To be Argued by:
WILLIAM T. O'CONNELL
(Time Requested: 30 Minutes)

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Appellate Division—First Department Case No. 2023-03239

Court of Appeals

of the

State of New York

JAMES KNIGHT, as Administrator of The Estate of PAMELA J. KNIGHT,

Plaintiff-Respondent,

– against –

AMSTERDAM NURSING HOME CORP. and THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants,

– and –

DEWITT REHABILITATION AND NURSING CENTER, INC. d/b/a Upper East Side Rehabilitation and Nursing Center,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

GOLDBERG SEGALLA, LLP
Attorneys for Defendant-Appellant
50 Main Street, Suite 425
White Plains, New York 10606
Tel.: (914) 798-5465
Fax: (914) 798-5401
woconnell@goldbergsegalla.com

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STATE OF NEW YORK
COURT OF APPEALS

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JAMES KNIGHT, as Administrator of The Estate of PAMELA J. KNIGHT,

Plaintiff-Appellant,

-against-

THE NEW YORK AND PRESBYTERIAN HOSPITAL and AMSTERDAM NURSING HOME CORP.,

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-and-

DEWITT REHABILITATION AND NURSING CENTER, INC. d/b/a UPPER EAST SIDE REHABILITATION and NURSING CENTER,

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Index No.: 805224/2021

App. Dkt.: APL-2022-00192

RULE 500.1(f) DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the New York Court of Appeals, Defendant-Appellant, DEWITT REHABILITATION AND NURSING CENTER, INC. d/b/a UPPER EAST SIDE REHABILITATION and NURSING CENTER, makes the following disclosure:

1. Dewitt is a New York corporation with no parent, subsidiary or affiliate corporation.

Dated: White Plains, New York
February 13, 2024

GOLDBERG SEGALLA, LLP

William T. O'Connell

William T. O'Connell, Esq.
Attorneys for Defendant-Respondent

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PRELIMINARY STATEMENT

This appeal raises the unusual question of which party bears the burden of proof on a motion to change venue pursuant to CPLR 501, 510 and 511 based on the express terms of a mandatory forum selection clause in an agreement allegedly signed by both parties to the lawsuit. The Appellate Division majority in this case effectively held that the burden lay with Appellant Dewitt, the rehabilitation facility moving to change venue, because it was Dewitt's burden to authenticate the 88 year-old Decedent's electronic signature on the rehabilitation center's admission agreements in order to seek relief pursuant to the forum clause.

Dewitt respectfully disagrees, as did the trial court, based on a long line of authorities holding that once the party asserting a forum selection clause makes an initial showing of the forum clause's applicability and enforceability, the burden shifts to the party challenging the forum clause to demonstrate that enforcing the clause would be unreasonable or unjust, the product of fraud or overreaching, contrary to public policy or that the transfer would be so difficult that it would effectively deprive the challenging party of their day in court.

Contrary to the Appellate Division majority's holding, Dewitt sufficiently authenticated the two Admission Agreements bearing the Decedent's alleged signatures and initials to invoke the forum clause. Although the majority found that Dewitt's efforts to authenticate were lacking, it limited its analysis of the valid

methods of authentication to certificates of acknowledgement, handwriting comparisons and eyewitness testimony to the actual signing, although New York case law also permits "circumstantial evidence" of authentication, such as occurred here. Consistent and corroborating circumstantial evidence adduced by Dewitt supported the conclusion that the Decedent electronically signed the admission agreements, including: the multiple signatures and initials identifying the signing resident as "Pamela Knight"; the statements thereon in bold-type that the Decedent's (or her designated representative's) execution of the agreement was a "condition" of admission to the facility; and the crucial corroborating fact that the Decedent was actually admitted to Dewitt on or about the same dates that the agreements were signed, which Plaintiff has never disputed.

In opposition, Plaintiff's evidence that the Decedent's signature on the agreements did not appear to be the same as he remembered it, or as his attached "exemplar" signature showed it, constituted no more than a "bald assertion of forgery." Plaintiff is not a handwriting expert. He did not identify the exemplar, nor indicate when it was created in relation to the 88-year old Decedent's signature on the admission agreements in February and March 2019. More fundamentally, because the Decedent's signatures were accomplished via Docusign, an electronic signature recorder, his handwriting comparisons bear little weight. As New York law provides that an electronic signature is entitled to same presumption of

genuineness as a signature by hand, *see* Technology Law § 304(2), and Plaintiff did not provide any evidence that he was familiar with the Decedent's electronic signature, the Appellate Division should have rejected Plaintiff's argument in opposition as lacking any merit.

In sum, given Dewitt's strong initial showing that the Decedent signed and initialed both Agreements electronically, that she agreed that her admission to Dewitt was conditioned on her signing such agreements, and that she was in fact admitted at or about the times she allegedly signed such agreements, Dewitt met its initial burden of showing that the forum clause was applicable and enforceable, and Plaintiff, in opposition, was unable to meet his burden of showing that the forum selection clause was not enforceable. This court should reverse the Appellate Division majority and grant the motion to change venue.

QUESTIONS PRESENTED

1. Did the Appellate Division majority err in holding that on a motion to change venue pursuant to CPLR 501, 510 and 511, Dewitt Rehabilitation and Nursing Center, doing business as Upper East Side Rehabilitation and Nursing Center ("Dewitt") had the burden of showing that an Admission Agreement to its nursing facility bearing the signature and initials of Pamela Knight ("Decedent") were not forgeries?

Answer: Yes. The Appellate Division dissenters correctly concluded that Plaintiff, as the party challenging the forum selection provision in the Admission Agreement, had the burden to establish the signature and initials were forgeries. The majority improperly shifted this burden to Dewitt.

2. Did the Appellate Division majority err in determining that Dewitt failed to meet its initial burden that the forum selection clause was applicable and enforceable?

Answer: Yes. The Appellate Division dissenters properly concluded that the Admission Agreements containing the decedent's signature and initials, the affidavit from Dewitt's Director of Admissions attesting to the custom and practice of Dewitt with respect to having staff review the admissions paperwork with all residents, and co-signing the agreements after such review, and other

circumstantial evidence met Dewitt's initial burden of showing that the signed agreements were applicable and enforceable.

3. Did the Appellate Division majority err in holding that Plaintiff's submission of his non-expert opinion as to the signatures of the Decedent, and his submission of an unidentified exemplar of the Decedent's alleged signature, raised a triable issue as to the authenticity of the Decedent's signature and whether the agreements were forged?

Answer: Yes. Plaintiff's non-expert opinion and exemplar attached to his opposition constituted no more than a bald assertion of forgery, especially considering that the signatures on the agreements were electronic, not handwritten.

JURISDICTIONAL STATEMENT

Dewitt seeks relief from the order of the Appellate Division, entered on August 10, 2023, which reversed the trial court and denied its motion to change venue from New York County to Nassau County. Dewitt timely moved for leave to appeal to this Court in the Appellate Division. (R. 174). The Appellate Division, which believed this Court should review whether its Order denying Dewitt's motion to change venue was properly made, granted Dewitt leave to appeal on November 14, 2023. (R. 174-175). Although the Appellate Division order did not finally determine this action, this Court nevertheless has jurisdiction over this matter pursuant to CPLR 5602(b)(1).

Dewitt preserved the arguments contained herein by presenting them in support of its motion to change venue in the trial court and in response to Plaintiff's appeal in the First Department.

STATEMENT OF THE CASE

A. Introduction.

This appeal arises out of a negligence, medical malpractice and wrongful death lawsuit commenced by the Plaintiff, the son and administrator of the Estate of Pamela Knight ("Decedent"), who died after receiving medical treatment and rehabilitation services from Defendants, The New York Presbyterian Hospital ("NYP Hospital"), Amsterdam Nursing Home Corp. (“Amsterdam”), and Dewitt. (R. 24-35).

The record contains two Admission Agreements between Dewitt and Decedent. One is dated February 11, 2019, while the other is dated March 24, 2019. (R. 61-89; 90-117). The first Admission Agreement contains the initials of Decedent on every page, while her full signature is contained on the final two pages. (R. 61-75). One of the provisions in the first Admissions Agreement is a forum selection clause, which unequivocally states that all claims arising out of or related to the Agreements must be brought in the Nassau County. (R. 72). The second Agreement also contains Decedent’s initials on all its pages, as well as her signature at the end. (R. 90-104). The second Admission Agreement contains the same forum selection clause as the first. (R. 101).

The first page of the Admission Agreements also included the following statement in bold type:

> The Resident and/or Designated Representative and/or Sponsor hereby understand and agree that Admission to the Facility is conditioned upon the review and execution of this Agreement and related documents as more fully set forth herein." (R. 61, 90).

In accordance with the Agreements, Dewitt brought a motion to change venue from New York to Nassau County pursuant to CPLR 501, 510 and 511. (R. 11). Dewitt's position was simple: both Admissions Agreements contain clauses that state all claims must be brought in Nassau County and Decedent signed both Agreements. (R. 18-19). In support of its motion, Dewitt submitted an affidavit from Francesca Trimarchi ("Trimarchi Affidavit"), Dewitt's Director of Admissions. She confirmed that the Agreements contain the signature of Eliezer Morales, a Facility Representative of Dewitt. (R. 120). She further averred that Dewitt's custom and practice is to have a Facility Representative meet with each resident to review the paperwork. (R. 121). The Facility Representative will first determine if the resident is oriented and inquire about whether the resident typically reviews and signs his or her own paperwork. (R. 121). If the resident is responsive and conversing appropriately, the Facility Representative will proceed with the review and discussion of the Agreement. (R. 121). If there appears to be a problem, or if the resident's medical records reflect the resident lacks capacity to sign the Agreement, the Facility Representative meets with a family member instead. (R. 121).

If a resident is in a sound mental state, the Facility Representative will personally witness the resident sign all the Agreement's signature pages, which is done by hand or through Docusign. (R. 121). The Facility Representative also explains the nature of the Agreement and informs the resident that he or she can refuse to sign if there is confusion about the document. (R. 121).

B. The Decisions of the Trial Court and the Appellate Division.

The trial court was unpersuaded by Plaintiff's suggestion that some unidentified individual forged the Decedent's signatures on the rehabilitation facility's admissions paperwork. Initially, the trial court observed that generally, forum selection clauses should be enforced unless enforcement would somehow be unreasonable or unjust. (R. 7). The trial court then concluded that Dewitt met its initial burden to show the forum selection clause was applicable and enforceable. (R. 8). The trial court further concluded that Plaintiff failed to prove that his mother's signature was forged. (R. 8). The court observed that while Plaintiff argued he compared the signatures from the Admission Agreements to an "exemplar" to determine if the signatures at issue were forged, he never identified the document from which the "exemplar" was extracted, or the document's age. (R. 8). The trial court concluded that Plaintiff's claim was nothing more than a bald assertion of forgery, which was insufficient to create a legitimate dispute about the authenticity of the signatures in the Admission Agreements. (R. 8).

Plaintiff timely filed a Notice of Appeal and, after full briefing, the Appellate Division reversed the trial court in a 3-2 split decision. (R. 2; 160-173). The majority reasoned that the burden to authenticate a contract is upon the party seeking to enforce it. (R. 163). The majority further stated that a party can authenticate a contract through various means, including through a witness who saw the contract being signed. (R. 163). Thus, the majority held that the Trimarchi Affidavit was insufficient because she did not personally witness the Decedent sign the document, nor did she explain the protocols governing Docusign, which evidently was used in this case. (R. 74, 103, 164).[1]

The two Appellate Division dissenters rejected this analysis. The dissent pointed to a prior First Department case to support its conclusion that the burden is on the Plaintiff to demonstrate why a forum selection clause should not be enforced. (R. 170). Thus, the dissent pointed out that the majority improperly reversed the burden of proof onto Dewitt. (R. 171). Additionally, the dissent noted that according to the majority's reasoning, "an affidavit from a representative with personal recollection of the events would be required in order to authenticate any agreement." (R. 171). After concluding that the burden was on Plaintiff, the dissent agreed with the trial court that Plaintiff failed to meet his burden and only made a

[1] The signature pages of both Agreements reveal that the Decedent's and Morales' signatures were made in a box titled "DocuSigned by:" (R. 74, 103).

bald assertion of forgery. (R. 171). Dewitt moved for leave to appeal to this Court, which the Appellate Division granted on November 14, 2023. (R. 174-175). This appeal now ensues.

ARGUMENT

I. ON A MOTION TO CHANGE VENUE UNDER CPLR 501, 510 and 511, A CONTRACTUAL FORUM SELECTION CLAUSE IS PRIMA FACIE VALID AND ENFORCEABLE UNLESS THE PARTY OPPOSING THE CHANGE MEETS ITS BURDEN OF SHOWING THAT THE SELECTED FORUM IS UNREASONABLE, UNJUST OR OTHERWISE OBJECTIONABLE

A. The Burden of Proof On A Motion To Change Venue Under CPLR 501, 510 and 511

CPLR 501 succinctly provides that "[a] written agreement fixing place of trial, made before an action is commenced shall be enforced upon a motion for change of place of trial."

As the Court of Appeals explained almost thirty years ago:

> "Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown by the requesting party to be unreasonable. *Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996), citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S.1, 10, 92, S. Ct. 1970, 1913 (1972).
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> * * *
>
> Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements. (*See, The Bremen, supra*; *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dep't 1991]*).*" *Brooke Group v. JCH Syndicate 488,* 87 N.Y.2d at 534.

Importantly, however, a motion to change venue pursuant to CPLR 501, 510 and 511 pursuant to a forum selection clause has nothing to do with the merits of the underlying lawsuit. In New York, "venue relates merely to place of trial, not to jurisdiction … [and] [i]mproper venue … is not grounds for dismissal but only for a transfer to a proper county." 3 Weinstein Korn & Miller, New York Civ. Prac. §501.00 (2024). Thus, a venue motion under the CPLR is not a merits-based request for relief, but rather "a matter of judicial administration and convenience to the parties and witnesses." 3 Weinstein Korn & Miller §501.1 (2024).

A motion to change venue pursuant to CPLR 501, 510 and 511 is significantly different than a merits-based motion for summary judgment under CPLR 3212. A defendant moving for dismissal under CPLR 3212 must support his or her motion with (1) an affidavit "by a person having knowledge of this facts"; (2) it must "recite all the material facts"; (3) it "shall show" that the cause of action has no merit; and (4) it must demonstrate that the defense has been established sufficiently to warrant the court "as a matter of law" in directing judgment in the moving defendant's favor. *See* CPLR 3212 (b).

A motion to change venue pursuant to a forum selection clause includes no similar statutory requirements. There is no statutory requirement of an affidavit based on personal knowledge. There is no need to establish the right to change venue "as a matter of law." Nor is there any express prohibition on the use of hearsay in

support of a motion to change venue under CPLR 501, 510 and 511. Lastly, unlike some other New York statutes, *see e.g.* CPLR 3-307 (1)(a), CPLR 501, 510 and 511 do not expressly place the burden of proof on either party on a motion to change venue, although the "prima facie valid and enforceable" language from this Court's *Brooke Group* decision certainly suggests that it lies with the plaintiff.

The obvious point here is that on Dewitt's motion to change venue under CPLR 501, 510 and 511, Dewitt's burden of proof, if any, was clearly less than the burden of establishing a right to summary judgment or any other merits-based evaluation of the parties' legal positions. This lesser burden is somewhat analogous to that on motions to dismiss for lack of personal jurisdiction, where a plaintiff's burden in opposition "does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiffs need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant." *Ying Jun Chen v. Lei Shi,* 19 A.D. 3d 407, 407-408 (2d Dep't 2005).

Thus, without a strict statutory or contractual burden of proof, the burden on a motion to change venue has largely been established by case law, which must be examined to resolve this appeal.

B. New York Courts Have Generally Placed The Burden Of Proof On The Plaintiff As the Challenger Of A Forum Selection Clause, Although The Defendant Bears An Initial Burden

In 2015, the Second Department squarely stated the rule governing the burden of proof on motions to change venue under CPLR 501, 510 and 511:

> "A contractual forum selection clause is prima facie valid and enforceable *unless it is shown by the challenging party to be* unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes be deprived of its day in court (*KMK Safety Consulting, LLC v. Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, 651 [2010], quoting *LSPA Enter. Inc. v. Jani-King of N.Y., Inc.*, 31 AD3d 394, 395 [2006]; *see Casale v. Sheepshead Nursing Rehabilitation Ctr.*, 131 AD3d 436 [2015]; *Molino v. Sagamore*, 105 AD 3d 922, 923 [2013]) (emphasis added)." *Puleo v. Shore View Ctr. For Rehabilitation & Health Care*, 132 A.D.3d 651, 652, (2d Dep't 2015).

Placing the burden of proof on the plaintiff to show that a forum selection clause should not be enforced is, of course, consistent with both the Court of Appeals statement in *Brooke Group* (87 N.Y.2d at 534) ("Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable"), and the rationale of the Supreme Court's holding in *The Bremen* (407 U.S. at 14) (while the lower courts placed the burden on the defendants to show that London would be a more convenient forum than Tampa, Florida, "the correct approach would have been to enforce the forum clause specifically unless the plaintiff could clearly show that

enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching").

Given the broad statements in *Brooke Group* and *The Bremen* regarding who had the burden of showing that a forum selection clause was unenforceable, it would be expected that New York appellate courts would be in uniform agreement on that issue; but that is not the case. Instead, there are conflicting authorities between the First and Second Departments, and now, some conflicting authorities within the First Department itself, on the burden of proof issue.

Initially, the First Department uniformly held that, on a motion to change venue based on a forum selection clause, the plaintiff challenging such venue transfer bore the burden of demonstrating why the forum clause should not be enforced. *See Caio v. Throgs Neck Rehabilitation & Nursing Ctr.*, 197 A.D.3d 1030, 1030-1031 (1st Dep't 2021) ("Plaintiff, as the party challenging the validity of the agreement's venue selection clause, had the burden to show why it should not be enforced"); *Braverman v. Yelp, Inc.*, 128 A.D.3d 568, 568 (1st Dep't 2015), *lv denied* 26 N.Y.3d 902 (2015) (plaintiff's allegations of fraudulent inducement would have to be brought in a different forum in accordance with the forum selection clause in the parties' agreement [as] Plaintiff failed to meet his burden of showing that the forum selection clause should not be enforced"); *Wang v. UBS AGI*, 139 A.D.3d 448, 448 (1st Dep't 2016) ("Plaintiff's claim must be brought in a different forum in

accordance with the forum selection clause contained in the account agreement entered into by the parties, and plaintiff failed to meet his burden of showing that the forum selection clause should not be enforced"); *British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234 ("It is a well-accepted policy that forum-selection clauses are prima facie valid [and] [i]n order to set aside such a clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching …").

Notably, these are all First Department authorities, they are all consistent with *Brooke Group* and *The Bremen*, and the burden they impose on the party challenging the forum clause to show why the forum clause should not be enforced is not materially different from what Plaintiff's burden was here -- to show that the Defendant's electronic signature on the Admission Agreements were forgeries, and therefore, the Agreements were unenforceable. Each of these bases for non-enforcement -- that the agreement was unreasonable or unjust, the product of fraud or overreaching, it was contrary to public policy, or it would be "gravely difficult" to appear in the selected forum -- are all fact-based inquiries that involve an attempt to avoid the plain terms of a written agreement. As indicated, in the motion to change venue context, New York courts have traditionally placed this burden on the party challenging the forum clause, not the party asserting it.

C. Plaintiff's Contrary Second Department Authorities Were Not Controlling And Were Inconsistent With *Caio*

Instead of applying *Brooke Group, The Bremen* and *Caio,* the Appellate Division majority in this case relied heavily on the Second Department's recent holding in *Andreyeva v. Haym Solomon Home for the Aged, LLC* (190 A.D.3d 801, 801-802 [2d Dep't 2021]), which placed the burden on the defendant nursing home to show that the forum clause was enforceable because the signature on it was that of the Decedent, and not someone else. In *Andreyeva*, a wrongful death action against a nursing home, the home moved to change venue from Kings to Nassau County based on a mandatory forum selection clause in the written admission agreement between the decedent and the home, allegedly signed by the decedent. *Id.* at 801. In support of its motion, the home submitted an "incomplete admissions form" bearing the "illegible" signature of the decedent. *Id.*[2] In addition, the home submitted an affidavit of one of its employees in an effort to authenticate the decedent's signature, although such employee had not witnessed the decedent signing the document. *Id.* In opposition, the plaintiff argued that the home had "failed to demonstrate that the decedent entered into the purported agreement [by

[2] *Andreyeva* is distinguishable from this case on these grounds, where Dewitt submitted two completed Admission Agreements, in which the electronic signatures and initials were at least partially legible.

signing it]." *Id.* The trial court denied the motion to change venue, and the nursing home appealed. *Id.* at 802.

On appeal to the Second Department, the *Andreyeva* Court affirmed the denial of the nursing home's motion to change venue, holding that the it "failed to adequately authenticate the alleged agreement containing the forum selection clause" because the employee's affidavit "failed to state that she was present when the decedent allegedly signed the admissions form or that she had personal knowledge as to whether the decedent signed it." *Id.*[3]

The *Andreyeva* Court relied on multiple different authorities in determining that the burden lay with the nursing home to authenticate the decedent's signature. The Court cited Prince, Richardson on Evidence § 9-101, to support its conclusions that a writing must be "signed or adopted by a particular person" to be relevant, and that "a contract is not enforceable against an individual" unless evidence establishes that the individual was the signer." *Andreyeva*, 190 A.D.3d at 802.

The majority at the Appellate Division in this case applied the same rationale as *Andreyeva* in placing the burden on Dewitt to authenticate the decedent's signatures on the admission agreements. The majority wrote that "the burden of

[3] Another Second Department decision, *Sherrod v. Mount Sinai St. Luke's* (204 A.D.3d 1053, 1055-1058 [2d Dep't 2022]), follows a similar analysis as *Andreyeva*. However, *Sherrod* also is distinguishable from this case because contractual forum selection clauses are enforceable only against parties in privity of contract, and in *Sherrod* it was the decedent's wife, a non-party, not the decedent nor the plaintiff administrator, who signed the admissions agreement.

proving the existence, terms and validity of a contract rests on the party seeking to enforce it,"[4] and this burden requires authentication of the writing by certificate of acknowledgement (CPLR 4538), by handwriting comparison (CPLR 4536), or by the testimony of a person who witnessed the signing of the document (citing *Andreyeva*, 190 A.D.3d at 802. (R. 163-164).

Respectfully, the majority was off-focus by relying on cases and evidentiary principles that apply to summary judgment and trial proceedings, not motions to change venue under Article 5 of the CPLR. *See* Prince, Richardson on Evidence § 9-101 (Farrell 11th ed) ("A writing is ordinarily not relevant *on trial* unless evidence has been introduced to show that it was made, signed or adopted by a particular person [emphasis added]"). While a party seeking to recover from another party based on the terms of a written contract must be required to prove the existence of such contract, venue motions do not implicate the merits of the dispute and the burden of proof set out in *Brooke Group* and *Caio* should be applied.

[4] None of the cases cited by Plaintiff in support of this specific point related to a motion to change venue. Instead, they all involved merits-related motions to dismiss or motions for summary judgment, in which the existence of a contract was a prerequisite to a liability or dispositive motion finding. *See e.g. Clarke v. American Truck & Trailer, Inc.,* 171 A.D.3d 405, 406 (1st Dep't 2019) (reversing the grant of summary judgment to the defendant based on the affidavit of a witness without personal knowledge); *Amica Mut. Ins. Co. v. Kingston Oil Supply Corp.,* 134 A.D.3d 750 (2d Dep't 2015) (reversing the dismissal of a subrogation action on statute of limitations' grounds where the motion was based on an unsigned agreement); *Bermudez v. Ruiz,* 185 A.D.2d 212 (1st Dep't 1992) (grant of motion to dismiss reversed where letter in issue was not authenticated).

Nor were the *Andreyeva* Court and the Appellate Division majority correct on the authentication issue. Both courts apparently overlooked that there is an additional method of demonstrating the authenticity of a writing, namely, circumstantial evidence. *See* Prince, Richardson on Evidence §9-103 (Farrell 11th ed 1995). Although the Appellate Division majority in this case pointed to only three methods of authenticating a writing -- a certificate of acknowledgment (CPLR 4538), a handwriting comparison (CPLR 4536) or the testimony of a person who witnessed the signing of the document (R. 163-164), the Prince treatise also enumerates additional valid methods of authenticating a writing, including circumstantial evidence. Prince, Richardson on Evidence §9-103 (Farrell 11th ed 1995).

More significantly, both the Court of Appeals and the Appellate Division have consistently recognized circumstantial evidence as a valid basis for authentication, and such method is applicable here to the circumstantial evidence of the Decedent's signing of the Admission Agreements. *See e.g. People v. Dunbar Contracting Co.*, 215 N.Y. 416, 421-423 (1915) (in criminal prosecution for conspiracy to defraud the State in the repair of a State road, the trial court did not err in allowing a State superintendent to testify that it was the defendant contractor who called him by telephone [and requested by letter] that a specific State inspector, a friend of the superintendent's, be assigned as inspector to the repair job, as the identity of the

caller and author of the letter was sufficiently authenticated, and trial court's ruling permitting such evidence was not erroneous); *see also Young v. Crescent Coffee, Inc.*, 222 A.D.3d 704, 2023 N.Y. App. Div. LEXIS 6313 *3-5 (2d Dep't 2023) (a writing may also be authenticated by deposition testimony and circumstantial evidence, and here the signatures on the lease agreement were adequately authenticated by the deposition testimony of the defendant's property manager); *Choudry v. Starbucks Corp.,* 213 A.D.3d 521, 522 (1st Dep't 2023) (Defendant Starbucks' arguments concerning the lease should have been considered on its motion because the witnesses for both defendants testified at their depositions about the lease's provisions, the lease and deposition transcripts were attached to the motion, and Starbucks' witness "had sufficient personal knowledge of the lease agreement to authenticate it, even though he did not sign or negotiate the lease"); *People v. Murray,* 122 A.D.2d 81, 82 (2d Dep't 1986) (two letters allegedly written by the defendant to the victim were properly admitted into evidence because "[c]ircumstantial evidence may satisfy the requirement that a writing be authenticated before it may be introduced"); *Anzalone v. State Farm Mut. Ins. Co.,* 92 A.D.2d 238, 239 (2d Dep't 1983) (in the absence of any contrary evidence, "the authenticity of [the policyholder's] signature on the finance agreement may be reasonably inferred from the fact that she paid at least five premium installments").

Here, as similarly strong circumstantial evidence existed that the Decedent electronically signed the Admission Agreements, they were adequately authenticated and the Appellate Division majority erred in holding otherwise.

D. Dewitt Made A Strong Initial Showing That The Decedent Signed the Admission Agreement

Although the case law establishes that the burden of proof on a motion to change venue under CPLR 501, 510 and 511 rests on the plaintiff, *see Caio*, 197 A.D.3d at 1030-1031, Dewitt has never denied that in order to raise such arguments, it was required to make some initial showing that the forum selection clause was generally applicable and enforceable. *Id*.; *see also Wang v. UBS AGI*, 139 A.D.3d at 448; *Hendricks v. Wayne Ctr. For Nursing & Rehab.*, 194 A.D.3d 648, 648-649 (1st Dep't 2021).

Dewitt's initial showing included two key pieces of evidence. First, Dewitt attached the two (2) Admission Agreements ostensibly signed and initialed by the Decedent Pamela Knight on or about February 11, 2021 and March 24, 2021. (R. 60-117). The two agreements included multiple indicia of having been reviewed and signed by both the Decedent and a Dewitt staff member named Eleizer Morales. (R. 60-117). Collectively, the two Admission Agreements included the type-written name "PAMELA KNIGHT" typed in the line identifying the name of the "Resident" being admitted to the facility at ten (10) different locations. (R. 61, 74, 75, 85, 86, 90, 103, 104, 114, 115). The Agreements also included eight (8) instances where

the Decedent allegedly signed her name using "Docusign," the electronic signature recorder. (R. 74, 75, 85, 86, 103, 104, 114, 115). There also were 44 instances where the Decedent allegedly entered her initials as "PK" (R. 60-117). Although the Docusign signatures of the Decedent are unclear, they plausibly can be read as "P Knight," and the initials "PK" are clear and recognizable. (R. 60-117).

Further, on the signature pages of both Admissions Agreements, the Decedent allegedly entered her initials "PK" next to a certification statement, which provides:

> "I agree, and it is my intent, to sign this record/document and affirmation by electronically signing and by electronically submitting this record/document to the Upper East Side Rehabilitation and Nursing Center. I understand that by signing and submitting this document in this fashion is the legal equivalent of having placed my handwritten signature on the submitted record/document and this affirmation. I understand and agree that by electronically signing and submitting this record/document in this fashion I am affirming the truth of the information contained there." (R. 74; 103).

Lastly, as noted above, both Agreements included a notice in bold-type that the signing Resident or Representative "hereby understand[s] and agree[s] that Admission to the Facility is *conditioned* upon the review and execution of this Agreement … (emphasis added)" (R. 61, 90). Thus, the inference exists that if the Decedent or her Representative had refused or declined to sign and initial the Admission Agreements, she would not have been admitted to Dewitt, or would not have been permitted to remain.

Second, Dewitt also submitted the supporting affidavit of its Director of Admissions, Francesca Trimarchi ("Trimarchi Affidavit"), who was the Director at the time of the Decedent's two admissions. (R.118-121). The Trimarchi Affidavit established three key points supporting Dewitt's motion. First, it demonstrated the basis of Trimarchi's knowledge concerning her statements in the Affidavit regarding the protocol for assisting new residents in their review and execution of the Admission Agreements upon their acceptance to the facility. According to the Affidavit, she was employed as the Director of Admissions at Dewitt in "February and March 2019," the same time period when the Decedent signed the Agreements. (R. 119). Further, she avers that her duties as Director included "directly overseeing the admissions process, which includes overseeing Facility Representatives providing and explaining admission paperwork to residents and their family members, processing admissions, and giving tours of the facility." (R. 119-120). Trimarchi further noted that her Affidavit Statements were "based upon my knowledge of the customs and practices in the performance of my duties as Director of Admissions of Dewitt." (R. 119).

The Trimarchi Affidavit also was important because it established that the Admission Agreements, allegedly signed and initialed by the Decedent, were created and kept by Dewitt as business records, and as such, they were "admissible in evidence in proof of that act, occurrence or event" -- which here, was the Decedent's

execution of the Agreements electronically and her admission to Dewitt. *See* CPLR 4518(a).

Paragraph 5 of the Trimarchi Affidavit states"

> "I have conducted a search of records of Dewitt for the Admission Agreements relative to the 2019 Admissions of resident Pamela Knight. Annexed hereto as an Exhibit to my affidavit is a true and complete copy of the February 2019 and March, 2019 Admission Agreements relative to Pamela Knight which are kept and maintained in the ordinary course of business and are maintained by it as business record of Dewitt. (R. 120).

The Appellate Division majority found that Trimarchi's statements quoted above were insufficient to establish the Admission Agreements as admissible business records under CPLR 4518(a). Specifically, the majority held that while the Affidavit sufficed to demonstrate that the records were "maintained" in the regular course of business, it did not establish that such records were "created" in the regular course of business, citing *JP Morgan Chase Bank, N.A. v. Clancy*, 117 A.D.3d 472, 473 (1st Dep't 2014).

We respectfully disagree. A fair reading of the Trimarchi Affidavit includes the Director's sworn statements that it was the "custom and practice" of Dewitt staff members to "meet with *each resident* to review the admission paperwork (emphasis added)," and after such review, the resident (and Dewitt staff member) would co-sign the Agreement if the resident was competent to do so. (R. 120-121). Accordingly, there was clear evidence in the record that Dewitt "created" these

documents with "each" resident pursuant to their protocols, and in the regular course of business. The majority erred in holding that an insufficient foundation was laid for the admission of the Agreements as business records. *See* CPLR 4518(a); *DeLeon v. Port Authority*, 306 A.D.2d 146, 146 (1st Dep't 2003) ("a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files").

Third, the Trimarchi Affidavit included important "customs and practice" evidence regarding the protocols utilized by Dewitt employees during the admission process. This evidence enhances the reliability and authenticity of the Admission Agreements ostensibly signed and initialed by the Decedent. In her Affidavit, Trimarchi swore that "it is the custom and practice of the Facility Representative processing admissions to meet with each resident to review the admission paperwork." (R. 120). Further, if the resident had sufficient capacity, the Dewitt Representative "would review every page of the Admission Agreement," and would "personally witness the resident execute all signature pages, which is done either by hand or via Docusign." (R. 121). Based on these existing protocols at Dewitt, and the alleged signatures on the two Agreements of both the Decedent and a Dewitt

Representative, Trimarchi averred that she believed that the Decedent "executed the two Agreements after they were received and explained." (R. 121).

Accordingly, on this motion to change venue under CPLR 501, 510 and 511, the two Admission Agreements bearing the Decedent's signatures and initialing, and the Trimarchi Affidavit relaying its admission protocols, constituted sufficient circumstantial evidence of authentication to meet Dewitt's initial burden of showing that the forum selection clause was applicable and enforceable against the Plaintiff. *See People v. Dunbar*, 215 N.Y. at 421-423; *Young v. Crescent Coffee, Inc.*, 222 A.D.2d 704; *People v. Murray,* 122 A.D.2d at 82.

Upon this showing by Dewitt, this shifted the burden to Plaintiff to come forward with evidence demonstrating that enforcing the contractual forum provision would be unreasonable or unjust, the subject of fraud or overreaching or was contrary to public policy. *See Caio*, 197 A.D. 3d at 1030-1031 (after the defendant nursing home made an initial showing that its admission agreement signed by the decedent's representative had a forum selection clause providing that Westchester County Supreme Court had exclusive jurisdiction over "any" dispute arising under the agreement, the burden shifted to the plaintiff, as the party challenging the validity of the clause, to show why it should not be enforced).

In addition, to the extent Plaintiff argued below that even if the forum clauses in the Agreements were binding on the Decedent, they were not binding on him as a

non-signatory, the argument is defeated again by the express language of the agreement. Dewitt's initial showing included both Agreements, which stated in Section XII(b) that "[t]his Agreement shall be binding on the parties, their heirs, administrators, distributees, successors and assignees." Under New York law, such provisions in a forum selection clause are binding not only on the signatory of the agreement, but also any administrator of the estate of a decedent signatory. *See Puleo v. Shore View Ctr. for Rehabilitation & Health Care*, 132 A.D.3d 651, 652-653 (2d Dep't 2015).

E. The Second Department's *Andreyeva* Holding Is Inconsistent With The First Department's *Caio* Holding That Properly Places The Burden On the Party Challenging A Mandatory Forum Selection Clause

Contrary to the Appellate Division majority's conclusion that the *Andreyeva* and *Caio* holdings were distinguishable and not inconsistent (R. 164), we believe they are in conflict and only *Caio* reflects the traditional view that the burden of proof on a motion to change venue based on a forum selection clause lies with the party challenging that clause -- which here is the Plaintiff.

Andreyeva (190 A.D.3d at 801-802) was decided first by the Second Department in January 2021. Although the *Andreyeva* Court initially cited the correct standard that a forum selection clause was "prima facie valid and enforceable unless it is shown by the challenging party" to be unreasonable, unjust or otherwise

unenforceable, it affirmed the denial of the nursing home's motion because the home allegedly could not authenticate the decedent's signature on the admission agreement containing the forum clause. The Court relied on evidentiary and contract principals providing that a contract is "not enforceable" against a person unless "sufficient" evidence exists that the person signed the contract. *See Andreyeva*, 190 A.D.3d at 802 citing Prince, Richardson on Evidence §§ 9-101, 9-103 (Farrell 11th ed 1995). It is hard to see how the *Andreyeva* Court did not reverse the traditional burden of proof by placing it on the nursing home to prove that the decedent's signature was genuine, which was the key criticism of the Appellate Division dissent in this case. (R. 171).

Caio (197 A.D. 3d at 1030-1031) was decided nine months later in September 2021. In *Caio*, the dispute regarding the forum clause in the admission agreement was not whether the decedent in that case had signed the agreement, but rather, whether the decedent's designated representative had actual or apparent authority to sign the agreement on the decedent's behalf. *Id.* Thus, while the specific issue in the two cases was slightly different, the issue for purposes of changing venue was the same -- was there an authorized signature on the admission agreements to invoke the forum selection clause?

The First Department's *Caio* decision unequivocally placed the burden on the Plaintiff to show why the forum selection in the admission agreement should not be enforced:

> "Defendants established that the nursing home admission agreement signed by the decedent's designated representative on his behalf to secure his admission to its nursing home had a forum selection clause providing that Supreme Court, Westchester County, has exclusive jurisdiction over any dispute arising under the agreement …
>
> * * *
>
> That defendants did not proffer an affidavit by a person having personal knowledge of the circumstances under which the admission agreement was executed is not fatal to their motion for a change of venue. Plaintiff, as the party challenging the validity of the agreement's venue selection clause, had the burden to show why it should not be enforced (*see Braverman v. Yelp, Inc.*, 128 AD3rd 568 [1st Dep't 2015), *lv. denied* 26 NY3d [2015])." *Caio*, 197 AD3d at 1030-1031.

The Appellate Division majority spent little time discussing the burden of proof issue, and simply held that "*Caio* is distinguishable." (R. 164). Respectfully, it is not. The majority held that *Caio* was distinguishable because in that case "we implicitly credited the defendants' argument that the decedent's son had apparent authority to sign the agreement," and because "unlike *Caio*, the authenticity of decedent's purported signatures is at issue here." (R. 164). Fairly interpreted, the majority held that *Caio* was different because that case did not involve the authenticity of a signature and because it had essentially "resolved" a disputed issue

of fact in the defendant nursing home's favor. Neither rationale is a valid basis to distinguish *Caio*.

Respectfully, *Caio* is not distinguishable from this case because both cases involved a disputed issue of fact involving the enforceability of the forum selection clause. In *Caio*, the plaintiff argued that the forum clause was unenforceable because decedent's son lacked the apparent authority to sign the agreement on the decedent's behalf. In this case, by contrast, the plaintiff argued that the agreement's forum clause was unenforceable because the decedent did not sign it at all, and that the person who did, apparently forged the signature. In both situations, however, the plaintiff was making the same argument of a different type, namely, that the forum selection clause was unenforceable because the defendant did not provide first-hand proof as a matter of law that the signing of the agreement was authorized.

Despite the materially identical principle in both cases, the First Department came to opposite results because it applied different burdens of proof on the issue of enforceability. In *Caio*, the Court placed the burden squarely on the plaintiff to show why the forum clause should not be enforced. By contrast, in this case the Appellate Division majority placed the burden on the defendant Dewitt to show as a matter of law that the Decedent's signature on the Admission Agreements was genuine. We respectfully submit that the *Caio* court had it right. Consistent with the Court of Appeals' holding in *Brooke*, and the First Department's prior holdings in *Caio*,

Grant, Braverman and *Wang, supra,* the Appellate Division majority erred in failing to place the burden of proof on the plaintiff to show why the forum clause should not be enforced, and instead, placed the burden on Dewitt to demonstrate as a matter of law that a forgery occurred.

II. AFTER DEWITT MADE ITS INITIAL SHOWING THAT THE DECEDENT EXECUTED AN AGREEMENT WITH A FORUM SELECTION CLAUSE THAT WAS APPLICABLE AND ENFORCEABLE, PLAINTIFF FAILED TO RAISE ANY FACTUAL ISSUES AS TO THE GENUINENESS OF THE DECEDENT'S SIGNATURE

Plaintiff has taken an unusual course in attempting to circumvent the forum selection clause. Instead of trying to demonstrate that obtaining the Decedent's "agreement" to litigate any dispute arising out of the Admission Agreements was unreasonable or unjust, against public policy, the product of fraud or overreaching, or objectionable for some other reason, as the established standard permits, Plaintiff has made the simpler argument (and one that is impossible for Dewitt to completely refute) -- that the Decedent never signed the Admission Agreements, and therefore, such signatures must be a forgery.

While certainly creative and resourceful, the argument carries no weight, for multiple reasons. First, the Affidavit submitted by James Knight, the Decedent's son and Administrator, does not indicate that he is a handwriting expert, and therefore his opinions that the Decedent's purported signature on the Admission

Agreements "was not my mother's as I know it" is entitled to little, if any weight. (R. 144). His non-expert assertions that "the 'signatures' do not even appear to be mutually consistent" because some "slant upwards and some seem to have a space," while others "have no slant, no break, and a connection between the P and K," are hardly bases to create a factual dispute as to whether the signatures on the Agreements were forgeries (R. 144)

Notably, although CPLR 4536 allows the comparison of handwriting to be admissible in evidence by expert and non-experts, such comparison must be between a "disputed writing" -- here, the Decedent's alleged signatures on the Agreements -- and "any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing, i.e., the Decedent's alleged exemplar. *See* CPLR 4536.

However, Plaintiff has wholly failed to establish that the exemplar writing attached to his affidavit does, in fact, represent the handwriting of the Decedent to which a comparison may be made. (R. 146). Although Plaintiff avers that he is "familiar with [his] mother's handwriting," and he attached a photograph of a portion of an exemplar document that allegedly includes the signature of his mother Pamela Knight (R. 146), the document raises more questions than it answers. Plaintiff does not identify the specific document that the image was taken from, where he obtained the document from, nor does he provide the approximate date on

which the signature was applied, a significant point because the Decedent was 88 years old at the time she signed the Admission Agreements. Clearly, her signature likely changed significantly due to her condition and the passage of years, as the trial court recognized.

A failure to describe or produce the exemplars in a manner that authenticates them will render inadmissible any comparison of a disputed signature with an exemplar. *See Al-Kabyalle v. Ali*, 159 A.D.3d 477, 477-478 (1st Dep't 2018) (where plaintiff alleged that his signature on a Consent Form had been forged, defendant's submission of an affidavit of a handwriting expert opining that the signature on the Consent Form was by the same person who signed seven exemplars was ineffective where the expert did not describe the exemplar nor submit them in the record); *Kanterakis v. Minos Realty 1, LLC*, 151 A.D.3d 950, 951-952 (2d Dep't 2017), *lv. denied* 30 N.Y.3d 913 (2018) (testimony of plaintiff's handwriting expert should not have been considered, where the plaintiff "failed to present evidence authenticating the group of 31 exemplars").

More fundamentally, Plaintiff's evidence of forgery loses nearly all its weight when it is recognized that the Decedent's signature was obtained via Docusign, and was not handwritten. As indicated, there is a Certification Provision on both signature pages of the Admission Agreements, both initialed by the Decedent, which indicate that she was "electronically signing" the Agreements; that such electronic

signing was the "legal equivalent" of having filled it out by hand; and that she is affirming the truth of the contents of the submission. (R. 74). In light of this Certification acknowledging an electronic submission, the debate over handwriting becomes largely academic, since handwriting comparisons are, at a minimum, highly difficult with electronic signatures.

In sum, Plaintiff's submissions in opposition to the motion to change venue were no more than a "bald assertion of forgery," *see Banco Popular N. Am. v. Victory Taxi Mgt.,* 1 N.Y.3d 381, 384 (2004) ("something more than a 'bald assertion of forgery' is required to create an issue of fact contesting the authenticity of a signature"), and as such, Plaintiff's submissions were insufficient as a matter of law to raise a disputed issue of fact on the CPLR 501, 510 and 511 motion to change venue.

III. THE APPELLATE DIVISION MAJORITY ERRED IN CONCLUDING THAT DEWITT WAS REQUIRED TO PROVIDE PROOF THAT DOCUSIGN HAD A PROTOCOL TO PREVENT FRAUD.

The Appellate Division majority criticized Dewitt for not providing evidence about the protections Docusign uses to prevent "tampering or degradation" of signatures. (R. 167, *quoting* CPLR 4539[b]). This was an error because CPLR 4539(b) does not apply in this case. Dewitt was not required to provide evidence of what protections Docusign has in place to prevent fraud. As this Court has stated, "CPLR 4539(b) applies only when a document that originally existed in hard copy

form is scanned to store a digital 'image' of the hard copy document, and then a 'reproduction' of the digital image is printed in the ordinary course of business." *People v Kangas*, 28 N.Y.3d 984, 985 (2016).

CLPR 4539(b) would apply if, for example, Decedent signed a hard copy of the Admissions Agreements, which were subsequently scanned. That was not what occurred in this case. As even the Appellate Division majority recognized, this was an electronic document that was originally signed with an electronic signature using Docusign. (R. 167). Therefore, Dewitt was not required to provide evidence of methods Docusign uses to prevent fraud. *See Kangas*, 28 N.Y.3d at 985. CPLR 4539(b) is simply irrelevant to determining the admissibility of the Admissions Agreements.

To the contrary, the fact that Decedent electronically signed the Admissions Agreements favors Dewitt. Electronic signatures have the same validity as hand signatures. N.Y. State Tech. Law § 304(2). As the majority recognized, even electronic signatures enjoy the presumption of genuineness. (R. 166, *citing* CPLR 4538; UCC § 3-307; N.Y. State Tech. Law, Article 3). Since § 4539(b) is irrelevant in this case, Dewitt was entitled to a presumption that the Decedent's signatures were authentic and that the Admission Agreements were valid and enforceable. In response, Plaintiff fell far short of legitimately refuting this presumption. As the Appellate Division dissent noted, electronic signatures often inherently look

different that handwritten signatures. (R. 172). Additionally, while Plaintiff claims that he is "familiar" with what his mother's "handwriting looked like," he neither claimed he is a handwriting expert, nor did he claim he is familiar with his mother's electronic signature. (R. 143).

The Appellate Division majority overlooked that fact that even if Plaintiff is familiar with his mother's handwritten signature, that is not enough to refute the presumption that his mother's electronic signatures are authentic. This case is not about a handwritten signature. It is about an electronic signature and Plaintiff did not state he is familiar with Decedent's electronic signature. The presumption that Decedent's electronic signature is valid cannot be overcome by Plaintiff's affidavit because he never claimed to have any familiarity with Decedent's electronic signature.

In sum, Dewitt was not required to provide evidence to show Docusign has protocols to prevent "tampering and degradation" because CLPR 4539(b) does not apply to this case. Dewitt was entitled to a presumption that Decedent's electronic signature was authentic. This presumption cannot be overcome by the affidavit of Plaintiff, who never claimed to have knowledge of Decedent's electronic signature, specifically. Therefore, since the presumption of genuineness stands, this Court should conclude that there is insufficient evidence to suggest that Decedent's signatures were forged.

CONCLUSION

In light of the foregoing, it respectfully is requested that this Court reverse the order of the Appellate Division, and grant Dewitt's motion pursuant to CPLR 501, 510 and 511 for a change of venue to Nassau County based on the terms of a mandatory forum selection clause, and for such other and further relief as this Court deems just, proper and equitable.

Dated: White Plains, New York
February 13, 2024

Respectfully submitted,

William T. O'Connell, Esq.

GOLDBERG SEGALLA, LLP

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

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Dated: February 13, 2024

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 13, 2024

deponent served the within: **Brief for Defendant-Appellant**

upon:

NGUYEN LEFTT, PC
Attorneys for Plaintiff-Respondent
228 East 45th Street, Suite 1110
New York, New York 10017
Tel.: (212) 256-1755
Fax: (212) 256-1756
stephen@nlesqs.com

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

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