SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION – THIRD DEPARTMENT

APPELLATE ADVOCATES Petitioner-Appellant, v. NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION Respondent-Respondent.	Docket No. 531737

REPLY BRIEF OF PETITIONER-APPELLANT

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Supreme Court, Albany County, Index No. 907522/2019

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PRELIMINARY STATEMENT

The issue presented by this case before the Court is whether government attorneys can withhold in-house training materials provided to the Board of Parole ("BOP") that did not reveal confidential facts and were unrelated to any specific matter. The Department of Corrections and Community Supervision ("DOCCS" or "Respondent") took the position that the attorney-client privilege shields from disclosure requests for attorney-drafted training materials made through the Freedom of Information Law ("FOIL"), regardless of content. Respondent also asserted the documents are deliberative and exempt from FOIL even though they do not point to a specific matter pending before the BOP. For the reasons set forth in the main brief of Petitioner-Appellant Appellate Advocates ("Petitioner"), and those discussed below, absent the ability to now assert attorney work product here, Respondent should not be allowed to withhold from the public any and all attorney-drafted training materials without limitation and the Court should compel disclosure.

QUESTIONS PRESENTED ON APPEAL

1. Whether the lower court erred as a matter of law in considering Respondent's argument under CPLR 3101(c) in response to the Article 78 Petition when Respondent failed to raise that argument during the underlying administrative proceeding.

2. Whether the lower court applied the wrong legal standard for the attorney-client privilege by protecting materials unilaterally provided by agency counsel to agency personnel that were not based on confidential information and instead were general training materials unrelated to any specific matter.

3. Whether the lower court erred in finding that the withheld materials were exempt from disclosure as intra-agency materials when it failed to require

Respondent to show that said materials were neither final agency policy nor general instructions to BOP staff that affect the public.

4. Whether a party seeking disclosure of materials that were withheld without a reasonable basis was entitled to recover attorneys' fees from the agency for the ensuing litigation upon prevailing on appeal.

ARGUMENT

At the outset, it is important to note Respondent conceded that the court below made an error of law in ruling that the documents in this action could be withheld from the Petitioner pursuant to CPLR 3101(c). (Brief of Petitioner-Appellant ("Petitioner Br.") at 7-9); (Brief for Respondent ("Respondent Br.") at 11 n.3). At minimum, therefore, the Court should reverse the finding of the lower court regarding attorney work product, regardless of whether that exemption may, under a different administrative record, have been the appropriate way to withhold attorney-drafted documents. As to the remaining issues, Respondent failed to address whether the court below made an error of law by (1) not articulating the correct legal standard to examine an assertion of attorney-client privilege under CPLR 4503(a) and the intra-agency exemption under Pub. Off. Law ("POL") § 87(2)(g), (2) failing to acknowledge or consider the public policy factor that limits CPLR 4503(a), and (3) failing to acknowledge and consider the exceptions to the intra-agency exception under POL § 87(2)(g)(ii) and (iii).[1] Instead, Respondent having provided this Court with the documents for an *in camera* review, argued the

[1] Through Respondent's silence in its Response Brief regarding the fourth question presented by Petitioner, Respondent also concedes that should this Court find that one or more of the eleven documents at issue should be disclosed, Petitioner would be entitled to the attorney's fees associated with pursuing those disclosures through this proceeding.

records should be withheld under the correct standards of law that the court below failed to consider. Essentially, Respondent is asking this Court for a *de novo* review of the documents, which means that the burden of proving the applicability of either the attorney-client privilege or the intra agency exemption once again rests with Respondent. Because the court below applied the incorrect legal standard, the Court should reverse and remand for further proceedings. Alternatively, the Court should perform an *in camera* inspection of the documents, and for the reasons stated here and in Petitioner's main brief, reverse and order that the documents be produced.

I. RESPONDENT HAS FAILED TO SHOW WHY THE TRAINING MATERIALS SHOULD BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

Respondent mistakenly tried to frame Appellant's argument as seeking an exception to the attorney-client privilege. (Respondent Br. at 14). But Respondent's argument fails to recognize that the burden of establishing the attorney-client privilege rests with the person asserting its protection. See Matter of Priest v. Hennessy, 51 N.Y.2d 62, 69 (1980). That is, the issue is not whether Petitioner can show that an exception to privilege exists here, but rather whether Respondent can show that the scope of the privilege protects the documents in the first instance. This is especially important because, as the Court of Appeals has noted, the attorney-client privilege "is not limitless" and it "constitutes an 'obstacle' to the truth finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose." Id. at 68

(quoting Matter of Jacqueline F., 47 N.Y.2d 215 (1979)); see also In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984) (noting privilege must "be strictly confined within the narrowest possible limits consistent with the logic of its principle")(citing 8 J. Wigmore, Evidence § 2291, at 554 (McNaughton rev. ed. 1961)). Indeed, "the need to apply [the privilege] cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure." Rossi v. Blue Cross & Blue Shield of Greater N.Y., 73 N.Y.2d 588, 593 (1989).

The purpose behind the attorney-client privilege is "to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment." Priest, 51 N.Y.2d at 67–68. Respondent has made no showing that disclosure of these training materials would frustrate this purpose. As these documents do not purport to reflect statements by BOP Commissioners in seeking legal advice from the Office of Counsel, and the documents do not appear to reflect counsel's opinion on any specific matter the BOP faces, disclosing them cannot chill requests for legal advice by the Commissioners in the future and cannot reveal strategies to a particular matter the BOP is currently facing or will soon face.

A. Training Materials Are Not Legal Advice.

While Petitioner has shown that courts have found that the privilege does not cover in-house training materials, (Petitioner Br. at 14-16, 24), Respondent focuses

on a single Southern District of New York decision supposedly to the contrary. (Respondent Br. at 15). Respondent's reliance on Valassis Commc'ns, Inc. v. News Corp. is misplaced. In that case "[b]oth parties agree[d] that training materials and policy documents can amount to legal advice protected by the attorney-client privilege" and the only remaining issue was determining whether the privilege was waived by disclosure of the documents to certain employees of the corporation. No. 17-CV-7378 (PKC), 2018 WL 4489285, at *3 (S.D.N.Y. Sept. 19, 2018). Here, there is no such agreement between the parties and the issue before the Court is the scope of the privilege as a matter of law, not whether it was waived.

Respondent also failed to distinguish the cases cited by Petitioner. In Amadei v. Nielsen, the materials at issue made specific recommendations, informing CBP officials about the laws governing their actions, while the records here involve general training materials to the BOP about the "breadth of its discretion and authority." (Respondent Br. at 15); Amadei v. Nielsen, 17-CV-5967, 2019 WL 8165492, at *7 (E.D.N.Y. Apr. 17, 2019). In both instances the fact that agency personnel must "apply legal standards and need to act within the law is not attorney-client information." Amadei, 2019 WL 8165492 at *8; cf. Cmty. Television of S. Cal. v. Gottfried, 459 U.S. 498, 515–516 (1983) ("[H]owever broad an administrative agency's discretion in implementing a regulatory scheme may be, the agency may not ignore a relevant Act of Congress. . . . [T]he agency cannot simply 'close its eyes' to the existence of the statute." (citation omitted)); Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("[A]n agency is not free simply to

disregard statutory responsibilities. . . ."); see also A.C.L.U. of San Diego & Imperial Ctys. v. United States Dep't of Homeland Sec., No. 8:15-cv-00229, 2017 WL 9500949, at *11 (C.D. Cal. Nov. 6, 2017) (refusing to find privilege existed for training materials because "the Government has not demonstrated that the document contains any fact-specific legal advice").

Additionally, Respondent's inclusion of the transcript from Flores v. Stanford, 18-cv-2468 (S.D.N.Y.), should be disregarded. First, the Flores court relied on Valassis in the same flawed way as Respondent—by overlooking that the parties in Valassis already agreed the training materials were privileged. (Transcript of Oral Argument, Flores v. Stanford, 18-cv-2468 (No. 176) ("Flores Tr.") at 53). Second, it appears that facts outside the record of this case were asserted to support defendant's position in that case. (Flores Tr. at 54) (reflecting an assertion that counsel was solicited to prepare the documents in question, which is not part of the record here). Third, the court in Flores improperly shifted the burden, away from requiring the defendant to prove the documents were privileged, to requiring the plaintiffs to prove that they are not. (Flores Tr. at 54 lines 9-10, at 55 lines 5-8). Fourth, public policy favoring disclosure under FOIL was not considered because the case involved federal discovery rules, not a FOIL request. Finally, to the extent that the magistrate in Flores relied on the decision being appealed here, it would be circular reasoning to now affirm the court below because another court relied on its contested findings. (Flores Tr. at 52).

Respondent also conceives the attorney-client privilege as broader than it is. (Respondent Br. at 16). Merely citing to the language of CPLR 4503(a) to make

such a claim is not sufficient, however, as when defining "what is encompassed by the privilege, courts still must look to the common law." Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 377 (1991). Additionally, the distinction Respondent tries to point to between a narrow or broad version of privilege is immaterial here. Respondent is focused on whether privilege applies to advice whose underlying facts were not supplied by the client. (Respondent Br. at 16). The court in Spectrum indeed noted that when asserting privilege for a communication from counsel to client, the asserting party did not have to show the source of the confidential facts. See Spectrum, 78 N.Y.2d at 379. The court did not, however, resolve the question of whether privilege covers training materials that do not rely on any confidential facts, but merely provide case summaries and general information about the law.

Respondent attempted to distinguish, Matter of Charles v. Abrams, the only case in New York that either party identified dealing with the privilege for documents that do not reflect any confidential facts, by focusing on the lack of an attorney-client relationship in that case. 199 A.D.2d 652 (3d Dep't 1993); (Respondent Br. at 18). That narrow reading misses the analysis the Charles court was conducting in accordance with the guiding principles laid out in Priest.[2]

[2] The guiding principles being that in assessing a claim of attorney-client privilege, a court must make sure that (1) an attorney-client relationship was established, (2) the information was confidential and communicated for the purpose of obtaining legal advice or services, (3) the burden of proving each element of the privilege rests upon the asserting party, and (4) even where the technical requirements are met the privilege may yield to strong public policy requiring disclosure. See Priest, 51 N.Y.2d at 69.

Charles, 199 A.D.2d at 653; Priest, 51 N.Y.2d at 69. Respondent's reading of Charles ignores the Court's discussion regarding the second guiding principle of Priest—asking whether there was legal advice. Priest, 51 N.Y.2d at 69. As the Court explained in Charles, what was outcome determinative for the second prong was that:

> the documents at issue herein do not concern a particular lawsuit which is either pending or imminent. Rather, the documents contain the agency's final policy, which is to be applied to all litigation in general. Although the policy is to be implemented within the context of litigation, it was promulgated without regard to any particular or specific litigation and the policy exists regardless of whether there is any pending or imminent litigation. The purpose of the policy is not to facilitate the rendition of legal advice or services. . . .

Charles, 199 A.D.2d at 653. That is, in addition to no attorney-client relationship, the claim of privilege was meritless as the documents were not legal advice because, like here, they contained general legal information regarding all litigation the agency faced.

Similarly, Respondent's claim that the documents should be protected by the privilege because issues related to the subject matter of the documents have been and continue to be the subject of litigation is irrelevant. (Respondent Brief p. 19). Every choice made by the agency is subject to potential litigation. What is material is whether the documents reveal confidential information specific to a particular litigation, potential liability, or action that the agency is considering. If, following the Court's *in camera* review, it finds, following Charles, the documents are not tailored to a specific parole matter before the BOP, but rather instruct BOP

members on how to handle matters before the BOP at a categorical level, the Court should order disclosure of the training materials.

Moreover, the record contains no evidence that any of the withheld documents contain confidential facts. Absent such facts, the Court need not be concerned about the "practical difficulties" of separating client confidences from disclosable information. Spectrum, 78 N.Y.2d at 379. Instead, the Court must focus on whether summaries of general legal principles for training purposes, absent any confidential information, merits protection. The federal courts have provided helpful guidance in this regard. In Coastal States Gas Corp. v. Dep't of Energy, the U.S. Court of Appeals for the D.C. Circuit considered memoranda from agency counsel which were issued in response to requests for interpretations of regulations within the context of non-confidential facts encountered by auditors. 617 F.2d 854, 858 (D.C. Cir. 1980). The court rejected the agency's claim of privilege because it recognized that the purpose of promoting frank communication with one's attorney is not damaged by disclosing information that would have been shared regardless of whether the privilege existed. Id. at 862-63. The court therefore concluded that it should not extend the privilege to memoranda that were "neutral, objective analyses of agency regulations" resembling "question and answer guidelines which might be found in an agency manual." Id. at 863. The documents at issue here were also part of in-house counsel's routine obligation to make sure that the BOP Commissioners are aware of the law that governs them. There is no evidence in the record that counsel prepared the training materials on the assumption that they were protected by the privilege.

Indeed, courts have routinely concluded that legal compliance manuals prepared by in-house counsel are not privileged. In In re Sulfuric Acid Antitrust Litig., the court concluded that most of a manual was not privileged because it did not reveal client confidences, only articulated the company's policies, and provided an overview of antitrust law in various jurisdictions. 235 F.R.D. 407, 431 (N.D.Ill. 2006). The court later also considered hypotheticals in the manual that were created by counsel to assist employees in better understanding antitrust law. In re Sulfuric Acid Antitrust Litig., 432 F. Supp. 2d 794, 796 (N.D.Ill. 2006). The court concluded that the hypotheticals were not privileged because they were "instructional devices, not responses to requests for legal advice" and were not reflections of actual scenarios involving the client. Id. at 796–97; see also Hartford Life Ins. Co. v. Bank of Am. Corp., No. 06–3805, 2007 WL 2398824, at *6 (S.D.N.Y. Aug. 21, 2007) (finding privilege should not extend to documents containing "only highly generalized guide-lines" and "no specific factual information."); A.C.L.U. of San Diego and Imperial Cntys. v. U.S. Dep't of Homeland Sec, No. 8:15-cv-00229, 2017 WL 9500949, at *11 (C.D. Cal. Nov. 6, 2017) (holding that agency training materials were not privileged but were rather general-purpose legal manuals that incorporated examples from case law).

Respondent failed to recognize that rather than involving protected attorney-client communication, the training materials represented non-privileged agency policy. In Tax Analysts v. IRS, the court found that agency counsel created "agency law" by issuing legal memoranda interpreting tax laws that agency personnel routinely applied when performing their duties. 117 F.3d 607, 619 (D.C.

Cir. 1997). The court explained that "the attorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public." Id. Similarly, the training materials provided to BOP Commissioners in this case included counsel's summaries of relevant statutory amendments and case law, in effect creating working agency law and policy that the attorney-client privilege does not protect. (R. 162); see Tax Analysts, 117 F.3d at 619.

B. Public Policy Strongly Disfavors Shielding Training Materials Through the Attorney Client Privilege.

Respondent did not disagree with Petitioner that the court below made an error of law by failing to consider the fourth guiding principle of Priest—that "even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure." Matter of Priest v. Hennessy, 51 N.Y.2d at 68–69. Respondent instead over-emphasized the need of government agents to freely communicate with their attorneys to make sure they are complying with the law. (Respondent Br. at 19-20). This argument overlooks the fact that knowing how the agency interprets its obligations under the law will assist the public in knowing whether government agents are properly complying with the law.

Furthermore, Respondent's characterization that Petitioner "discounts the value of the attorney-client privilege as applied to government officials" is an oversimplification of the issue before the Court. Id. Neither Petitioner nor Amici Curiae aver that the privilege has no role in the governmental attorney context. Obviously, the privilege is important to encourage communication between

attorneys and their clients. What is at issue is the scope of the privilege, namely, whether it extends to general legal training materials. To be clear, the documents at issue in this case are not drafts being sent back and forth to be finalized and then distributed, nor are they minutes of conversations between agency personnel and their attorneys. Instead, these documents are finalized versions of materials that provide agency personnel a how-to guide to comply with the law while conducting their jobs. The public is entitled to see how the BOP Commissioners are trained at this abstract level, which would not chill frank discussion between counsel and the BOP about specific parole hearings or appeals. Importantly, this is only an issue because while other governmental agencies in New York disseminate similar materials on their websites, the BOP withholds its training materials. (Petitioner Br. at 17).

Respondent made no effort to address the public policy underlying the FOIL statute that would be frustrated by the continued withholding of the training materials. "That act, of course, proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979); Town of Waterford v. N.Y. State Dep't of Envtl. Conservation, 18 N.Y.3d 652, 657 (2012) (quoting Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 N.Y.2d 246, 252 (1987)). Allowing privilege to shield training documents that do not reveal BOP confidential communications, and would not cause embarrassment if shared, runs counter to FOIL's intent to narrowly construe exempted documents so that the public "is granted maximum access to the records of government." Town

of Waterford 18 N.Y.3d at 657. Without disclosure of these documents, potential parolees cannot fairly or adequately defend their rights to life, liberty, and due process, having to return to incarceration, while the BOP avoids transparency, applying secret agency law and policy.

Additionally, allowing privilege to protect such documents may have the negative effect of incentivizing agencies to withhold all training records from public inspection. As there is no likelihood that the BOP would be chilled from communicating with counsel regarding sensitive matters in the future if these documents are revealed, and there are strong public policies favoring disclosure of the training materials, including knowing how the BOP believes it should comply with the law when conducting hearing and appeals, this Court should not allow the requested records to be shielded by the attorney-client privilege.

II. RESPONDENT HAS NOT SHOWN THAT THE DOCUMENTS CAN BE WITHHELD AS INTRA-AGENCY MATERIALS.

Although Respondent argued that the intra-agency exemption of POL § 87(2)(g) is an alternative ground to withhold the documents at issue, Respondent did not contest, and therefore conceded, Petitioner's argument that the court below committed an error of law by not considering the limitations set forth in POL § 87(2)(g)(ii) & (iii). Instead, Respondent contended that these limitations do not apply here. Not only did Respondent fail to address the case law cited by Petitioner, but Respondent contended, without citation to any authority, that the Board of Parole should not be considered "staff" for purposes of FOIL, that the

documents are not instructions, and that the documents do not reflect agency law. Each of those claims should be rejected by this court.

A. The Board of Parole is Subject to the Same FOIL Provisions as the Rest of DOCCS Staff.

Without citing to any case law, Respondent argued that "the Commissioners are not agency 'staff' with respect to parole decision-making." (Respondent Br. at 23). Executive Law § 259-c does not support Respondent's argument as it does not define who amounts to "staff" at the BOP. Another part of the BOP's enabling statute does, however, state that "administrative matters of general applicability within [DOCCS] shall be applicable to the [BOP]." Exec. Law § 259-b. BOP members are thus treated like all other staff at least when it comes to administrative matters within DOCCS.

Additionally, while the term "staff" is not defined by the FOIL statute, in determining whether the word is meant to encompass all personnel at the agency, including BOP Commissioners, this Court "may indulge in a departure from [a] literal construction and [] sustain the legislative intention." Stat. Law § 111. When "the intention can be disclosed from the statute, words may be modified or altered so as to obviate all inconsistency with such intention." Schmidt v. Wolf Contracting Co., 269 A.D. 201, 203 (3d Dep't 1945), aff'd, 295 N.Y. 748 (1946). The Court of Appeals has made clear that the intent of FOIL is to provide as much transparency as possible and that the statute is therefore to be liberally construed in favor of disclosure of documents. Washington Post Co. v. N.Y. State Ins. Dep't, 61 N.Y.2d 557, 564 (1984); Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462 (2007).

Likewise, the exemptions to FOIL "are to be narrowly interpreted so that the public is granted maximum access to the records of government." Data Tree, 9 N.Y.3d at 462 (citing Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 N.Y.2d 246, 252 (1987)). The word "staff" in POL § 87(2)(g)(ii) should therefore be given a broad definition so that it assists in giving POL § 87(2)(g) a narrow scope. Reading it otherwise would forever remove public access to all instructions given to BOP Commissioners, whether or not the documents were drafted by attorneys.

Respondent's contention that the documents should not be viewed as instructions because they "do not command a single course of action" is also meritless. (Respondent Br. at 23). As Respondent literary states regarding at least ten of the eleven documents, each is a "how to" guide to BOP members about fulfilling aspects of their duties and not about a specific decision that the BOP is considering. (Respondent Br. at 7-8, 15, 24). That means that although the documents may discuss options available to BOP members, the documents as a whole are instructions on how to make a decision, not a predecisional conversation regarding what policy or ruling should be made. See Stokes v. Brennan, 476 F.2d 699, 700, 704 (5th Cir. 1973) (recognizing that instructor and student manuals, training slides, training films, visual aids, and other training materials are "established policy designed to be utilized as an educational and reference tool, not for policy-making or deliberative purposes"). Respondent acknowledges that the documents in question are, at least partially, instructions on how to apply statutes, regulations, and new court decisions. (See Respondent Br. 6-7). If the documents

do not discuss a specific hearing or appeal pending before the BOP and are meant to be applied to all BOP decisions, they are instruction about the duties of the BOP that are subject to disclosure under FOIL. See N.Y.C.L.U. v. Erie Cnty. Sheriff's Off., 47 Misc. 3d 1201(A), 2015 N.Y. Slip Op. 50353(U) (Sup. Ct. Erie Cnty. 2015) (finding that memorandum regarding record keeping and data handling obligations were instructions to staff that affected the public, and thus subject to FOIL disclosure).

B. Respondent Failed to Show that the Documents Were Deliberative to a Particular Decision Before the BOP and Not the Standing Policy of the BOP.

Respondent also argued that the documents do not reflect final agency policy because they provide options rather than a specific path the agency must follow. This ignores that "[m]atters are different in the governmental context, when the counsel rendering the legal opinion in effect is making law." Tax Analysts v. I.R.S., 117 F.3d 607, 619 (D.C. Cir. 1997). The enabling statues of the BOP make clear that its role is to make decisions in the application of the law to specific hearing and appeals. See Exec. Law 259-c. The BOP is not empowered to make its own interpretation separate from agency counsel regarding its legal obligations. Respondent also does not contend that the documents reflect the give and take of a deliberative process. If these documents explain to the BOP how it may comply with the law generally, they are the final policy on the matter for the BOP. Tax Analysts, 117 F.3d at 619; (Brief of Amicus Curiae Reinvent Albany and N.Y. Coal. for Open Gov't, Inc. in Support of Petitioner-Appellant at 6-9).

Additionally, Respondent's arguments to withhold the documents continues to ignore the burden placed on Respondent. To the extent that the documents only reflect options available to the BOP, respondent needed to establish sufficient facts to show that these documents were part of a deliberative process and not the final position on a matter. This is especially important here where, based on the descriptions provided in the record, the documents are not about any specific matter pending before the board from which the Court could easily judge whether the BOP chose to adopt or ignore the guidance in the documents. Because the documents pertained to matters at a categorical level and were of a general scope, Respondent needed to establish that Respondent never implemented the opinions or analyses contained in the documents, never incorporated them into policies or programs, never referred to them in a precedential fashion, and never otherwise treated them as if they constitute agency protocol. Alternatively, Respondent could have shown that the issues discussed were not resolved at any point between the time the documents were created and the FOIL request here was made. Instead, the only information Respondent has shared about these documents is that they were given to BOP members as part of training sessions. (R. 162-64). That is not sufficient to disprove that the documents are agency policy.

CONCLUSION

For all the foregoing reasons, the Court should reverse the Supreme Court's order entered on June 26, 2020.

Dated: July 2, 2021
Beachwood, Ohio

Respectfully Submitted,

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PRINTING SPECIFICATIONS STATEMENT

(PURSUANT TO 22 NYCRR § 1250.8[j])

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