denial of a motion to set aside a verdict on the basis that a motion to amend was improperly granted during the trial, which resulted in a new cause of action being put before the jury and that cause of action being the only one upon which the jury found in favor of the plaintiffs. This Court has found that decisions on motions to amend are reviewable and, in conducting such a review, this Court is empowered to decide whether the Appellate Division erred in finding that the Trial Court properly permitted Plaintiffs to amend their Complaint (*Oakes v. Patel*, 20 NY2d 633, 644-47 [2013]; *Herrick v. Second Cuthouse, Ltd.*, 64 NY2d 692 [1984]; *Steiner v. Wenning*, 43 NY2d 831 [1977]).

B. ***MATTER OF SCM CORP.*, BINDING COURT OF APPEALS' PRECEDENT, CONCLUSIVELY ESTABLISHES THAT PLAINTIFFS' REFORMATION CLAIM DOES NOT RELATE BACK TO THEIR BREACH OF CONTRACT CLAIM.**

Plaintiffs' reformation claim is of the same type and nature as the reformation counterclaim asserted by the landlord in *Matter of SCM Corp.* There, like should have happened here, this Court concluded that the newly asserted reformation claim did not relate back to Plaintiffs' breach of contract claim.

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the wheel immediately prior to the accident); *Levo v. Greenwald*, 66 NY2d 962 (1985) (involving a decision to set aside a verdict and order a new trial on the basis that the trial court had erred by limiting cross-examination of certain witnesses and refusing a requested charge on issues going to the witnesses' credibility).

Plaintiffs here sought to assert a reformation claim, out of time, in an attempt to remove from the Policy the same endorsement that Seneca has always claimed Plaintiffs failed to comply with—the PSE. This factual scenario is substantially similar to that at issue in *Matter of SCM Corp.*, where, nearly ten years after a lease agreement was entered and nearly two years after a tenant served its arbitration demand, the landlord sought to reform the same section of the lease agreement that the tenant claimed the landlord had breached. In *Matter of SCM Corp.*, this Court made clear that such a reformation claim was time barred because the reformation claim related to the intention of the parties prior to and at the time the lease was executed, while the tenant's breach of contract claim related to how the landlord performed under that agreement. This Court concluded, factually and temporally, that these two claims did not arise out of the same transactions or occurrences (40 NY2d at 791-92). Given that this matter involves a substantially similar factual scenario to *Matter of SCM Corp.*, the Trial Court never should have permitted the amendment.

Plaintiffs do little to distinguish *Matter of SCM Corp.* beyond asserting that Plaintiffs' reformation claim somehow arose from the same transactions or occurrences as their waiver and estoppel claims, which they contend were at issue throughout this litigation. As set forth in Seneca's Opening Brief, this position is contrary to well-established New York law that in determining whether a claim

relates back, the analysis must be focused on comparing the new claim to what was asserted in the complaint, not different theories pursued during discovery and motion practice (*See* CPLR 203[f]; *Matter of SCM Corp.*, 40 NY2d at 791). Moreover, even if the law permitted the Trial Court and the Appellate Division to consider the evidence in support of the waiver and estoppel theories in determining whether to allow the reformation claim, which it does not, the reformation claim still does not relate back. The waiver and estoppel theories, just like the breach of contract theory (the only theory ever asserted in the Complaint), are based on post-Policy issuance actions, whereas reformation focuses on pre-Policy issuance actions. *Matter of SCM Corp.* makes clear that claims of pre-Policy issuance wrongs simply do not relate back to allegations of post-Policy issuance wrongs.

Next, Plaintiffs contend that certain cases cited by the Appellate Division in its Decision and Order support their relation back argument. These cases, however, do not compel a different result.

O'Halloran v. Metropolitan Transp. Auth., 154 AD3d 83 (1st Dep't 2017) does not assist at all. In *O'Halloran*, the First Department affirmed a trial court decision allowing the plaintiff to amend her complaint to include untimely claims of discrimination on the basis of sexual orientation where she had already alleged discrimination on the basis of sex and disability and retaliation. The court reasoned that "[a]ll of plaintiff's claims are based on the same occurrences—namely the

underlying employment actions taken against her—and the original complaint put defendants on notice of those occurrences" (*Id.* at 87). The court found that the occurrences underlying the new claim were defendants' general treatment of plaintiff "*all of which occurred on the same dates and in the same instances as alleged in the original complaint*" (*Id.* at 88 [emphasis added]). The plaintiff simply sought to include "another *reason"* for those occurrences (*Id.* [emphasis in original]).

The *O'Halloran* Court also found important that the case was at an early stage of litigation when plaintiff sought to amend, giving the parties ample time for discovery to determine if the plaintiff suffered discrimination because of her gender or sexual orientation, or both, or that she did not suffer discrimination at all (*Id.* at 91).

Here, unlike in *O'Halloran*, the reformation claim is not based upon the same allegations as contained in the Complaint or even allegations that occurred at or around the same time as the allegations set forth in the Complaint. The Complaint only alleges wrongdoing in the handling of Plaintiffs' fire loss claim (R. 2494); it does not allege wrongdoing in the issuance of the Policy five months or more prior to when the fire occurred. Plaintiffs in the instant matter did not simply seek to insert a new motivation for Seneca's failure to pay the fire loss claim. Rather, Plaintiffs sought to insert an entirely new theory of liability that revolved around actions or

inactions months prior to the loss. *O'Halloran* plainly does not stand for the proposition that CPLR 203(f) is meant to reach claims that far removed from an initial pleading. Moreover, the plaintiff in *O'Halloran* sought to amend early in the litigation, while discovery was ongoing. Although Plaintiffs here could have done the same, they chose not to and instead chose to surprise Seneca with this new theory at trial.

Duffy v. Horton Mem. Hosp., 66 NY2d 473 (1985) and *Abrams v. Maryland Cas. Co.*, 300 NY 80 (1949) are similarly unhelpful.

Duffy involved a plaintiff who brought a medical malpractice action against certain defendants and then sought to add the third-party defendant as a direct defendant, asserting the same types of claims related to the same occurrences alleged in the third-party complaint.

In *Abrams*, the plaintiff's initial cause of action was to recover the judgment he obtained in an underlying personal injury action. The plaintiff also sought reformation of a policy to reflect that the defendants in the underlying action were both considered insureds under the policy. The Appellate Division reversed a judgment in plaintiff's favor, finding that the plaintiff had not made out a claim for reformation, but granted plaintiff leave to amend the complaint. Plaintiff then served an amended complaint (after the deadline set forth in an applicable suit limitation clause) which, unlike the initial complaint, did not seek reformation. The amended

complaint simply sought a money judgment. This Court deemed the amended complaint timely because it was based upon the "same obligation or liability" (*Id.* at 86). The Court found "significant and vital" that in both complaints, the insurer's liability was predicated upon the same set of facts (that the underlying defendants were covered by the policy) and that the insurer was at all times fully aware of the nature of the plaintiff's claim (*Id.* at 87).

In both *Duffy* and *Abrams*, the basis for the plaintiffs' claims was clear from their initial pleadings. Even though their amended pleadings may have reflected slightly different theories or involved different parties, the new claims were ultimately based upon the same allegations as set forth in the initial pleadings. The same cannot be said in the instant matter, where the Complaint gave Seneca no notice that it would ever face a claim arising out of what occurred leading up to the issuance of the Policy.

In one last ditch effort to distinguish *Matter of SCM Corp.*, Plaintiffs submit a new argument that this Court should consider the equities surrounding the nature of the document sought to be reformed. Plaintiffs submit that the contract at issue in *Matter of SCM Corp.* was a lease agreement that was negotiated between the parties, whereas the contract at issue in this case was not negotiated and was a "form policy." Initially, this argument was never made below and, as such, should be rejected (*See Bingham v. New York City Transit Auth.*, 99 NY2d 355, 359 [2003]).

This argument should also be substantively rejected. It is inaccurate for Plaintiffs to suggest that there were no negotiations in connection with the Policy. Prior to the Policy being issued, there were communications between Plaintiffs and their broker and between Plaintiffs' broker and Seneca. A Policy could not have been issued without those communications. It was during that time that the parties would have discussed the type of coverage that Plaintiffs sought and could have discussed whether a PSE should be included in the Policy.[2] The Policy at issue here should not be treated any differently than the lease agreement in *Matter of SCM Corp.* based upon the amount of negotiation.

Plaintiffs' suggestion that this case is somehow different from *Matter of SCM Corp.* based upon when Plaintiffs learned of the basis for their reformation claim is similarly inaccurate. For the reasons explained in Seneca's Opening Brief and further below, Plaintiffs had sufficient facts to assert a reformation claim (and had access to them) when they first filed the Complaint or, at the latest, two years prior to the trial when they had Mohammed Malik's (their key witness) version of events; the underwriting file; and Carol Muller's (Seneca's underwriting witness) deposition. The fact that Plaintiffs engaged in gamesmanship by waiting until trial

[2] Of course, the parties have no way of obtaining a full understanding of what occurred during the course of those discussions given that Plaintiffs did not bring their reformation claim until ten years later and any relevant witnesses' memories have long since faded.

to ask Ms. Muller questions related to the claimed mistake, much to the surprise of Seneca, does not weigh in favor of permitting Plaintiffs' reformation claim.

Moreover, Plaintiffs provide absolutely no support for the proposition that *Matter of SCM Corp.*'s application is limited depending upon the type of agreement at issue. In fact, *Matter of SCM Corp.* has consistently been applied by other courts in the context of other types of agreements, without any distinction drawn for the type of agreement at issue (*See First National Bank of Rochester v. Volpe*, 217 AD2d 967 [4th Dep't 1995] [applying *Matter of SCM Corp.* in the context of a mortgage document]; *Davis v. Davis*, 95 AD2d 674 [1st Dep't 1983] [applying *Matter of SCM Corp.* in the context of a separation agreement]; *182 Franklin St. Holding Corp. v. Franklin Pierrepont Assoc.*, 217 AD2d 508 [1st Dep't 1995] [applying *Matter of SCM Corp.* in the context of a mortgage document]; *Levy v. Kendricks*, 170 AD2d 387, 388 [applying *Matter of SCM Corp.* in the context of an agreement to collect royalty and other income attributable to certain copyrighted materials]).

Under Plaintiffs' argument, *Matter of SCM Corp.* and its fair conclusion would only apply in the limited instance of lease contracts, and only those that were extensively negotiated, leaving open to plaintiffs to execute litigation abuses like the Plaintiffs did here for any other type of claim—contract or tort. There is no basis for such a limited enforcement of *Matter of SCM Corp.* That result simply cannot be right.

C. PLAINTIFFS' REFORMATION CLAIM WAS NOT FILED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

Plaintiffs do not dispute that the statute of limitations applicable to actions based on a mistake is six years (CPLR 213[6]). Nor do Plaintiffs dispute that the statute of limitations begins to run on the date of the purported mistake (*1414 APF, LLC v. Deer Stags, Inc.*, 39 AD3d 329, 330 [1st Dep't 2007]). They also do not dispute that claims of mistake are not ones in which accrual is measured by actual or constructive knowledge (*See National Amusements, Inc. v. South Bronx Develop. Corp.*, 253 AD2d 358, 359 [1st Dep't 1998] [citing *First Nat. Bank of Rochester*, 217 AD2d at 967]). Nonetheless, Plaintiffs claim that Seneca should not be permitted to rely on the statute of limitations because of its purported delay in producing its underwriting file. Apart from being factually wrong, the simple point is that the content of the underwriting file has nothing to do with the statute of limitations applicable to a reformation claim.

In order to assert a reformation claim, Plaintiffs needed two pieces of "fact": (1) their own position that the PSE did not belong in the Policy and (2) the fact that the Policy contained a PSE. Based thereon, Plaintiffs could have asserted that claim and sought to further develop it during discovery. Alternatively, Plaintiffs could have first sought to develop the claim during discovery and then asserted the claim well prior to motion practice or trial, but they did not do that either. In actuality, it appears pretty clear Plaintiffs never intended to assert a reformation claim because

if they intended to do so, they would have challenged Seneca's inclusion of the PSE from the very beginning. But they did not.

Plaintiffs have taken the position that they could not formally assert a reformation claim until they had proof of fraud or mutual mistake. Plaintiffs' approach turns the pleading and discovery rules in New York on their head. Plaintiffs are supposed to assert a claim as soon as they have a reasonable basis for believing they have a claim and then the parties focus their discovery efforts on establishing or refuting that claim.

Simply put, given that Mr. Malik was in possession of the Policy, which contained the PSE, and the disclaimer letter, which referenced the PSE, prior to filing this action in 2011 (R. 427-429; 430-433; 440; 776; 2487-2492), if it was truly his belief that the PSE was in the Policy by mistake, the reformation claim should have been asserted in the Complaint. Plaintiffs had the ability to assert this claim within the statute of limitations, but chose to instead keep the claim in their back pocket until it became useful at trial.

Plaintiffs also argue that Seneca should be estopped from relying on the statute of limitations because if Seneca had investigated its underwriting file sooner, it would have discovered the mistake and should have admitted to Plaintiffs that it made a mistake in including the PSE in the Policy. Seneca's review of its underwriting file, which it did throughout the course of this litigation, did not lead

Seneca to conclude that a mistake had been made in including the PSE in the Policy. It has always been Seneca's position that the PSE was intended to be included in the Policy–Seneca had no reason to believe otherwise. Ms. Muller's trial testimony does not change what Seneca understood to be the case at all times prior to trial—that the PSE was properly in the Policy. It is easy for Plaintiffs to draw the conclusion that Seneca should have recognized this alleged mistake sooner when Plaintiffs' approach to pursuing the reformation claim is what caused Seneca to be deprived of any opportunity to obtain the type of discovery that would be necessary to evaluate and defend against the reformation claim. Plaintiffs should not be permitted to benefit from this strategy.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING PLAINTIFFS TO AMEND THEIR COMPLAINT PURSUANT TO CPLR 3025(c) BECAUSE THE ALLEGATIONS IN PLAINTIFFS' COMPLAINT WERE INSUFFICIENT TO PUT SENECA ON NOTICE THAT PLAINTIFFS WOULD EVER PURSUE A REFORMATION CLAIM.

In determining whether a plaintiff is permitted to amend its complaint at trial, the sole focus must be on the allegations in the complaint leading up to that point, not on what was learned during discovery, motion practice, or at trial (*See Symbax, Inc. v. Bingaman*, 219 AD2d 552, 553 [1st Dep't 1995]; *DiMauro v. Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 240 [2d Dep't 1984]; *Forman v. Davidson*, 74 AD2d 505 [1st Dep't 1980]; *Xavier v. Grunberg*, 67 AD2d 632 [1st Dep't 1979]; *D'Angelo v. D'Angelo*, 109 AD2d 773 [2d Dep't 1985]). The CPLR places the

burden on the plaintiff to put the defendant on notice of the claims the plaintiff intends to prove (CPLR 3013 ["[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense"]). Neither the CPLR nor governing case law require the defendant to prepare to defend against theories the plaintiff theoretically could pursue at trial if those theories are not tethered to the factual allegations in the pleadings. Moreover, neither the CPLR nor governing case law permit a plaintiff to file a bare bones complaint, pursue a theory through discovery and/or trial that is not supported by any of the allegations of the complaint, and then avoid a formal amendment until after resting at trial. This is precisely what the Trial Court and the Appellate Division permitted Plaintiffs to do here.

Notably, in their brief, Plaintiffs do not attempt to distinguish the case law governing amendments pursuant to CPLR 3025(c)[3] nor do they offer any explanation of how the allegations in their Complaint could support a reformation claim. A review of Plaintiffs' three-page Complaint makes clear why Plaintiffs have taken this approach. The Complaint is completely devoid of even a single allegation

[3] In fact, Plaintiffs cite to *Bernstein v. Remington Arms Co.*, 18 AD2d 910 (2d Dep't 1963), which supports Seneca's position in stating that "an amended complaint *based on the same set of facts and founded upon the same actionable wrong, as originally pleaded*, was not equivalent to the commencement of a new action" (emphasis added).

related to the issuance of the Policy or any suggestion that the Policy may contain a mistake. (R. 2493-2494.) The Complaint notifies Seneca only that the Plaintiffs will assert that after the Policy was in effect, the Plaintiffs sustained a fire loss and that Seneca failed to pay for the damages sustained as a result of the fire in breach of the Policy. (*Id.*).

Plaintiffs rely on *Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18 (1981) for the proposition that the Trial Court providently granted the motion to amend. *Loomis*, however, is readily distinguishable from the instant matter.

At issue in *Loomis* was whether a plaintiff could increase the amount of money she sought in the *ad damnum* clause of the complaint either before or after verdict (*Id.* at 20). The Court of Appeals ultimately answered this query in the affirmative, finding that, in the absence of prejudice to a defendant, a plaintiff should generally be permitted to amend the *ad damnum* clause (*Id.* at 23). The Court found that no prejudice existed in that case because several months before the hearing on damages, plaintiff informed defendant that her damages were well in excess of the amount first specified in the *ad damnum* clause and that defendant's expert inspected the items of damage claimed prior to the hearing (*Id.* at 24).

Unlike in *Loomis*, the Plaintiffs here did not seek to simply increase the amount of money damages. They sought to assert an entirely different theory of the case. Unlike the defendant in *Loomis*, Seneca was clearly prejudiced because

asserting a reformation claim at trial reflected a substantive change to the way the Plaintiffs intended to pursue their case.

Realizing they cannot refute these points, Plaintiffs instead suggest that the allegations of their Complaint are not important for this Court's analysis. Plaintiffs submit that this Court should focus on the contents of Seneca's own Answer and what took place during discovery, motion practice, and at trial.

With respect to Seneca's Answer, Plaintiffs argue that their reformation claim is a proper response to Seneca's Fourth Affirmative Defense. They rely upon *Arthur v. Homestead Fire Ins. Co.*, 78 NY 462 (1879) for this proposition. *Arthur* is legally and factually distinguishable from the instant matter.

First, the CPLR was not in effect at the time *Arthur* was decided. For this reason alone, application of that decision must be limited. Second, in *Arthur*, the plaintiff initially sought a ruling that the defendant owed coverage for a fire loss. The defendant answered and pled breach of warranty for plaintiff's failure to disclose an additional mortgage on the policy application. At trial, in response to the defendant's proof of the application and additional mortgage, plaintiff offered to prove that his agent was informed of the additional mortgage, but failed to insert the additional mortgage in the application by mistake. Although the court excluded the evidence, it offered to allow the plaintiff to amend his complaint to plead mistake. Plaintiff refused to do so. Thus, in *Arthur*, the application, *i.e.*, a key document

related to the issuance of the policy, was always at issue because it was explicitly asserted as a defense in a written pleading.

Here, Seneca's Fourth Affirmative Defense made no mention of the application, conversations leading up to issuance of the Policy, or the actual issuance of the Policy. Rather, the Fourth Affirmative Defense cited the PSE and then stated "Plaintiffs, and/or their agents failed to maintain an 'Automatic Sprinkler System' as required by the Policy and thus, the Policy does not provide coverage to plaintiffs." (R. 2499-2500.) The fact that this affirmative defense discusses the PSE cannot be read to open the door to a claim of mistake with respect to including the PSE in the Policy because, unlike in *Arthur*, neither the Answer nor the Complaint make any reference to anything that took place prior to the Policy becoming effective. There simply is no support in the *Arthur* decision or any subsequent case law for the finding that an affirmative defense related to the application of an exclusion to a claimed loss somehow provides the underpinning for a pre-policy claim for reformation. The two are truly unrelated.

Furthermore, it is clear from case law that amendments pursuant to CPLR 3025(c) should not be permitted even where discovery, motion practice, and trial testimony have revealed support for a claim, but where the plaintiff has failed to plead any facts related to that claim (*See e.g.*, *DiMauro*, 105 AD2d at 241 ["An adversary cannot, in all fairness, be expected to proceed to trial on every conceivable

theory of liability arising out of an unpleaded state of facts of which he acquires personal knowledge, even though the aforementioned state of facts is revealed during pretrial proceedings."]).

And, even if discovery, motion practice, and trial testimony were relevant to the question of whether Plaintiffs should be permitted to amend their Complaint pursuant to CPLR 3025(c), as explained at length in Seneca's Opening Brief, the evidence that came out during discovery and motion practice that might have supported waiver and estoppel claims (which the jury rejected) did not support a reformation claim.

Plaintiffs also rely upon *Kimso Apartments, LLC v. Gandhi*, 24 NY3d 403 (2014) for the proposition that absent prejudice, which Plaintiffs claim Seneca cannot show here, courts are free to permit amendment even after trial. Like Plaintiffs' other caselaw, *Kimso* is plainly distinguishable.

In *Kimso*, the plaintiffs sought a declaratory judgment that their corporations had a common-law right to offset the remaining amount they owed Gandhi under a settlement agreement against the money Gandhi owed the corporations on shareholder loan notes. In an amended pleading filed in that case, the plaintiffs explicitly admitted that they were liable for the amounts due Gandhi under the settlement agreement and that if plaintiffs failed to make the full payments to Gandhi under the settlement agreement, Gandhi may allege that the plaintiffs are in default

of the settlement agreement and Gandhi would be entitled to remedies thereunder (*Id.* at 408). Gandhi's amended answer asserted numerous counterclaims, but did not assert a counterclaim for back payments under the agreement. The Court of Appeals agreed with the Supreme Court's decision to permit Gandhi to amend his answer at trial, finding support for this ruling in the statement in plaintiffs' amended complaint that they were liable for the amounts due to Gandhi under the settlement agreement and, if they failed to pay, that they would be in default of its terms (*Id.* at 412). "In other words, after arguing from the beginning of the lawsuit that the entire sum of money they owed Gandhi should be reduced by the money he owed them, they cannot now claim prejudice resulting from Gandhi's demand for outstanding payments due him under the settlement agreement" (*Id.*).

Unlike the money due under the settlement agreement to Gandhi, here the pleadings never contained an admission by Seneca or an assertion by Plaintiffs that the Policy contained a mistake or that it should be reformed. There was no allegation that anything leading up to and including the issuance of the Policy was in issue in this litigation. It simply was not—ever—until opening statements.

Moreover, the evidence used to support the reformation claim here was not the same as the evidence that supports waiver and estoppel. While the inspection report and Seneca's decision not to cancel the Policy in response to that report may have supported waiver and estoppel claims in connection with Seneca's ability to

rely on the PSE (claims that the jury explicitly rejected), that evidence does not support reformation because those pieces of evidence did not exist until after the Policy was issued.

Plaintiffs have, on the one hand, claimed that the evidence supporting the reformation claim was clear throughout the litigation. At the same time, Plaintiffs claim that they did not have the necessary information to support their reformation claim until after trial started. First, these positions are fundamentally inconsistent. Plaintiffs cannot have it both ways—they cannot claim that it should have been clear to Seneca from the evidence developed during discovery and motion practice that a mistake had been made, and at the same time assert that there was not enough evidence for Plaintiffs to assert a reformation claim until after trial began. If there was evidence to support that a mistake was made while discovery or motion practice was taking place, Plaintiffs had an obligation to move to amend much sooner than they did. If there was not enough evidence to support a reformation claim before trial began, then Seneca certainly could not have been on notice that this claim was coming.

Second, both of Plaintiffs' positions with respect to the evidence supporting a reformation claim are clearly refuted by the Record. The evidence developed throughout discovery and motion practice did not suggest that a mistake had been made in placing the PSE in the Policy. In fact, the entire focus of discovery and

motion practice was on whether Plaintiffs complied with the PSE or if Seneca had waived or should be estopped from enforcing the PSE based upon actions it took after the Policy was issued. There was absolutely no discussion in discovery or motion practice about the possibility of a mistake in issuing the Policy with the PSE.

Plaintiffs argue that they could not seek reformation of the Policy until they had Ms. Muller's trial testimony regarding the underwriting materials. There are at least two problems with this argument. First, Plaintiffs did not need all of the evidence necessary to prove their reformation claim before they even asserted it. The Plaintiffs simply needed a reasonable basis for asserting the reformation claim, *i.e.*, Mr. Malik's belief that the PSE was included in the Policy by mistake, and then develop this theory during discovery, in the open, with Seneca fully understanding what it was defending against, which is how litigation should occur under the CPLR. Instead of approaching this litigation in that logical way, Plaintiffs instead decided that they would try their case first and then determine the theory that fit the evidence best. That strategy is exactly what New York courts have previously rejected (*See Symbax*, 219 AD2d at 553; *DiMauro*, 105 AD2d at 240; *Forman*, 74 AD2d 505; *Xavier*, 67 AD2d 632; *D'Angelo*, 109 AD2d 773).

Second, Plaintiffs had access to Ms. Muller and the underwriting file years before trial. Ms. Muller's trial testimony was not based on new information that could not have been explored at her deposition. Rather, Plaintiffs simply failed to

ask Ms. Muller questions at her deposition with respect to whether the PSE was included in the Policy by mistake. Plaintiffs should not be rewarded for their failure to seek out discovery to support their claims.

Seneca was prejudiced by Plaintiffs' failure to diligently pursue the reformation claim. As a result, Seneca was unable to gather timely testimony related to conversations between the broker and Mr. Malik and the broker and Seneca. It is completely inaccurate for Plaintiffs to assert that Seneca simply could have asked for a continuance to take additional discovery, such as the broker's deposition. The broker's deposition would have been completely based on her personal recollection of conversations that took place ten years prior. Without doubt, that recollection would have faded and likely would have been nonexistent.

Moreover, Plaintiffs' contention that Seneca cannot claim prejudice because it named its underwriters and the brokers as witnesses in written discovery is without merit. The discovery request broadly asked Seneca to identify individuals who were eyewitnesses to: any occurrence alleged in the complaint; any acts, omissions, or conditions which allegedly caused the occurrence alleged in the complaint; any statements or admissions by any party or officer, employee, or representative of the party represented by the undersigned; and the nature and duration of the alleged condition which caused the occurrence alleged in the complaint. (R. 2735-2739.) The underwriters and brokers are individuals who may have knowledge of the terms

of the Policy, the claim, and compliance with the PSE, among other things. Their knowledge is not limited to the negotiation of the Policy and intentions of the parties, as Plaintiffs would have this Court believe. Naming those witnesses does not reflect that Seneca had any idea that Plaintiffs intended to claim a mistake was made in issuing the Policy with a PSE—Seneca had no reason to believe that to be the case.

Given that Plaintiffs could have brought the reformation claim when they first filed suit and discovery could have been focused on the issue of mistake from the beginning, Plaintiffs should not be permitted to profit off of Seneca's inability to now obtain the evidence necessary to refute the reformation claim (*See Raymond v. Ryken*, 98 AD3d 1265, 1266 [4th Dep't 2012]; *Burke, Albright, Harter & Rzepka LLP v. Sills*, 187 AD3d 1507 [4th Dep't 2020]; *Boyd v. Trent*, 297 AD2d 301, 303-04 [2d Dep't 2002]).

E. THE ERROR MADE IN GRANTING THE MOTION TO AMEND WAS NOT HARMLESS.

For the first time, Plaintiffs argue that any error by the Trial Court in permitting the amendment was harmless because Plaintiffs did not need to formally amend their Complaint to present the reformation claim to the jury. According to Plaintiffs, the reformation claim would have been before the jury whether the motion to amend was granted or not. Initially, this is a new argument raised for the first time before this Court and, as such, it should be rejected (*See Bingham*, 99 NY2d 355). The argument should also be rejected on the merits. If Plaintiffs thought that

their reformation claim would have been considered by the jury without a motion to amend, it is a wonder why they ever made such a motion and why they waited until now to argue that such a motion was unnecessary. This likely is because Plaintiffs' argument is without legal or factual support. The law required that in order for Plaintiffs' reformation claim to make it to a jury, the Complaint had to contain allegations suggesting a mistake, which it never did.

Plaintiffs rely upon *Arthur*, 78 NY 462, *Susquehanna S.S. Co. v. A.O. Andersen & Co.*, 239 NY 285 (1925), and *Lounsbury v. Purdy*, 18 NY 515 (1859) in support of their position that the reformation claim would have been before the jury even without a formal amendment. Each of these cases is distinguishable. As set forth above, *Arthur* is distinguishable because, unlike in *Arthur*, neither the Answer nor the Complaint in this matter make any reference to anything that took place prior to the Policy becoming effective. In *Susquehanna S.S. Co.*, at issue was whether the defendant had to plead reformation as a counterclaim or if pleading it as a defense was sufficient. The court found that it could be pled as a defense, which is what the defendant had done, explaining in its answer that reformation was being sought on the grounds of fraud or a mutual mistake. Unlike in *Susquehanna S.S. Co.*, Plaintiffs here never pleaded fraud or mutual mistake in their Complaint. Plaintiffs quote from *Lounsbury* that the court may amend the pleadings "<u>where the amendment does not change substantially the claim or defence</u>" (18 NY at 521).

Here, there can be no question that the amendment to assert a reformation claim substantially changed the nature of this case from one in which only post-Policy issuance actions were at issue to one in which the parties' intentions in negotiating the Policy became the prime focus, despite no pre-Policy issuance facts ever having been pled or even alluded to prior to trial.

Seneca does not dispute the general proposition that reformation can be asserted as an equitable defense, but the case law is clear that even if it is asserted as a defense, the facts necessary to support it must appear in the pleadings (*Application of Saxton*, 4 AD2d 135, 136 [4th Dep't 1957] ["The facts which would sustain reformation on the ground of mutual mistake may be pleaded and proved as an equitable defense . . ."] [emphasis added]; *Pitcher v. Hennessey*, 48 NY 415, 422 (1872) ["if this equitable defence was sufficiently set up in the answer, it should have been tried and determined by the court] [emphasis added]; *Tracy Develop. Co. v. Empire Gas & Elec. Co.*, 190 NYS 172, 173 [NY Sup Ct Seneca County 1920] ["If the defendant has an equitable defense of reformation, or any other affirmative defense, it should be stated with the same particularity as a cause of action is required to be alleged in a complaint."] [emphasis added]). That is not the case here. There have, at no time, been any facts pled that would support a reformation claim.

Plaintiffs take the bold position that they were permitted to surprise Seneca with the reformation claim at trial because the reformation claim was responsive to

the Fourth Affirmative Defense and the CPLR does not require a pleading to be filed in response to affirmative defenses. As set forth above, Plaintiffs' reformation claim is not responsive to the Fourth Affirmative Defense. The two are fundamentally different because Seneca's Fourth Affirmative Defense is premised on the PSE properly being in the Policy, and the reformation claim is premised on the PSE not being in the Policy. As was the case in *Matter of SCM Corp.*, Plaintiffs' reformation claim is not in the nature of a defense; it is an affirmative claim seeking to change the terms of the Policy in such a way as to favor the Plaintiffs (40 NY2d at 791). Given that, prior to trial, no facts had been pled to support such a claim, the amendment never should have been permitted. If the Trial Court had not granted the motion to amend, the reformation claim would not have been put before the jury and, as a result, the jury would have come back with a defense verdict. As such, the error clearly caused harm to Seneca.

III. CONCLUSION

Based on the foregoing and all papers previously submitted in support of Seneca's appeal, Seneca respectfully requests that this Court reverse the Appellate Division's January 28, 2021 Decision and Order and, in doing so, reverse the Trial Court's October 18, 2019 Decision and Order, and enter judgment in favor of Seneca.

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)(1), the foregoing brief was prepared on a computer using Microsoft Word.

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