To be Argued by:
DENNIS T. D'ANTONIO
(Time Requested: 30 Minutes)

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Appellate Division–First Department Appellate Case No. 2019-04601

Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents,

– against –

SENECA INSURANCE COMPANY,

Defendant-Appellant.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f) and 22 N.Y.C.R.R. § 500.22(b)(5), Plaintiffs 34-05 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), hereby disclose that each entity is a limited liability company organized and existing under the laws of New York, and that with the exception of their affiliation with one another, Plaintiffs have no corporate parents, subsidiaries, or affiliates.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Trial Court properly allowed Plaintiffs' to conform the pleadings to the proof, pursuant to CPLR 3025(c), and seek reformation of the policy, as the reformation claim related back to their cause of action for breach of contract and their claim that the Protective Safeguard Endorsement ("PSE") was inapplicable and unenforceable?

2. Whether the Trial Court properly allowed Plaintiffs to conform the pleadings to the proof, pursuant to CPLR 3025(c), and seek reformation of the policy, before Defendant presented its case, when the Defendant's Vice President, Carol Muller, admitted at trial that underwriting materials that would have necessarily existed if a Protective Safeguard was intended to be in the policy did not exist?

3. Whether Defendant's unclean hands, including the failure to timely turn over its underwriting file to Plaintiffs for five years after it was initially requested, and only after the actual underwriter who bound the coverage left the company and could no longer testify due to disability, estopped it from asserting a "statute of limitations" defense in response to Plaintiffs' application to the Trial Court to have the pleadings conform to the proof?

4. Whether Seneca waived any right it may have had to raise the question of "prejudice" relating to Plaintiffs' application to conform the pleadings to the

proof by failing to raise such argument at the time that Plaintiffs made their application, when the Court could have fashioned a remedy?

5. Whether Seneca possessed a viable claim of "prejudice" as it relates to its decision not to call additional witnesses at trial or otherwise seek a continuance in order to present additional evidence?

6. Whether, to the extent that this Court finds any error with the Trial Court's grant of the motion to amend, such error was nevertheless harmless such that the verdict should be affirmed where Plaintiffs had a right to assert the equitable defense of reformation in response to Defendant's affirmative defense that Plaintiffs' prior breach of the contract justified Defendant's non-payment under the policy of insurance at issue in this litigation?

PRELIMINARY STATEMENT

Plaintiffs-Respondents 34-06 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), by and through their attorneys, respectfully submit this brief in opposition to the appeal filed by Defendant-Appellant Seneca Insurance Company ("Defendant or "Seneca") seeking to reverse the January 28, 2021 decision of the Appellate Division, First Department that affirmed the Trial Court's October 18, 2019 refusal to overturn the jury verdict rendered on March 22, 2019, or the final judgment entered on December 4, 2019.

The issues raised in this appeal center on Seneca's attempt to engage in legal gymnastics so as to paint itself as a victim of "unfair surprise" at trial wherein it was allegedly forced to litigate a time barred issue never raised before trial. Such assertions are utter nonsense. Rather, an examination of the Record reveals, once Defendant's obfuscations are pulled back, that Defendant's Vice President of Underwriting, upon her review of the underwriting file, admitted that the file did not support the conclusion that the Subject Policy was intended to be issued with a Protective Safeguard Endorsement—the endorsement upon which Defendant had been relying upon since it denied Plaintiff's request for coverage on April 13, 2011. It was upon this testimony that Plaintiff sought to amend its pleadings to conform to the proof. Furthermore, it was upon this testimony that the jury found Plaintiff had met its burden of establishing by clear and convincing evidence that the Defendant

included by mistake a sprinkler requirement found within the Protective Safeguard Endorsement in the policy that it issued to Plaintiffs.

In addition to the fact that there is no law to support Defendant's ability to make these types of admissions on the witness stand and then resist a CPLR 3025(c) motion to conform the pleadings to the proof by seeking shelter based upon a claim of an expired statute of limitations, Defendant has twisted and mischaracterized this Court's decision in *Matter of SCM Corp. (Fisher Park Lane Co.)*, 40 N.Y.2d 788, 390 N.Y.S.2d 398, 358 N.E.2d 1024 (1976). *In re SCM Corp.* stands for the proposition that a counterclaim brought by a defendant on an issue completely unrelated to the one plaintiff sued upon does not relate back to the plaintiff's complaint. Besides the obvious observation that the fact scenario in *In re SCM Corp.* bears no relationship to the undisputed facts at bar, the clear lack of notice in that case contrasts sharply with the instant litigation wherein Defendant knew from the start that Plaintiffs sought payment under the policy issued by Defendant for a fire loss that occurred while the policy was in full force and effect, constantly challenging the enforceability of the Protective Safeguard Endorsement. When the jury rendered its verdict in favor of Plaintiff and both the Trial Court and the Appellate Division affirmed this verdict, it also rejected the applicability of the Protective Safeguard Endorsement to this loss-finding that it was never the intent of Seneca to include this Endorsement in the Policy in the first place.

Moreover, the Defendant contrived to conceal the meritorious nature of a reformation action from Plaintiffs by refusing to produce its underwriting file until after the statute of limitations would have lapsed. It was revealed at the time of trial that the Defendant not only failed to produce this file for over four and half years, but also affirmatively misrepresented that the file produced was a complete file when – according to Defendant's corporate representative at time of trial – it was not. The Trial Court described Defendant's behaviour as "at best negligence."

Similarly, it is hornbook law that a plaintiff is assumed to have asserted any and all viable defenses that are responsive to a defendant's affirmative defenses. At bar, Defendant interposed as its Fourth Affirmative Defense that the Plaintiffs' prior breach of conduct precluded recovery in this action. Thus "reformation" of the Policy would have reached the jury with or without Plaintiff's motion to amend. Consequently, any error in granting the motion would have been harmless, since reformation would have gone to the jury as a response to Defendant's Fourth Affirmative Defense. Plaintiffs-Respondents therefore respectfully request that this Court affirm the judgment of both the Appellate Division and the Trial Court and allow the judgment entered against the Defendant to remain undisturbed so that Plaintiff may finally be compensated for the monies owed to it.

STATEMENT OF FACTS

This appeal arises from the Trial Court's denial of Defendant Seneca's motion to overturn a jury verdict in Plaintiff's favor. This decision was affirmed by the First Department on January 28, 2021 and then affirmed once again by that Court in connection with Defendant's motion to re-argue.

The resolution of this matter through trial took place in March 2019 and arose due to Defendant's failure to indemnify Plaintiffs in accordance with a policy of insurance issued by it to Plaintiffs (the "Subject Policy") when a fire loss (the "Loss") occurred at a vacant commercial building located 50-09 27th Street, Long Island City, New York (the "Subject Premises"). *See* R. at 1642 *et seq.* The Subject Policy provided coverage to nine vacant buildings and lots owned by Plaintiffs, insuring the vacant properties against all basic loss, including coverage for fire losses. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.* By its own admission, Defendant knew at the time of the initial application that the Subject Premises lacked a working sprinkler system. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.* Defendant further received an inspection report dated April 30, 2009 from its retained expert that stated that the Subject Premises were not actively sprinklered. *See* R. at 639-43, 1801-12. Seneca took no action with regard to this report so as to require Plaintiffs to repair the sprinkler system. *See* R. at 646-49, 1726-27. Plaintiffs learned subsequent to the loss that despite this, the Subject Policy allegedly included

a Protective Safeguard Endorsement (the "PSE") that required Plaintiffs to maintain an automatic sprinkler in the Subject Premises. *See* R. at 344-51.

After coverage was bound, but prior to the Loss, Seneca physically inspected each of the properties covered under the Subject Policy. These inspections confirmed that the properties were in the same condition as described in the initial application. *See* R. at 639-43. In fact, the inspection report for the property at issue herein, which was part of Defendant Seneca's underwriting file, stated that the property lacked functional sprinklers. *See id.,* R. at 1801-12.

Thereafter, Seneca issued a letter setting forth certain recommendations to Plaintiffs with respect to this property, failing to even mention the sprinklers, let alone any instruction for Plaintiffs to repair the sprinkler system. Rather, the letter only addressed issues such as cracks in the sidewalk and requested that Plaintiffs "make the insurer aware" that the sprinkler system was out of service, a fact, as indicated above, that Seneca was already well aware of based on its physical inspection of the premises at issue. *See* R. at 646-49, 1726-27. Thus, it is without dispute that Seneca was not only aware from the applications prior to the binding of coverage that the subject property did not have functional sprinklers, but this fact was confirmed to Seneca upon its receipt of the inspection reports. *See* R. at 782 *et seq.*; R. at 807-08. Nonetheless, Seneca did not seek to modify or cancel the subject policy. *See* R. at 658-65.

On September 8, 2009, while the Subject Policy was in full force and effect, the Subject Premises was destroyed by fire. *See* R. at 129-30, 937. On or about April 13, 2011, after a nearly twenty-month long investigation, Defendant wrote a letter to Plaintiffs denying coverage on the basis that Plaintiffs failed to comply with the PSE. *See* R. at 2487-92. As a result of Defendant's refusal to pay, on September 1, 2011, Plaintiffs filed their Complaint in this matter. *See* R. at 2493-96.

On or about October 5, 2011, issue was joined when Defendant filed its answer. *See* R. at 2497-2504. From the time of the Defendant's answer, it was clear to all parties that the focus of this litigation would be the PSE and its application to the loss. *See* R. at 2497-2504. The parties did not dispute the existence of a contract between them, specifically the Subject Policy issued by Defendant to Plaintiffs. *See* R. at 2497, ¶ 3 (admitting policy). Nor did the parties dispute that a fire occurred at the Subject Premises, such that there was no dispute as to the fact of damages. *See* R. at 2498, ¶ 4 (admitting fire occurred). Defendant further admitted, notwithstanding the all-risk nature of the Subject Policy discussed above, that Defendant had not paid for the losses suffered by Plaintiff as a result of the fire. *See* R. at 2498, ¶ 5 (admitting non-payment). Rather, consistent with its prior denial letter, the parties' dispute centered on the PSE, which Defendant asserted as its Fourth Affirmative Defense. *See* R. at 2499-2500, ¶¶ 11-12.

Notwithstanding the relevance of the PSE and its inclusion in the Subject Policy, Defendant stonewalled Plaintiffs when it came to the production of the underwriting file associated with the Policy as well as the location of the pertinent personnel of Defendant and personnel from Plaintiffs. As part of Plaintiffs' initial set of document requests, dated November 29, 2011, Plaintiffs requested a copy of the underwriting file. *See* R. at 2683-2685. Plaintiffs also noticed the deposition of Mr. Robert Guardino, a Seneca employee who had been identified by Defendant as the underwriter involved in the issuance of Plaintiffs' insurance policy. *See* R. at 2687-91 (initial notice), 2692-96 (subsequent subpoena). Defendant itself had initially identified Mr. Guardino as a current employee under Seneca's control and who had knowledge relevant to this proceeding as early as January 2013. *See* R. at 2735-39. At that same time, Defendant itself also identified brokers Denise Frayman and Fran Solomon of JFA as individuals with knowledge relevant to this proceeding. *See* R. at 2735-2739. On February 17, 2016, after Defendant had failed repeatedly to produce its underwriting file, as well as Mr. Guardino, notwithstanding multiple requests to do so, the Court issued an Order commanding Defendant to produce the underwriting file by March 8, 2016, and to produce Mr. Guardino shortly thereafter. *See* R. at 2697-98. Notwithstanding this Court Order, Defendant failed to comply with the Court's Order, even though Plaintiffs sent multiple letters throughout March and April 2016. *See* R. at 2699-2704. Nearly sixty days later, when Plaintiffs had

expressed intent to file a motion to compel production of the underwriting file and Mr. Guardino, Defendant finally produced the underwriting file on April 28, 2016. *See* R. at 2705. This belated production of the Defendant's underwriting file did not alleviate the prejudice Plaintiffs incurred as a result of the Defendant's failure to timely produce its underwriting file.

Mr. Guardino not only no longer worked for Defendant, but had been formally declared disabled as of November 2013. *See* R. at 2692-96; 2707-10. It was further revealed that Mr. Guardino would never be able to testify due to his diminished mental incapacity. *See* R. at 2707-10. This of course would not have been the case if the underwriting file had been timely produced when it was initially demanded in November 2011. *See* R. at 2687-91. While Plaintiffs did not know it at the time, it has become clear, based upon the testimony of Ms. Muller, that if Mr. Guardino's deposition had been taken, he would have provided favorable testimony for the Plaintiffs which, at the very least, would have enabled them to seek reformation of the Policy and perhaps would have compelled Defendant to withdraw its defenses and pay the Plaintiffs' insurance claim. Defendant thereafter took a year before it produced a supervising underwriter, Carol Muller, to testify on its behalf on April 5, 2017. *See* R. at 2711-18.

Plaintiffs, without conceding that they were in violation of the PSE, attacked the legitimacy of enforcing the PSE against them, including via a motion for

summary judgment in connection with Defendant's Fourth Affirmative Defense. *See* R. at 979. While the Motion Court denied Plaintiffs motion by Decision and Order dated July 3, 2018, Defendants were certainly aware that Plaintiffs were not only defending the propriety of its insurance claim based upon its compliance with the PSE but was also challenging Defendant's right to rely upon the PSE in order to deny Plaintiffs' claim. *See* R. at 979. Plaintiffs also contended, in the alternative, that at the time of the loss, they complied with all terms and conditions. *See* R. at 71-72. Therefore, because "fire" was a covered cause of loss, Plaintiffs continued to assert Defendant's failure to pay Plaintiffs' claim constituted a breach of contract. *See* R. at 57-84.

Plaintiffs also served Seneca with a Notice to Admit. *See* R. at 2508 *et seq.* In response, Seneca admitted that it knew that the fire sprinkler system at the premises was out of service and that they did not cancel the policy on those grounds. *See* R. at 2528 *et seq.* In June 2017, following the completion of all party depositions, Plaintiffs moved to dismiss Seneca's Fourth Affirmative Defense, which asserted non-compliance with the PSE by failing to maintain an automatic sprinkler system at the time of the fire, on the grounds that although Seneca knew that the sprinkler system at the premises was not functional, it did not cancel the policy. *See* R. at 2547-2580. In response to Plaintiffs' motion, Seneca cross moved for summary judgment on the grounds that Plaintiffs breached the PSE as a result of

its failure to maintain the sprinkler system. The Court held that the issues of whether Plaintiffs breached the PSE and whether Seneca waived its right to rely on the breach of the PSE presented questions of fact for the jury to resolve at trial. R. at 2602-2612. Nonetheless, evidence presented in support of both of these motions raised issues going to the issuance of the PSE and its enforceability.

Following the denial of both parties' summary judgment motions, on or about March 14, 2019, a jury was impaneled for trial of this case. *See* R. at 1239-40. It was during the course of the trial that a Vice President in the Defendant's Underwriting Department revealed that the underwriting file lacked any indication that Seneca had ever intended to issue the Subject Policy with a PSE in the first place. On March 18, 2019, during the second day of a six-day trial, Plaintiff called to the witness stand Carol Muller, Defendant's Vice President. *See* R. at 577-79. At the time of trial, Ms. Muller had worked for the Defendant for twenty-five years, including time spent as an underwriting manager prior to her then-current role as vice president. *See* R. at 579-80. Through a series of admissions made during her testimony, it became clear that not only was the PSE that was at the heart of Defendant's denial of the claim an endorsement that was issued in error, but also that Defendant knew or should have known of this error and never alerted Plaintiff to this fact. Specifically, Ms. Muller conceded that the PSE was not included in the initial quote sheet sent by Seneca to Plaintiffs' brokers, nor was there any indication

that Seneca had expressed to Plaintiffs the desire to include a PSE in the subject policy prior to the binding of the policy. *See* R. at 796-97. Furthermore, Plaintiffs were not issued a premium credit associated with maintaining a PSE, which is typically reflected in a file when a PSE requires that the building maintains functioning sprinklers. *See* R. at 652-55. Moreover, the issuing of the PSE was not referenced in the binder of insurance, which would have been the first written indication as to whether the agreement by the parties contemplated including of a PSE in the policy. *See* R. at 794-95; R. at 2002-13.

The questions then continued:

> Q Would you agree with [] me for the jury unequivocally that at no time prior to binding coverage did Mr. Guardino ever say to the insured or the broker that they were going to attach a protective safeguard clause requiring sprinklers in all ten properties on this vacant building coverage?
> MR. KOVNER: Objection.
> THE COURT: Overruled. You may answer.
> A. It's not in the file; correct.
> Q. Okay; and you testified previously insurance companies keep files?
> A. Yes, we do.
> Q. Everything is recorded; correct?
> A. Things get missing too.
> Q. Yeah, people make mistakes. I understand. But unless things get missing, it's all there.
> A. Yes, of course.
> . . .
> Q. There's no mention of protective safeguard clause at any time during this entire process giving rise to the binding of coverage by your own admission on April 3rd, 2009; correct?
> A. Correct.
> . . .

> Q. All of your testimony that you've given to Mr. Kovner and to me is based on the insurance company's keeping books and records of their transactions and communications; correct?
> A. Correct.
> . . .
> Q And in fact, based upon those records, would it be correct that there is not one scintilla of evidence that at the time the $41 ,000 premium was quoted, there was going to be a requirement that there be protective safeguards on these vacant buildings?
> MR. KOVNER: Objection.
> THE COURT: Overruled.
> A. Based on the way the paperwork looks, you're correct.

See R. at 796-97, 799-800. Ms. Muller also was forced to concede that Mr. Guardino, Seneca's underwriter for the Subject Policy, did not include any written indication that the Subject Policy include a PSE. On this topic, Ms. Muller testified as follows:

> Q. And if Mr. Guardino is making different arrangements, he makes notes; correct?
> A. I would hope so, yeah.
> Q. And they should be in the underwriting file?
> A. They should be.
> . . .
> Q. Just stay prior to April 3rd. There is not anything in the file that says that there is going to be a protective safeguard requirement; correct?
> A. Correct.
> Q. And there is no notes for Mr. Guardino saying that?
> A. No.
> Q. And you don't know — do you actually know once coverage is bound, how does the policy come into effect? How do they create the physical policy?
> A. They follow his instructions.
> Q. And he would have had to give instruction to someone?
> A. Yes.
> Q. Were you able to find a copy of those instructions?

A. I -- there is a sheet somewhere in this file.
Q. You've seen it?
A. I don't remember it.
Q. Okay. Well, there should be, but it might not be there.
A. No, they couldn't issue the policy without it.
Q. Well, is it possible someone took it out before they can produce to?
MR. KOVNER: Objection.
A. It's possible.
THE COURT: Overruled.
Q. Is it possible before Seneca produced it, they took the *route sheet* out?
A No. No.

See R. at 800-01. Ms. Muller then admitted that a *route sheet*, which would have been in the underwriting file had a protective safeguard endorsement had been intended to attach to the policy, did not exist. *See* R. at 801-803.

Q. You haven't seen a rec sheet in that — you haven't seen a document in that file that dictates that the policy should be issued with a protective safeguard clause; have you?
A. I don't remember.
Q. Well –
A I have 800 pages. I don't remember.
Q. You recognize what this case is about; correct?
A. I understand. *You can not issue a policy without a route sheet.*
Q. Miss Muller, I agree with you; but there is a difference between issuing a policy without a route sheet and showing us what the route sheet actually said. So you haven't seen the route sheet; correct?
A. I don't remember.
Q. *So if there was a route sheet, it would be important for us to look at it to see if it says to include a protective safeguard; correct?*
MR. KOVNER: Objection.
A. *Correct.*
THE COURT: Overruled.

> Q. In the preparation you've done for trial, the reviewing of the files, meeting with Mr. Kovner, you don't remember ever seeing that route sheet that you know must have existed at sometime; correct?
> A. I don't remember if I saw it or I didn't see it.
> Q. But it should be there?
> A. It should be in the file.
> Q. And if it's not, can you explain why it's missing?
> A. Absolutely not. How would I explain it?

See R. at 801-803 (emphasis added). Indeed, as later discussed, not only was the route sheet missing, but the original quote was also missing:

> *Q. So I gather from what you're telling us, there is a missing document that's not in your file that should be there?*
> *A. It looks, yes.*
> *Q. That should be the quote according to the questions that —*
> *A. And the route sheet.*
> *Q. And the routing. So there are two missing document?*
> *A. Yes.*
> *Q. And they are both critical documents on this question; correct?*
> *A. Correct.*
> Q. And those documents would be in your files; correct?
> A. Yes. Absolutely.
> Q. And your files were produced as part of discovery in this case; correct?
> A. Yeah.
> Q. By your lawyers; correct?
> A. I don't know who produced them.
> Q. And when those files were produced according to those bate stamped numbers, there are two critical documents missing; correct?
> A. Yes.
> Q. What's the name of the first critical document that's missing?
> A. The original quote.
> Q. The original quote. And you have no explanation as to why it's not in your files?
> A. I have no idea.

. . .
Q. Okay. There's another critical document on the issue that's being litigated that's also inexplicably missing from Seneca's file according to your testimony; correct?
MR. KOVNER: Objection.
THE COURT: Overruled.
A. Yes.
Q. And tell the jury what that other missing document is.
A. The original quote.
Q. And the original quote is relevant to the issues that we are litigating here; correct?
A. Correct.
Q. And the original quote absolutely should be part of the file that was produced in this case?
A. Correct.
Q. Correct And again, it's not. It's missing from the file; correct?
A. Correct.
Q. And you have no explanation as to why it's missing?
A. I have none.
Q. And if I had the original quote or if the jury had the original quote, we could see whether the original quote included the protective safeguard clause; correct?
A. Correct
Q. So not having the quote and not having the routing sheet, we can't see whether or not those documents were silent as it relates to the protective safeguard clause?
MR. KOVNER: Objection.
THE COURT: I think that I'll overrule the objection, but this is the last question on the subject.
Q. Isn't that correct?
A. I'm sorry. You have to say that again.
Q. Sure. I will restate it again. Because of these two missing documents, the routing sheet and the quote that should be in Seneca's file, we are not able to see whether or not they didn't include the protective safeguard clause?
A. Correct.

See R. at 855-59 (emphasis added).

At the close of her testimony, after being confronted with what was and was not contained in the underwriting file, Ms. Muller was compelled to make one last admission--that the inclusion of the PSE in the Subject Policy could have been a mistake. *See* R. at 834-35. Ms. Muller's statement of mistake was bolstered by the testimony of Plaintiffs' own representative, who testified that he had not wanted a PSE included in the Subject Policy and had said as much to the broker negotiating the Subject Policy. *See* R. at 344-51, 433.

In light of Ms. Muller's stunning admission, Plaintiffs sought leave from the Trial Court, pursuant to CPLR 3025(c), to amend its pleading to conform to the proof adduced at trial. The Trial Court heard argument on the motion, at which Defendant's sole contentions in opposition, was that Plaintiffs' proposed amendment was futile or barred by the statute of limitations. *See* R. at 1006-23, 1298-1312. Defendant did not raise any issue relating to prejudice or indicate any desire to call additional witnesses or even ask for a continuance in order to do so. *See id.* Plaintiffs, in contrast, argued that the amendment related back to its initial cause of action. *See* R. at 1298-1312. In granting Plaintiffs' application, the Trial Court read into the Record a portion of a pre-trial decision by Hon. Tanya Kennedy, who supervised the case during discovery. The Trial Court noted that Judge Kennedy observed that Plaintiffs had previously argued that pursuant to the terms of the policy Defendant had the right to cancel the policy within the first 60 days and by not doing

so, had waived its right to enforce the endorsement. *See* R. at 979. The Trial Court then concluded, "for [Defendant] to sit here and say that waiver and estoppel was not part of this case when [Plaintiff's summary judgment] motion was made in July of 2017 and decided on July 3rd, 2018 is absurd." *See* R. at 979.

Following Ms. Muller's testimony, one additional fact relevant to the Trial Court's determination emerged. Ms. Muller testified over the course of two days. *See* R. at 578 *et seq.*, 769 *et seq.* After the close of her testimony, Defendant's counsel, realizing the impact of her testimony and the fact that it had now been revealed for everyone to see that not only was the PSE issued in error, but that Defendant knew it had been issued in error, attempted to salvage his case (and Defendant's reputation) by attempting to have her return to the witness stand for a third day so as to introduce a "missing document" from its underwriting file as a new exhibit, although never previously disclosed to Plaintiffs.[1] *See* R. at 978 *et seq.*

At the hearing held by the Court, Ms. Muller testified that somehow she was able to miraculously retrieve the "missing pages" from her digital file on the intervening night because the absence of these documents bothered her. See R. at

[1] That this page was discovered overnight is particularly suspect in light of Ms. Muller's testimony that she had reviewed the file over the course of two weeks, including a two-hour meeting with counsel. *See* R. at 582-587. While Plaintiff cannot speak as to the validity of the document *per se*, it is simply inconceivable that Defendant was unaware of its omission prior to trial. Thus, Ms. Muller, Defendants Vice-President and a 25-year employee who was also the underwriting manager at the time that the Subject Policy was issued, took the stand knowing that the page was missing from Defendant's production and that based on the "complete" underwriting file produced, the protective safeguard endorsement in the Subject Policy was issued in error.

985. She further testified that she had no idea why the documents were not produced during discovery. See R. at 987. In denying Mr. Kovner's application to offer into evidence this newly found document, the Court made it very clear the basis for its refusal to allow this document into evidence. "This is pretty much outrageous that this is – this document that contains -- that references the very protective safeguard, it's referencing the ILN form, it's - I mean, you need to come up with a better explanation than it was copied blank." *See* R. at 981. The Court proceeded to conduct a hearing on Defendant's failure to produce the alleged relevant document, noting in part, "[s]o far you've told me that it was copied wrong which is at best negligence. Maybe even gross negligence. So all sorts of sanctions start falling from gross negligence. It says -- it references the very, very protective safeguard form at issue in this case and the -- and the fire of the building." *See* R. at 982.

Thereafter, the Court granted Plaintiffs' motion to amend. At the close of the trial, the Trial Court submitted four questions to the jury – (1) whether Plaintiffs showed by clear and convincing evidence that the PSE had been included in the subject policy by mutual mistake; (2) whether the Plaintiffs had shown by the preponderance of evidence that Seneca knowingly and voluntarily waived its right to enforce the PSE; (3) whether the Plaintiffs had shown by a preponderance of the evidence that Seneca should be estopped from relying on the PSE; and (4) whether Plaintiffs had shown by a preponderance of the evidence that they complied with the

PSE. *See* R. 2131-35. The jury ultimately returned a verdict in favor of Plaintiffs in the amount of $2,481,395.63, finding that Seneca had breached its contract with Plaintiffs by failing to pay Plaintiffs' claim, and concluding that clear and convincing evidence existed to establish that the PSE was issued by mistake. *See* R. at 2131.

Thereafter, Seneca filed a motion to set aside the verdict, solely based upon its claim that Plaintiffs' demand for reformation should not have been presented to the jury. This motion did not, however, contend that the "reformation" finding by the jury was not supported by clear and convincing evidence. *See* R. at 29. Rather, Seneca simply sought to re-argue claims raised with the Trial Court in opposition to Plaintiffs' application to conform the pleadings to the proof. However, in its post-trial submission, Seneca claimed for the first that it had suffered prejudice as a result of Plaintiffs' application to amend its Complaint to conform to the proof. *Compare* R. at 1006-23, 1298-1312 *with* R. at 2457 *et seq.* Although admitting that it had recognized and been aware of Plaintiffs' claim in which it sought to estop Seneca from relying upon the PSE to negate coverage as well as the claim that it had waived the right to rely on the PSE, *see* R. at 2461, Seneca failed to articulate any meaningful difference between those attacks on the applicability of the PSE to Plaintiffs' claim and the claim that the PSE was issued by mistake. *See also* R. at 979 (wherein the Trial Court stated "for [Defendant] to sit here and say that waiver and estoppel was

not part of this case when [Plaintiff's summary judgment] motion was made in July of 2017 and decided on July 3rd, 2018 is absurd."). The Trial Court therefore denied Seneca's post-trial motion on October 18, 2019, holding that amendment to the pleadings had been proper, both because of Plaintiffs' prior attacks on the PSE as well as the fact that Plaintiffs' reformation claim was a proper response to the pleading of Seneca's Fourth Affirmative Defense. *See* R. at 28-31. Moreover, the Trial Court further noted in the alternative that "defendant can hardly complain about statute of limitations when it failed to turn over its underwriting file until 2016, even though plaintiff filed its complaint in 2011." *See* R. at 30.

On March 22, 2019, the jury returned a verdict in which it found that Defendant had breached its contract with Plaintiffs by failing to pay Plaintiffs insurance claim and that the PSE was never intended to be issued by Defendant and was therefore a mistake, thus requiring reformation. *See* R. at 2131. When Defendant's motion to set aside the verdict, as detailed above, was denied, it filed an appeal with the First Department. *See* R. at 2. The First Department denied both the Defendant's appeal and a subsequent motion by the Defendant for leave to appeal to this Court. *See* R. at 2773 *et seq.*; R. at 2778. This Court granted a subsequent motion filed by Defendant directly with it for leave to appeal, and thereafter filed the instant appeal. This opposition now follows.

ARGUMENT

POINT ONE

SENECA'S APPEAL IS JURISDICTIONALLY DEFICIENT

This Court has held that denial of leave to amend is only appropriate where the Defendant has made a showing that it was in fact prejudiced by the failure to raise an additional cause of action at an earlier date. *See Dittmar Explosives v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498, 502–503, 231 N.E.2d 756 (1967); *Molloy v. Village of Briarcliff Manor*, 217 N.Y. 577 (1916); *see also Murray v. City of New York*, 43 N.Y.2d 400, 405–406, 372 N.E.2d 560 (1977). At the time of trial, Defendant failed to raise any arguments relating to prejudice resulting from proposed motion to amend. The failure to raise such argument when the Court could have fashioned a remedy as permitted by CPLR 3025(c) and raising them for the first time in post-trial briefing forfeits any claim that Defendant may have had to same because arguments that have not been preserved for appeal are not considered reviewable by the Court of Appeals even where the Appellate Division, in its discretion, has considered such issues. *See McGovern v. Mount Pleasant Cent. School Dist.*, 25 N.Y.3d 1051 (2015) (dismissing appeal for lack of preservation of issues raised before Court of Appeals); *People v. Chaitin*, 61 N.Y.2d 683 (1984) (same). Similarly, Defendant did not contend at trial that the Complaint did not plead sufficient facts regarding the cause of action for reformation – indeed, the first time

that Defendant raised this question was in its first motion for leave to appeal to this Court. Defendant also did not argue at trial that Plaintiffs had been in possession of all facts necessary to seek reformation at the time that the Complaint was initially filed until it sought leave to appeal to this Court. Consequently, the instant appeal may be dismissed on this basis alone.

POINT TWO

DEFENDANT'S APPEAL FAILS TO MEET THE HIGH BURDEN APPLICABLE AFTER A JURY VERDICT AND WHERE A MATTER IS COMMITTED TO THE SOUND DISCRETION OF THE TRIAL COURT

While Plaintiffs do not dispute that this Court has the authority to review final judgments and matters of discretion, as asserted in Defendant's Initial Brief, *see id.* at 25-26, it must be observed that Defendant-Appellant failed to set forth the standards upon which this Court may do so. After a jury trial, the court may set aside a verdict or order a new trial only where "the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court." C.P.L.R. 4404(a). Although Defendant denominates this as an appeal from the denial of a motion pursuant to the aforementioned rule, *see* Initial Brief at 1, Defendant raises no argument in its appeal that the verdict was contrary to the weight of the evidence nor that it should be overturned in the interest of justice. Such failure in and of itself justifies dismissal of this appeal, as arguments raised only in reply must be rejected

as a matter of law. *See* CPLR 2214(b); *see also Ritt by Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-62, 582 N.Y.S.2d 712 (1st Dept. 1992).

Moreover, because the decision on a motion pursuant to C.P.L.R. 4404(a) rests within the discretion of the trial court, in the ordinary course and does not finally determine the action, this Court will affirm such decisions as beyond its purview. *See*, *e.g. McCulley v. Sandwick*, 9 N.Y.3d 976 (2007) ("Appeal, insofar as taken from that portion of the Appellate Division order that affirmed the denial of appellants' CPLR 4404 postjudgment motion, dismissed, without costs, by the Court of Appeals, sua sponte, upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution."); *Aiello v. Garahan*, 58 N.Y.2d 1078 (1983) ("The Appellate Division's determination that it was error to have set aside the verdict as against the weight of the evidence, although appealable, is beyond the scope of our review. Due to the posture in which this case comes before us, there must be an automatic affirmance."). Indeed, unlike the Appellate Division, this Court cannot "substitute[] its discretion for that of the trial court," and must affirm any case that does not present a true issue of law for review. *See*, *e.g.*, *Levo v. Greenwald*, 66 N.Y.2d 962 (1985). "Where the Appellate Division has made such a discretionary determination, [the Court of Appeal's] review is limited to whether the Appellate Division abused its discretion as a matter of law." *See*, *e.g.*, *Andon ex rel. Andon v. 302-304 Mott Street Associates*, 94 N.Y.2d 740,

745, 731 N.E.2d 589 (2000) *citing Brady v. Ottaway Newspapers*, 63 N.Y.2d 1031, 1033, 473 N.E.2d 1172 (1981); *see also Sadek v. Wesley*, 27 N.Y.3d 982, 983, 51 N.E.3d 553 (2016); *Alliance Property Management and Development, Inc. v. Andrews Avenue Equities, Inc.*, 70 N.Y.2d 831, 517 N.E.2d 1327 (1987) ("The Appellate Division is, of course, vested with the same power and discretion as Special Term, and can review a determination for abuse of discretion or substitute its own discretion, which is then reviewable by us only for abuse of discretion as a matter of law.").

POINT III

THE TRIAL COURT PROPERLY GRANTED PLAINTIFFS' MOTION TO AMEND TO CONFORM THE PLEADINGS TO THE PROOF

Motions to amend under C.P.L.R. 3025(c) "are a matter within 'the sound discretion of the court and should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to subdivision (b), except that under (c) the possibly increased effect on orderly prosecution of the trial might be a factor to be taken into account.'" *Loomis v. Corinno Corp.*, 54 N.Y.2d 18, 23 (1981). As a result, where the amendment merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation, amendment generally should be granted. *See Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 477 (1985). "A party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment].'" *McGhee v. Odell*, 96

A.D.3d 449, 450 (1st Dept. 2012). Similarly, in New York, "the policy of the courts [is] to permit actions to be determined on their merits." *See Scott v. Allstate Ins. Co.*, 124 A.D.2d 481 (1st Dept. 1986) (granting motion to amend pleading in light of merits); *see also U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72 (2019); *Xu v JJW Enterprises, Inc.*, 149 A.D.3d 1146, 1147, 53 N.Y.S.3d 660, 661 (2nd Dept. 2017) (affirming order compelling acceptance of late answer).

On this appeal, the Defendant asserts without citation that a Court must consider the party's initial Complaint, and only its Complaint, in determining whether to grant a motion to amend or to conform the pleadings to the proof. *See* Initial Br. at 32-33. To the contrary, "[t]his Court has in the past recognized that, absent prejudice, courts are free to permit amendment even after trial." *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411, 23 N.E.3d 1008 (2014) (holding that the Appellate Division abused its discretion in reversing the trial court's grant of a motion to amend). C.P.L.R. 3025(c) explicitly authorizes the grant of a motion to amend to conform to the proof at the time of trial. The standard utilized by a trial court when passing on such an application, that "leave should be freely granted", is identical to the standard utilized in passing on a motion to amend a pleading under C.P.L.R. 3025(b). *See Loomis v. Corinno Corp.*, 54 N.Y.2d 18, 23 (1981). "The matter of allowing an amendment is committed 'almost entirely to the court's discretion to be determined on a *sui generis* basis', "the widest possible latitude"

being extended to the courts." *See Murray v. City of New York*, 43 N.Y.2d 400, 405–406, 401 N.Y.S.2d 773, 372 N.E.2d 560 (1977) (citations omitted).

Further, this Court has observed that where the amendment to a pleading merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation, amendment generally should be granted. *See Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 477 (1985) (observing that in such situations, a party likely has "collected and preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action" and permitting amendment to add new defendants who were united in interest with previously named defendants even after the statute of limitations had elapsed). Consistent with this judicial philosophy, "[t]he relation-back doctrine, now codified in CPLR 203(f), provides that '[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading.'" *O'Halloran v. Metropolitan Transp. Auth.*, 154 A.D.3d 83 (1st Dept. 2017).

A. Relation Back Is Presumptively Proper (And Therefore Was Proper Here) Where Facts Adduced At Trial Support An Additional Cause of Action

This case was never simply about whether the Plaintiffs had complied with the PSE. From the point in time when Plaintiffs were finally provided with

Defendant's underwriting file on April 28, 2016—four and a half years after the request was made--- to the time when Plaintiffs were able to take the deposition of Carol Muller on April 5, 2017, the applicability of the PSE had always been an issue. Indeed, Defendant itself put the PSE in issue when it asserted the PSE as its Fourth Affirmative Defense in the Answer to the Complaint in this matter. Because the enforceability of the PSE is directly connected to Defendant's affirmative defenses and Plaintiffs' responses thereto, it is simply disingenuous for Defendant to suggest that there is no relation between Defendant's alleged breach of contract based upon Defendant's failure to pay Plaintiff's covered claim due to an alleged violation of the PSE and the cause of action for reformation in which it is claimed that the same PSE was placed into the Subject Policy in error.

It is black letter law that "[i]n a case involving a provision of statute or of contract limiting the time within which suit must be commenced, the cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability." *See Abrams v. Maryland Casualty Co.*, 300 N.Y. 80 (1949) (affirming plaintiff's verdict to recover on contract, where complaint initially sought only reformation and thereafter was amended to include recovery on contract at trial); *see also Bernstein v. Remington Arms Co.*, 18 A.D.2d 910 (2nd Dept. 1963) ("an amended complaint based upon 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"). Where the "variance between the pleadings and the proof was not so great that the defendants could not reasonably have expected that such evidence would be adduced at trial," a court may properly permit amendment at trial. *See A-1 Check Cashing Serv. v Goodman*, 148 A.D.2d 482, 482 (1st Dept. 1989); *see also Guarino v. Mine Safety Appliances Co.*, 31 A.D.2d 255, 261 (2nd Dept. 1969) (permitting amendment to allow new theories of recovery because "[r]eason and fairness demand that the causes of action based on new theories of recovery relate back to the fundamental [causes of action], which were commenced prior to the expiration of the applicable limitations period.").

In *Abrams v. Maryland Casualty Co.*, *supra*, this Court sustained judgment against an insurer following the Trial Court's grant of a motion to amend the complaint from one for reformation to one for breach of contract. *See id.* The plaintiff therein had initially asserted a cause of action for reformation in the erroneous belief that she was not covered under the policy as an additional insured and therefore could not recover on a breach of contract theory. *See id.* at 84. Defendant there, like the Defendant here, claimed that the applicable period of limitations had run and that the new theory at law, rather than at equity, should be barred as untimely. *See id.* at 85. The Court of Appeals disagreed. *See id.* In the Court's opinion, the "cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability." At bar,

the legal obligation of Defendant remained constant-its liability to reimburse the Plaintiffs for the damages that it suffered. Furthermore, the quantum of damages associated with the loss was stipulated to by Defendant. *See* R. at 683-85 (discussing and stipulating to $2.4 million in damages). As a result, the amended theory of recovery never altered the nature or the quantum of damages Defendant owed to Plaintiffs. It is thus not surprising that Defendant has failed to effectively refute or rebut the holding or analysis employed by this Court more than 70 years ago.

Furthermore, New York case law historically has supported the proposition that reformation is properly granted as an amendment at trial where it is asserted in response to an affirmative defense by an insurer that the insured has failed to comply with a policy. *See Arthur v Homestead Fire Ins. Co.*, 33 Sickels 462, 78 N.Y. 462 (1879) (holding that where trial judge offered to permit plaintiff to amend complaint to assert cause of action for reformation at trial, "the evidence of mistake was proper . . . in reply to the claim of breach of warranty"). This is precisely the manner in which Plaintiffs proceeded, as the reformation was sought only in response to Defendant's Fourth Affirmative Defense that the Plaintiffs prior breach of the PSE and Defendant's assertion that it was not liable under the contract on that basis.

The case at bar also bears striking similarities to *Green v. Phoenix Ins. Co.*, 218 Iowa 1131 (1934), in which the plaintiff brought an action at law to enforce a contract of insurance. There, the defendant asserted an exclusion in the policy which

the plaintiff, as here, claimed should not have been included in the policy because the application clearly indicated that the insured property was in violation of the exclusion. *See id.* at 38. The Iowa Supreme Court affirmed that the trial court acted correctly in permitting the action to proceed on an equitable theory of reformation, notwithstanding the fact that the original action was for breach of contract, because "the right, if any, to reformation of the instrument, was an incident of its original cause of action, and inhered therein as a part of the ultimate remedy to which the plaintiff might be entitled." *See id.* at 42-43.

In an attempt to identify error down below by both the First Department and the Trial Court, Defendant asserts that the Appellate Division was confused as to the interaction of CPLR 3025(c) and CPLR 203(g). *See* Initial Brief at 39-43. This self-serving statement is disingenuous at best based upon the factual record as it relates to the pleadings at issue and the circumstances leading to Plaintiff's application to seek reformation when it did. Of course, one should not plead one case and then prove a completely unrelated case as to which only one party has secret knowledge. That is not what happened here. In this case, Plaintiffs were at least as surprised as Defendant – if not more so – when the Defendant's Vice President said for the first time on the witness stand at trial that the inclusion of PSE may have been a mistake. The revelation occurred as a result of questioning on issues that Defendant admits, even on this appeal, that Defendant knew would be raised at trial – specifically

estoppel and waiver. Can it really be the case that a defendant may conceal the fact that the underwriting file produced in connection with the Subject Policy is missing material documentation that should have existed if it was the intent of Defendant to issue the Policy with a PSE, only revealing same when confronted during an examination at trial, and then insist upon the application of a statute of limitation so as to foreclose Plaintiff's right to effectuate such a finding? Basic principles of fairness and equity counsel it should not, and this Court's rules and precedent supports the same the conclusion. Therefore, the First Department acted well within its discretion in affirming the Trial Court's decisions and the jury's verdict.

The Defendant's reliance on this Court's decision in *In re SCM Corp. (Fisher Park Lane Co.)*, 40 N.Y.2d 788, 390 N.Y.S.2d 398, 358 N.E.2d 1024 (1976), in an attempt to escape from this conundrum of its own making, is misplaced. In that case, in 1974, the plaintiff had asserted a claim for recovery of overpayment of rent against its landlord relating to a 1969 rent increase on an apartment that had been leased in 1966. *See id.* at 789. Shortly before the first hearing on the matter in January 1976, more than a decade after the contract was executed, the defendant landlord asserted for the first time a counterclaim seeking to reform the contract between them to change the terms relating to the tenant's liability for electricity expenses. *See id.* at 790. The Court noted specifically that the rules regarding an equitable defense – which a claim for reformation as asserted by Plaintiffs in this case would also be,

see infra at Point V - were inapplicable in that case because the defendant landlord's counterclaim was a separate and distinct claim in favor of the defendant landlord.

With this context in mind, the Appellate Division correctly observed that in that case, "the Court of Appeals held that the landlord's counterclaim for reformation of the lease could not be saved by CPLR 203 (c) from the applicable period of limitation, because the landlord's claim for reformation and the tenant's action to recover rental overpayments did not arise from the same transactions or occurrences." As this Court wrote when deciding *In re SCM Corp.*, a primary basis for this conclusion was predicated on the fact that the counterclaim did not relate to the issues raised by the parties' pleadings and that the plaintiff therefore had no notice of the defendant's intentions to raise any issue regarding a separate contractual provision completely unconnected to the pleadings. In contrast, the Appellate Division concluded that at bar, "as defendant concedes, plaintiffs have contended throughout this litigation that defendant waived or should be estopped from reliance on the PSE." *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *1 (1st Dept. Jan. 28, 2021). Moreover, as both the Trial Court and the Appellate Division observed, "the same evidence supporting the waiver claim also supports reformation." *See id.* This alone provides a sufficient basis on which to affirm the Appellate Division's decision.

Finally, the equities surrounding the nature of the document sought to be reformed must be taken into consideration when assessing the relationship between the pleading and the document sought to be reformed. In reaching its conclusion, the Court noted that the reformation sought by the Landlord was based upon the negotiation and articulation of the agreement made between the parties prior to its execution. *In re SCM Corp. (Fisher Park Lane Co.)*, 40 N.Y.2d 788, 792, 390 N.Y.S.2d 398, 358 N.E.2d 1024 (1976). At bar, the contract at issue was not one that was negotiated by the parties but rather was a form policy issued by an insurance carrier to its insured. Furthermore, at bar and as set forth herein, the basis of the reformation claim arose based upon the testimony of Defendant's Underwriter at trial as to the policy issued by Defendant to Plaintiff. Thus, this is a far different type of reformation than that of a party seeking reformation ten years after the creation of a document negotiated by both parties and which implicitly both sides were equal participants in creating.

B. Relation Back Is Proper Where Defendant Had Notice Of The Issues That Support The Amended Pleading

Notwithstanding the above, in its Initial Brief before the Appellate Division, Defendant observed the following regarding *Abrams*:

> Essentially, the Court of Appeals held that the claim in the amended complaint was essentially the same as the claim in the original complaint for Statute of Limitations purposes because both claims asserted that the employee of the truck driver who caused the accident was covered under the policy issued by

> defendant, which was at all times apprised of the nature of plaintiff's claim.

Defendant claimed that the instant case is different because it, Defendant, did not know that Plaintiffs disputed the enforceability of the PSE until Plaintiffs' motion to amend at trial. Oddly, Defendant's briefing before this Court fails to so much as mention *Abrams*, likely because the Defendant is aware that there is no principled distinction between the amendment permitted in *Abrams* and the amendment permitted in this case. In the same brief, Defendant admitted its knowledge that Plaintiffs claimed alternative compliance with the PSE or that the PSE was unenforceable as a matter of waiver or estoppel. Said differently, and in direct contrast to the argument that it now advances before this Court, the Defendant admitted that Plaintiffs have maintained from the start of this case that alternatively, either the PSE was unenforceable against Plaintiffs or that Plaintiffs were in compliance with the PSE's terms and conditions at the time of loss. A review of the record in this matter establishes this fact. *See*, *e.g.*, R. at 2461 (Defendant acknowledges that waiver had been asserted in Plaintiffs' motion for summary judgment on the Fourth Affirmative Defense and further "recognizes that the concepts of waiver and estoppel are closely related such that Seneca cannot claim surprise or prejudice by the Court's decision to submit the estoppel issue to the jury."). Indeed, Plaintiffs' request for and dogged pursuit of the Defendant's underwriting file would be entirely inexplicable if, as Defendant now claims,

Plaintiffs' only position in this matter was that they had complied with the PSE. *See* R. at 2683-2704. As the Trial Court observed, "for [Defendant] to sit here and say that waiver and estoppel was not part of this case . . . is absurd." See R. at 979.

Most tellingly, and notwithstanding any of the above, at the time of the initial motion practice before the Trial Court, wherein Defendant could have the articulated the need for additional discovery, it remained silent—foreclosing its rights to articulate same for the first time in front of this Court. *See* R. at 1006-23, 1298-1312. *McGovern v. Mount Pleasant Cent. School Dist.*, 25 N.Y.3d 1051 (2015).

In any event, Defendant's proposed conclusion ignores the Court of Appeals' statement that a "cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability." *See Abrams v. Maryland Cas. Co.*, 300 N.Y. 80, 86, 89 N.E.2d 235 (1949). The cause of action for reformation added by Plaintiffs at trial was used to support its contention that it was entitled to coverage under the Subject Policy for its losses on September 9, 2009. As the policy period has ended, a grant of reformation herein had no effect other than to enforce Defendant's obligation to pay for the loss that Plaintiffs indisputably have pursued from the initiation of this litigation. *See* R. at 1642. As such, the amendment relates back and the Trial Court's decision should be affirmed.

C. Defendant Neither Claimed Prejudice At Time Of Trial
Nor In Fact Suffered Any Prejudice As A Result Of Plaintiffs' Amendment

As noted *supra* at Point I, the Defendant in this matter has waived any right to assert prejudice in this matter by failing to timely raise it in opposition to Plaintiffs' motion to amend. When a plaintiff moves to amend its complaint, defendant bears the burden of proving that it was "hindered in the preparation of [its] case or ... prevented from taking some measure in support of [its] position." *See Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444, N.Y.S.2d 571, 429 N.E.2d 90 (1981). If the amendment is premised on evidence admitted at trial, "that burden cannot be met when the difference between the original pleading and the evidence results from "proof admitted at the instance or with the acquiescence of [the opposing] party." *See Lakshmi Grocery & Gas, Inc. v. GRJH, Inc.*, 138 A.D.3d 1290, 1292 (3rd Dept. 2016) *quoting Murray v. City of New York*, 43 N.Y.2d 400, 405, 372 N.E.2d 560 (1977).

At trial, the sole grounds on which the Defendant opposed the motion was the existence of the statute of limitations, with no other claims or requests for continuance to seek additional information placed before the Court. The Defendant likewise lacks any credible assertion of prejudice. In its post-trial brief, Defendant claimed for the first time that there was prejudice because the Defendant needed the depositions of several witnesses which it had itself identified previously as persons having knowledge of all relevant facts, including Mr. Guardino, the underwriter on

the policy who became incapacitated such that Plaintiffs' were unable to take his deposition as a result of the Defendant's four and a half year delay in responding to discovery demands, and the brokers who worked for Plaintiffs on the policy. *Compare* R. at 2459 *et seq. with* R. at 2438 (Guardino worked for Seneca until March 2013), R. at 2708 (Guardino became disabled as of November 2013). That theory having been soundly rejected by the Trial Court and the Appellate Division, the Defendant now asserts for the first time before this Court that the prejudice comes from having to defend against a new theory of liability, and that Defendant had no reason to know that the terms of the policy were at issue in this litigation. The lie of this claim appears from the facts: if the Defendant truly believed that the policy itself were not in issue, and that the terms therein had no bearing on this litigation, why did it identify its own underwriter, who issued the policy, and Plaintiffs' brokers, who obtained the policy on Plaintiffs' behalf, as persons having knowledge related to this claim as early as January 2013? *See* R. at 2735-39. Rather, the Defendant understood that the terms of its policy and how they got into the policy were at issue throughout this litigation. Defendant cannot conduct litigation as though issues were relevant and then feign surprise when those issues are addressed at trial.

Defendant also claims that prejudice could not have been avoided once the issue of reformation was raised at trial – an interesting argument given that the jury was demonstrably out of the room when Plaintiffs made their motion to amend.

Compare R. at 1004 (court expressing desire to bring jury back), R. at 1011 (court speaking with bailiff regarding status of jury), R. at 1028 (jury entering) *with* R. at 1006 *et seq.* (Plaintiffs move for leave to amend); *see also* R. at 1298 *et seq.* (discussion of motion to amend during charge conference). Rather, the Defendant at that time chose not to raise the issue of prejudice, likely because it knew that as described *supra* it had not suffered an such prejudice. The untimely assertion of a hypothetical prejudice does not meet the Defendant's burden to oppose the grant of a motion to amend, which the Appellate Division and the Trial Court in their discretion correctly permitted.

D. Plaintiffs Lacked All Relevant Facts And Could Not Amend Prior To Trial

Before this Court, for the first time, Defendant contends vigorously that Plaintiffs had knowledge of all facts relevant to assert a cause of action for reformation at the time of the initial complaint because Plaintiffs knew that they did not intend to have a Protective Safeguard Endorsement in the policy of insurance and communicated that to their insurance broker prior to the issuance of the policy. Defendant's efforts to cast aspersion on Mr. Malik's testimony, which clearly was credited and believed by the jury in light of the verdict in Plaintiffs' favor, have no place in this Court's consideration. *See*, *e.g.*, *L. Smirlock Realty Corp. v Title Guar. Co.,* 63 N.Y.2d 955, 473 N.E.2d 234 (1984) (observing that a trial court's findings of fact, when affirmed by the Appellate Division, are beyond the purview of the

Court of Appeals). More to the point, Defendant's position evidences a clear lack of understanding of the elements of a claim for reformation, which specifically demands a mutual mistake or allegations of fraud, which must be pleaded with particularity. *See 313-315 West 125th Street L.L.C. v. Arch Specialty Ins. Co.*, 138 A.D.3d 601, 602, 30 N.Y.S.3d 74 (1st Dept. 2016) (observing that reformation is proper only where there is proof of a mutual mistake or fraud). "To succeed, the party asserting mutual mistake must establish by "clear, positive and convincing evidence" that the agreement does not accurately express the parties' intentions or previous oral agreement." *See id.* (citations omitted). This in fact is how the Trial Court charged the jury. *See* R. at 1537 et seq.; R. at 1544-46.

The knowledge identified by Defendant shows at best a unilateral mistake – in other words, nothing which could in good faith support a claim for recission that would be appear to be more than a fishing expedition. It was only at trial that Plaintiffs gained the knowledge that Defendant also did not intend to include a Protective Safeguard Endorsement, as part of testimony which supported the Plaintiffs' assertion that the Protective Safeguard Endorsement was unenforceable as a matter of equity. Under the rule proposed by the Defendant, any plaintiff hereafter would have an obligation to assert even those related claims that it believes in good faith cannot be substantiated at the time of the initial pleading in order to avoid forfeiting a meritorious claim. Such a rule not only has no basis in current

law, which expressly permits amendment for related claims to surpass the statute of limitations in the ordinary course under the relation-back doctrine, *see* CPLR 203(f), but would also dramatically increase the number of claims in the average case by forcing plaintiffs to take a kitchen sink, belt-and-suspenders approach to their pleadings.

E. Defendant's Failure to Timely Comply With Discovery Demands Estops It From Claiming That Plaintiffs Should Have Asserted A Cause For Reformation Earlier And Is Now Time Barred From Doing So

The delay in the discovery process clearly weighed on the Trial Court, particularly in light of the admission at trial that notwithstanding Defendant's explicit representation in 2016 that it had produced its full and unredacted underwriting file, Defendant had in fact failed to do so. *Compare* R. at 2705 ("This is the complete and unredacted underwriting file.") *with* R. at 978 *et seq.* (discussing discovered document). Indeed, Ms. Muller retrieved literally overnight a page allegedly helpful to Defendant which had been purportedly produced in a redacted form as a purely blank page without any indication of redaction years earlier. *See* R. at 985. The Trial Court observed that the document was relevant to the question of waiver and estoppel, both of which the Defendant has acknowledged were always part of the case, and should have been produced as a document likely to lead to admissible evidence in this case. *See* R. at 982 ("It doesn't matter about it being in or not. It goes to waiver. It should have been produced."). The Trial Court thus

correctly concluded that having delayed the case for over five years, Defendant had no right to complain about the timing of the amendment vis-à-vis the statute of limitations. *See* R. at 30.

"To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *See Glus v. Brooklyn East. Term.,* 359 U.S. 231, 232-33, 79 S.Ct. 760, 762 (1959); *see also General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125 (1966) ("Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay . . . ."). Estoppel "operates to bar a party from asserting the Statute of Limitations when that party's own wrongful concealment has engendered the delay in prosecution." *See Matter of Steyer*, 70 N.Y.2d 990, 992-93, 521 N.E.2d 429, 430 (1988).

Consequently, a defendant may be equitably estopped from asserting a statute of limitations defense where the delay is caused by the defendant's failure to produce records within the defendant's possession that would have indicated the existence of the cause of action to plaintiff if timely produced. *See Kamruddin v. Desmond*, 293 A.D.2d 714, 715-16 (2nd Dept. 2002) (affirming trial court's decision that defendant

estopped from asserting statute of limitations); *see also Arbutina v. Bahuleyan*, 75 A.D.2d 84 (1980); see also *Drake v. Laboratory Corp. of America Holdings*, No. 02-cv-1924 (FB)(RML), 2007 WL 776818, *8 (E.D.N.Y. Mar. 13, 2007) (denying motion to dismiss on statute of limitations grounds despite eight-year delay in filing cause of action because defendant ignored plaintiff's requests for information, thereby concealing relevant information, until ordered to provide same). It was not until Plaintiffs had the file and took the deposition of the available underwriter with respect to this file on April 5, 2017 that Plaintiffs would have been able to initially determine the existence of a reformation claim.

Furthermore, a review of the Record indicates that Defendant knew or should have known years ago that its underwriting file reflected the fact that Defendant had never intended to issue a PSE in connection with Plaintiffs' policy. During Ms. Muller's examination at trial by Plaintiff, she identified the two documents that would be in the underwriting file that would have evidenced the carrier's intent to have issued a PSE with Plaintiffs' policy. *See* R. at 855-59. Counsel for Plaintiff asked the witness, with the 800-page underwriting file in front of her, to go through the file and locate these documents. *See* R. at 801-03. Ms. Muller admitted that they were not there—supporting the inference that she knew about the non-existence of these documents before she took the witness stand and explaining why she did not attempt to search the file to find them. *See* R. at 801-03; 855-59. Furthermore, prior

to her testimony, she spent approximately two hours with counsel for Defendant preparing for her testimony. *See* R. at 582-87. Finally, after Ms. Muller made these admissions, counsel for Defendant, during re-cross examination, did little to soften the effects of or sought to explain her testimony. *See* R. at 837 *et seq.*; R. at 859-60. All of the above, leads to the inescapable inference that Defendant knew that the PSE was issued to Plaintiffs in mistake—yet at no time did Defendant, as the insurance carrier for these Plaintiffs, ever see fit to acknowledge this to its insured.

An insurance policy, as with every other contract issued in the State of New York, requires that the parties act in a manner to each other consistent with the principles of "good faith and fair dealing." *See New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318, 662 N.E.2d 763 (1995) ("implicit in every contract is a covenant of good faith and fair dealing"). One cannot imagine a more fundamental application of this principle than a carrier, upon a proper investigation, admitting to its insured that it had issued a policy endorsement in error—irrespective of its consequences. Defendant, at bar, failed to adhere to this basic tenant and now seeks to double down and exacerbate its conduct by seeking to use it as a sword in order to deprive Plaintiffs of the recovery the jury and the Trial Court has determined that it is owed.

The decision of the Trial Court, as affirmed by the Appellate Division, incorporated aspects of both a motion to amend and a sanction for Defendant's four-

and-a-half year long refusal to comply with its discovery obligations, the absence of which could have resulted in a trial prior to the running of the statute of limitations. The Trial Court and the Appellate Division both clearly considered the question of the statute of limitations when reaching their decision to grant the motion to amend, thus indicating that all relevant factors were considered in reaching the decision to grant the motion to amend. More to the point, the Court also considered the discovery violation that was ongoing at the time of trial, insofar as Defendant had failed to disclose that documents which should have been in the file had not been produced. Plaintiffs' demand for discovery and inspection unambiguously called for the Defendant to provide its complete underwriting file, a production that the Defendant affirmatively represented had been made and was complete years prior to trial but which it asserted at trial was not in fact complete, claiming it had taken a very short amount of time for the Defendant to locate the purportedly missing document. *See* R. at 985. This is a violation of the rules of discovery, subject to sanction up to and including the entry of judgment against the Defendant. *See* CPLR 3124; CPLR 3126. Absent an abuse of discretion by the Trial Court in precluding the Defendant from raising a statute of limitations defense to Plaintiffs' request to add a cause of action for reformation, which Defendant has not and cannot show, there is no basis to disturb the existing decision.

POINT IV

ANY ERROR WAS HARMLESS BECAUSE THE QUESTION OF REFORMATION WAS PROPERLY BEFORE THE JURY EVEN WITHOUT THE AMENDMENT OF THE PLEADINGS

Notwithstanding the foregoing, to the extent that this Court concludes that the Trial Court erred in granting the motion to amend, this Court should nevertheless deny the relief sought by Defendant on this appeal because the alleged error would be deemed to be harmless. As a matter of practice, this Court refuses to disturb trial level verdicts, and in particular jury verdicts, where the appealing party suffered no harm as a result of the alleged error. *See Helfhat v. Whitehouse*, 258 N.Y. 274 (1932) ("Where it appears that the trial has been adequate for the presentation of all relevant testimony, technicalities may be disregarded. The courts are administered to promote the search for the truth; when that is accomplished, all else may be immaterial."); *see also Lounsbury v. Purdy*, 4 E.P. Smith 515 (1859) ("At any time, before or after judgment, the court may amend the pleadings "by inserting other allegations material to the case," "or by conforming them to the facts proved," where the amendment does change substantially the claim or defence. . . . The proper amendment would conform the pleading to the facts, but would not, in substance, "change the nature of the claim.".").

The Appellate Division correctly recognized that Plaintiffs-Respondents' "reformation claim is responsive to defendant's fourth affirmative defense." *See 34-*

06 73, LLC et al. v. Seneca Insurance Company, 190 A.D.3d 628, 2021 WL 278280 at *2 (1st Dept. Jan. 28, 2021), *citing Arthur v Homestead Fire Ins. Co.*, 78 N.Y. 462, 466-467, 469 (1879) (concluding that following the joining of the law and equity systems, the plaintiff was entitled as a matter of law to "the benefit of every possible answer to the [affirmative] defense" without further pleading, provided that such answer be proved by evidence). In *Arthur v. Homestead Fire Ins. Co.*, 33 Sickels 462, 78 N.Y. 462 (1879), this Court deemed an amendment of a pleading to add a cause of action for reformation at trial proper because "the evidence of mistake was proper . . . in reply to the claim of breach of warranty." *See id.* Defendant-Appellant placed the PSE in issue via its affirmative defenses to Plaintiffs-Respondents' Complaint, and under the clear precedent of this Court, Plaintiffs-Respondents were entitled to all defenses to this assertion, including without limitation the equitable defense of reformation. See *Arthur v. Homestead Fire Ins. Co.*, *supra*; *see also Susquehanna S.S. Co. v. A.O. Andersen & Co.*, 239 N.Y. 285 (1925) (observing that reformation can be both a claim and an equitable defense). This makes sense, as Defendant's complaints about needing to predict Plaintiffs' theories notwithstanding, *see* Initial Brief at 42-43, in general, a defendant bears the burden of proof as to its affirmative defenses. *See Wechsler v. Bowman*, 285 N.Y. 284, 295, 34 N.E.2d 322 (1941). Indeed, there is no mechanism by which a plaintiff must formally provide its responses to the defendant's affirmative defenses,

including without limitation a defense of prior breach of contract. This may suggest an infirmity with the rules of civil procedure, but this Court must make its determination on the rules as they existed at the time of trial, not as any party would prefer them to be written or in the manner that might be most ideal. Thus, even if the motion to amend the Complaint had not been granted, the question of reformation was properly set before the jury. Similarly, at bar and as discussed *supra* at point I.C, Defendant suffered no prejudice as a result of the granting of the motion to amend, and is not entitled to a new trial to give it a second attempt to prove its affirmative defense. The judgment of the Trial Court therefore should be affirmed.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully requests that the judgment of the Trial Court be affirmed in all respects, and for such other and further relief as the Court may find just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: March 9, 2022

WEG AND MYERS, P.C.